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IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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THE

VIRGINIA

LAW JOURNAL

VOL. III.

JANUARY-DECEMBER, 1879.

GEO. L. CHRISTIAN, Editor.

J. W. RANDOLPH & ENGLISH,
1302 and 1304 Main Street, Richmond.

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CASES REPORTED IN VOLUME III.

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To the Legal Profession:

The third volume of the VIRGINIA LAW JOURNAL commences with this number. The Editors seeing the importance, nay, necessity, to the profession in Virginia, of a Journal of this kind, began the publication of this work two years ago. They commenced at the very worst time, looking at it from a financial standpoint, that any enterprise could have been undertaken, and they begun with many misgivings of their ability to make the work self-sustaining, under the circumstances surrounding it, and in the then condition of the country. Their labors have been so far appreciated, that what was started simply *as an experiment* is now presented as an *established means of communication in the profession.* We have received so many evidences of the utility and importance of the Journal, that we are determined to put forth renewed efforts to make it even more valuable in the future, if we can do so, than it has been in the past. Each year's experience increases the facilities both of the Editors and Publishers to accomplish this end. As a short *resumé* shewing some of the past work of the Journal: It has given to the profession original articles from the following writers, other than those from the Editors, viz.: Conway Robinson, Wm. Green, Peachy R. Grattan, Jno. M. Orr, Wm. L. Royal, Camm Patteson, H. O. Claughton, O. G. Kean, J. P. Harrison, Robert Ould, John S. Wise, Francis L. Smith, Richard B. Tunstall and M. P. Burks, and discussed the following practical and important subjects, viz.: "*Res Judicata*," "The Virginia Married Woman's Act," "Power of a Partner," "Lawyers in Virginia Between 1704 and 1737," "Interested Witnesses under the Virginia Statute," "Claim of Homestead Against the State," "Virginia Colonial Money and Tobacco's Part Therein," "Jurisdiction of Common Law

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Courts in Attachments," "Power of Appellate Courts," "Notice of Dissolution by Retiring Partner," "Slave Marriages," "The Lien of the Fi. Fa.," "War Interest on the State Debt," "Constitutionality of the Funding Bill," "Has the Rule in Shelley's Case Been Abolished by Statute in Virginia?" "Householder or Head of a Family," "The Last Three Amendments to the Federal Constitution," "Can the Homestead be Claimed Against Liabilities for Tort?" "Suability of a State," "Liability of Purchasers from Executors and Trustees," "The Kimpton Case," "The Obligation of Retiring Partners to Partnership Creditors," "Attorney's Lien," "Rent," "Reduction of Judicial Salaries," &c., &c. We have published, either in full or in a condensed form, about three hundred important decisions—nearly all of those rendered by the Supreme Court of Appeals of Virginia—many from the Supreme Court of the United States, the Supreme Court of Appeals of West Virginia, the late Special Court of Appeals of Virginia, the Chancery Court of the City of Richmond, some from the able Circuit Judges of Virginia and the Federal Courts held in Virginia, and many other important decisions and matters from our valuable list of exchanges, which embrace nearly all the Law Journals published in this country and in Europe. The publication of the able decisions of our own Court of Appeals so soon after they are rendered, and always long before they could be published in any other way, ought alone to command the price of the Journal. We expect to continue to furnish this class of material with each succeeding number, and the Editors have assurances of aid from such lawyers as Judges Geo. P. Scarburgh and Wm. H. Burroughs, of Norfolk; Judge E. H. Fitzhugh, of Richmond; Alex. H. Sands, W W. Henry, Legh R. Page and other prominent members of the Richmond Bar; Majors Jno. W. Daniel, Thomas J. Kirkpatrick and R. G. H. Kean, of the Lynchburg Bar; Wm. A. Maury, Esq., of Washington City, and other lawyers and writers of eminence in and out of Virginia. Such names are a sufficient guarantee of what may be expected.

The price of subscription will continue to be $5 *per annum*, but as an inducement to those who may wish to subscribe to

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another Law Journal besides ours, we will furnish ours and any other, of the same price as ours, if obtained through us, for $8 per annum for the two; ours and any *four dollar* Journal for $7, and ours and any *three dollar* Journal for $6.50, and so on.

Every lawyer knows the value of a LEGAL DIRECTORY, to enable members to send business to others at distant points of the State or territory, and these *directories* have become an incident to nearly every Journal published in this country and in Europe. We have determined to add this to the *Virginia Law Journal*, and to add unusual inducements to the Bar to make use of it. We will insert, in large type, the name of the attorney, or firm, with P. O. address and courts of practice, *if from a subscriber*, for $2 *per annum*. If from an attorney or firm, who are not subscribers, for $3 *per annum.*

Publishers will also find the Journal an excellent medium for communicating directly with the profession in *Virginia* and *West Virginia* specially; advertisements of law books, &c., will be inserted on very reasonable terms.

J. W. RANDOLPH & ENGLISH, *Publishers*,

January, 1879. Richmond, Va.

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To the Bench and Bar:

We begin the publication of the third volume of the VIRGINIA LAW JOURNAL with pride and pleasure, and we return our sincere acknowledgments to the Bench and Bar of Virginia especially, and to many others outside of the State for the manner in which our labors have been received, encouraged and sustained. We call attention to the circular of our publishers, to show something of what we have done in the past, and propose to try to do in the future. We simply desire to remark further, that we are very desirous of making the Journal not only *useful*, but *attractive* to the profession, and we know that this can be done, if our friends will aid us and take that interest in our work that it seems to us they should take. There is ample material known to the Virginia and West Virginia Bars alone, which has never been published in any form, to make our work *very attractive*, and which should be published by all means. No people have suffered more from the want of publications than the people of the South. We sit idly by, and let the people of the North, with their wealth and enterprise, scatter their publications to the winds, manufacturing public opinion, giving their side and their version of everything in this country, making their men demi-gods and heroes, when we have men all around us who are *incomparably greater*, in our opinion, in every way, who have never been heard of at all, in many instances, outside of the narrow limits of their own neighborhoods. The Virginia Bar has produced some of the brightest intellects and most profound lawyers that have been reared in this country, and, with the exception of the few who have occupied prominent federal positions, or who have been

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prominent politicians, their names are unknown to fame, and will soon be forgotten by us. As a striking illustration of this, we have just been glancing over an American work, collecting the wit, humor, &c., of over two hundred judges and lawyers, and the only names mentioned from Virginia are those of Patrick Henry, John Marshall, John Randolph and Wm Wirt It is useless to deny that the want of publications in our midst is the cause of this, *and this state of affairs should not be permitted to exist any longer.* The names of such men as Spencer Roane, John Wickham, Chapman Johnson, John S. Fleming, Walter Jones, Benjamin Watkins Leigh, John M. Patton, Alexander Campbell, Wm. Leigh, Robert Standard, John B. Clopton, Arthur A. Morson, John J. Allen, Geo. H. Lee, William Daniel, Jr., John Robertson, Robert Y. Conrad, N. P. Howard, John B. Baldwin, Thomas Michie, Thomas P. August and a host of others, that now crowd upon us, should not be forgotten, and yet they soon will be, unless something is done in the direction indicated. Who knows anything now, outside of Virginia, even, of Spencer Roane, John Wickham, Chapman Johnson or John J. Allen? while the names of Charles O'Conner and David Dudley Field are the heritage of the world. We believe that a *Law Journal* can, and should do much towards rescuing these names from oblivion, and by this means not only do good, but *sheer justice* to our people. We invite, then, from any competent source, for publication in our Journal, short sketches of the lives of any of the prominent men who have adorned the Bench and Bar of Virginia and West Virginia, and we hail with real pleasure such contributions as that signed "K" and that entitled "Jury Speaking," published in the Miscellany of this number. The former was furnished by a prominent member of the Richmond Bar, and the latter by an eminent judge. Both of these gentlemen promise further contributions, and anything from them cannot fail to be appreciated. We earnestly ask any one, who will, to furnish us more of these sparks, that were continually flying from these and other brilliant minds all over the State. The genial and lamented August, alone, fur-

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nished material enough of this kind for a volume. Won't some of his friends send some of them to us?

But while we are thus anxious for this kind of material, we are more anxious to obtain that which will make the Journal *eminently useful and practical.* We want each member of the Bench and Bar to feel a *personal interest* in keeping up the work, and they can best shew this by sending us, for publication, discussions on important legal topics, and we invite them, earnestly, to do this. Judges and lawyers are frequently called upon to investigate novel and interesting questions; and by very little additional labor the results of these investigations can be thrown into shape for publication, and in this way not only help us in making our work useful and instructive, but help to enlighten each other, and, very often, give reputation and real benefit to the writer.

Our special thanks are due to the Judges of the Supreme Court of Appeals of Virginia, Mr. Peachy R. Grattan, the venerable and excellent Reporter of the Court, Mr. P. C. Nicholas, its accomplished Librarian, Messrs. Taylor, Waddell and Caldwell, its accommodating and accomplished Clerks at Richmond, Staunton and Wytheville, and to A. G. Tebbetts, Esq., Ass't Reporter of the Supreme Court of West Virginia, for favors and aid during the past year. Mr. Grattan has been so kind as to do much of our work for us; in other words, he has made many of the reports of cases published by us. These gentlemen will continue their invaluable aid in the future.

THE EDITORS.

Richmond, January, 1879.

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THE

VIRGINIA LAW JOURNAL.

JANUARY, 1879.

THE VIRGINIA MARRIED WOMAN'S ACT.

By the act approved March 14th, 1878, entitled "An Act to amend and re-enact section two of an act approved April 4th, 1877, entitled an act securing to married women, on conditions, all property acquired by them before or after marriage, so as to more clearly define the curtesy and dower rights." It is provided as follows:

§ 2. "All real and personal estate hereafter acquired by any woman, whether by gift, grant, purchase, inheritance, devise or bequest, shall be, and continue, her sole and separate estate, subject to the provisions and limitations of the preceeding section, although the marriage may have been solemnized previous to the passage of this act, and she may devise and bequeath the same, as if she were unmarried; and it shall not be liable to the debts and liabilities of her husband: provided that nothing contained in this act shall be construed to deprive the husband of curtesy in the wife's real estate, nor the wife of dower in the husband's estate, and provided further, that the sole and separate estate created by any gift, grant, devise or bequest, shall be held according to the terms and powers, and be subject to the provisions and limitations thereof, and to the provisions and limitations of this act, so far as they are in conflict therewith, provided that nothing herein contained, shall be so construed as to modify or alter section seven of chapter one hundred and twenty-three of the Code of 1873, except as hereinafter provided; that is to say, where the wife is a minor, having an estate in the hands of a guardian, it shall not be lawful for said guardian to pay or turn over her estate before she attains the age of twenty-one years, notwithstanding her marriage."

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Before the passage of acts of this kind, where a settlement was made with power of appointment, and the wife failed to execute the power, after her death, the husband was entitled to administer on her personal estate, whether separate or otherwise, and was not bound to make distribution. He was bound to pay her debts, if he had not reduced her personal estate into possession during her life.

The question is, to what extent and how far the section above quoted changes the law in this respect?

Is personal property hereafter acquired in manner provided for by the act, her absolute estate to pass to her next of kin, irrespective of her husband, in default of disposition by her, either in her lifetime or by will?

This second section saves to the husband his tenancy by the curtesy, which provision applies only to the real estate of the wife—not to her personal estate.

Does not this proviso exclude the husband from any interest in the personalty? The maxim, "*Expressio unius est exclusio alterius,*" applies as well to statutes as it does to other writings.

Where it plainly appears that the subject matter was under consideration, all the incidents that would naturally follow from the language of the act or *writing*, must be governed by the rule.

A statute is the will of the Legislature, and in this case the subject is under its control, for it has power, unless vested rights are disturbed, to declare new rules of "property law." Upon the face of the statute it is not to be controverted that the personal estate of the wife, *hereafter acquired* is hers absolutely, but a question arises, does the section referred to repeal the third clause of section 10, Statute of Descents and Distribution, page 918, Code of 1873?

"If the intestate was a married woman, her husband shall be entitled to the whole of the said surplus of the personal estate."

This clause is in the general statute of Descents and Distribution, and should be governed by subsequent legislation. It is in fact repealed by necessary implication. There is nothing against the policy of the law, that after the death of the wife, her personal estate should pass to her next of kin in blood. Title by the curtesy does not exist until after the death of the wife; the husband's right to her personal estate not reduced into possession, depends upon survivorship.

In both cases, then, there must be survivorship to entitle the husband to any estate in his wife's property as above ex-

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plained. Does the Married Woman's Act intend to make any change in case of her death, without disposition, in regard to the rights of her husband?

The intention of the Legislative will is to govern us in solving this question, and must be found in the language of the Act. Suppose the Act had been silent as to curtesy, it cannot be controverted, but that such a title in the husband would be at an end. The act is silent as to personalty, and the same result must necessarily follow.

The statute of "Descents and Distribution" was intended to preserve the long-established rights of the husband; the Married Woman's Act was intended to abridge and, to some extent, destroy them.

In my opinion, it has destroyed his marital right to administer and his right to "*the surplus of her personal estate.*"

If he should administer, he would have to distribute in like manner as any other administrator; otherwise, the husband would stand in the same position he did before the statute, both as to realty and personalty, unless the wife disposed of it in her life time or made a will. This was not the intention of the Legislature, for it is evident that the statute was framed to make the wife independent of the husband, which intention could not be accomplished if she were left under his control and influences to make a will or not. [See Cooley's Lim., top pages 360, 361.] His interest would be to prevent, by all means in his power, any disposition by the wife, except for his own benefit. This opinion applies exclusively to property acquired by the wife after the passage of the Act.

C. W. W.

Alexandria, Va.

THE PROPOSED AMENDMENTS TO THE JUDICIARY ACT.

[The following letter, from Judge Hughes to Judge Davis, of the United States Senate, in relation to amendments proposed by the latter, to the Judiciary Act, has been referred to in the daily press, but has never been published, as far as we are advised. It will be found to be very interesting to the profession, not only as giving, in a succinct manner, the principles which relate to that portion of the judiciary system of the United States upon which the Circuit and District Courts was founded, but also as stating the facts connected with the present unpopular, and to a great degree, necessarily inefficient administration of justice in the Circuit Courts of the United States. We are not prepared to express an opinion as to whether the system suggested by Judge Hughes, will meet the exigencies of the times; but we have no hesitation in saying that the present system of Circuit Courts is so unfortunate in its operations, as to demand an immediate change of some kind.—ED.]

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NORFOLK, Va., December 12th, 1878.

Hon. David Davis, U. S. Senate:

Dear Sir,—For various reasons, some of which will appear in what follows, I am convinced that your bill for establishing intermediate Appellate Courts of the United States, will not pass in its present form; imperatively necessary as such a measure seems to be. There is a *party* reason for it, which I may as well mention, though it does not affect the principle on which the bill is based. The Democratic party, of course, hope and expect to carry the next Presidential election, and will not vote for the appointment of nine new Circuit judges at any time before March, 1881. But it is to reasons, grounded on principle, to which I wish to address myself.

The feature, of judges for the Circuits, was introduced into the federal judiciary system in 1869. It grew out of the great increase of business thrown upon the judges for the Districts by the Bankruptcy Act. The review cases alone, authorized by that act, were almost sufficient to give full employment to the judges for the Circuits. But these latter judges were an incongruity. They were not within the theory on which the judiciary system of the United States was constituted. They grew out of an emergency, and ought to disappear with the cessation of that emergency; for they produce disorder in the working of the system, and are violently inconsistent with the fundamental principle of its original mechanism.

What was the system in its origin, as framed by the framers of the National Constitution and founders of our National Government?

That government was one in which the amplest powers, which could be practicably and safely so left, were left to localities, and the fewest powers, consistently with safety and strength, were concentrated in centres. An admirable statement of the principles upon which the men of 1787 acted in this respect, is given by Gov. Seymour in his article in the *November-December* (the last) number of the *North American Review*, pages 365 to 370. If you have not already read that paper, you will find it amply to repay perusal and study.

This theory controlled in the organization of the national judiciary system. It provided local judges, resident in, and presumably born and raised in, the Districts, for administering the business of the two courts. And it provided that the Circuit Courts of the Districts should be occasionally presided over by one of the justices of the National Supreme Bench, in order that that Bench might be in direct and responsible relations with the local administration of justice.

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District Courts were created having jurisdiction of cases in admiralty, of proceedings in bankruptcy, of forfeiture proceedings, instituted for the National Government, and of criminal cases, not capital. Circuit Courts were created having jurisdiction of common law actions, of suits in equity and of criminal prosecutions, concurrently with the District Courts. The jurisdiction of these two courts were so different and distinct, that they scarcely held to each other the relation of inferior and superior courts. This relation only subsisted in respect to appeals in Admiralty, and latterly, to review proceedings in bankruptcy. Writs of error do not lie to the District Courts in criminal cases. The appeal in Admiralty was not technically an appeal, but only an expedient for giving a trial *de novo* in another forum. Of these two courts in each District, so nearly equal in dignity, but charged with wholly different duties, a judge for the District was provided. The law expressly required that he should be resident in the District; and it implied that he was born and raised there, was in full local affiliation with the community, was conversant with its laws and customs, and was not a stranger and foreigner to its affairs. It contemplated and provided that this judge, thus locally identified, thus known to the people, thus of them as well as among them, thus responsible socially, morally and individually to the local public sentiment, should hold the regular sessions, and dispatch, in order, at stated periods, the business of both the District and Circuit Courts. And I will here add that the high character of the judges for the Districts, for three-quarters of a century, gave to the national judiciary system, in very large part, its popularity and its hold upon the confidence of the American people.

In order to bring the central court of ultimate resort into direct relations with the local courts, the law provided that the Union should be parcelled into as many Circuits as there were Supreme Bench justices, and that one of these being designated for each Circuit, should hold a Circuit Court in each District at least once in two years.

Such was the system. It was as simple as complete; it was in character with all the work of the great men of 1789; it was admirably efficient; it was wonderfully popular; and it gave exceptional satisfaction in administering the business devolved upon it by law.

In 1869, a new feature was introduced into the system, which has greatly affected its before pleasant relations with the country. A judge was interpolated, who was known

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neither locally nor nationally. To every District but one in his Circuits he was a stranger. To the Supreme Bench he was a stranger. He constituted no link between the national and the local court, and was an exaggerated incongruity to both. His functions and duties are violently inconsistent with the theory on which the national judiciary system was based. Practically, too, though through no fault of his, he is an embarrassment to the business of the courts of his Circuit. It is physically impossible for him to hold these courts, numbering three or four in each District; there being an average of five Districts in each Circuit; each court being held at least twice a year. I am reminded here of the bill which the Circuit Judge for the Fourth Circuit tells me you have in charge for changing the times of holding the Circuit Courts in that Circuit, which consists of five States and eight Districts; and in which about thirty-five Circuit Courts are held in each year. It reminds me of the circular railroad which they had on the World's Fair Grounds in Philadelphia in 1876, where a passenger was put around a Circuit at the rate of about forty miles an hour.

At present the sudden appearances and sudden departures of judges for the Circuits at their different courts, has got to be a subject of derision with the bar. There is a sudden apparition of a judge, and before anything is accomplished, there is as sudden a disappearance, leaving it in doubt whether his presence were a reality or a dream. The whole affair is a travesty upon the idea of a patient and deliberate administration of justice.

It is true, that the law imposes the laboring oar on the judge for the District in regard to the business of both the Circuit and District Courts, for it was not changed in this respect in 1869. But the judges for the Circuits naturally assume that they should control the Circuit Court business; and so, the judges for the Districts are placed, in their relation to the Circuit Court, in greater or less degree, in the attitude of intruders; though in fact it is they who are intruded upon. The justices of the Supreme Court seem to lend countenance to this state of things by visiting their Circuits in company with the judges of the Circuits, and seldom sitting as the original law provided and still provides, with the judges for the Districts. Thus they continually present to each community the never pleasant spectacle to Anglo Saxons, of courts entirely conducted by judges from a distance, often from a great distance—strangers if not foreigners.

I repeat what must be obvious to any thoughtful student of

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our judiciary system and of the history of the times and men in which it originated, that the feature, of the judges for the Circuits interpolated into it in 1869, is an incongruity, and intrusion, really tending more to embarrass the business of the Circuit Courts than to advance it. No one who knows my pleasant personal relations with the Circuit Judge of the Circuit in which I live, and the exceptional respect which I am in the habit of expressing for his talents and learning, will believe that I am capable of any injurious reference to him in what I am saying. It is with the system that I am dealing and not with the men who are its instruments, and who are also, as to these defects, its victims. Having now given the reasons for what I am about to say, I am sure you will excuse me for expressing the opinion, that your proposal to add yet another judge, for each Circuit, to the already existing incongruity, will only embarrass your bill, and delay, probably defeat, its passage. Now that the judges for the Districts are relieved from the burden of the bankruptcy business, there is no reason why they should not devote their time and labor to the business of the Circuit Courts; and entirely relieve the judges for the Circuits from service upon the Circuit Courts, except in cases of appeal and cases reserved by consent of parties to causes. As to that class of business, there is no necessity for additional judges for the Circuits; and, I humbly submit, your bill in that respect proposes a useless expenditure.

The necessity of intermediate Appellate Courts is acknowledged by all. It is felt to be immediate and imperative; and I am led to believe that it would readily pass, if its provisions were such as to make avail of the judicial material already at hand for the constitution of those courts.

May I take the liberty of making the following suggestions:

1. Let there be an intermediate Appellate Court for each Circuit; the number of Circuits to correspond with the number of justices of the Supreme Bench; which may be increased if, and when necessary.

2. Let the Chief Justice designate from among the judges for Districts in each Circuit, say *four*, who shall constitute in part the desired court.

3. Let this court be presided over by the present judge for the Circuit, except when the justice assigned to the Circuit is present, when the latter shall preside. It shall be no objection to a judge sitting on this Court that he sits in an appeal from his own decision; it ought rather to be a reason *for* his sitting.

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4. Let the judge for the Circuit be relieved from service on the Circuit Courts of his Circuit, except in cases reserved by consent of parties to them, and in appeal cases now authorized by law.

Let the justice for the Circuit be relieved from service in the Circuit Courts, but required to sit once a year in the Appellate Court of his Circuit.

I think the general objection to your bill, is that it ignores the judges for the Districts too much, and fails to assign them that important part of duty and service in the judiciary system which local judges, to the manor born and familiar with the local law written and unwritten, were designed by the founders of the system to have. Does not your bill really degrade them? Born and reared in Virginia myself, and thoroughly taught in her ancient political doctrines, I may attach too much importance to her traditional views on this subject; but, whether important or not, I have felt it to be entirely consonant with my profound respect for yourself, personally, to express them fully and frankly as I have now done.

I am, with great respect and esteem,

Your obedient servant,

ROBERT W. HUGHES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

KEITH *v.* CLARKE, COLLECTOR, &C.

1. Where a case has been decided in an inferior court of a State on a single point which would give this court jurisdiction, it will not be presumed here that the Supreme Court of the State decided it on some other ground not found in the record or suggested in that court.
2. The State of Tennessee having organized in 1838 the Bank of Tennessee, agreed by a clause in the charter to receive all its issues of circulating notes in payment of taxes, but by a constitutional amendment adopted in 1865, it declared the issues of the bank during the insurrectionary period void, and forbid their receipt for taxes. HELD, That this was forbidden by the constitutional provision against impairing the obligation of contracts.
3. There is no evidence in this record that the notes offered in payment of taxes by plaintiff were issued in aid of the rebellion, or on any consideration forbidden by the Constitution or laws of the United States, and no such presumption arises from anything of which this court can take judicial notice.
4. The political society which in 1796 was organized and admitted as a State into the Union, by the name of Tennessee, has remained the same body politic to this time. Its attempt to separate itself from that Union did not destroy its identity as a State nor free it from the binding force of the Federal Constitution.

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5. Being the same political organization during the rebellion and since, that it was before, an organization essential to the existence of society, all its acts, legislative and otherwise, during the period of the rebellion, are valid and obligatory on the State now, except where they were done in aid of that rebellion or are in conflict with the Constitution and laws of the United States, or were intended to impeach its authority.
6. If the notes which were the foundation of this suit were issued on a consideration which would make them void for any of the reasons mentioned, it is for the party asserting their invalidity to set up and prove the facts on which such a plea is founded.

In error to the Supreme Court of the State of Tennessee.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiff in error, who was plaintiff below, sued the defendant for the sum of $40, which he had paid in lawful money under protest for taxes due the State of Tennessee after he had tendered to defendant that sum in the circulating notes of the Bank of Tennessee, which defendant refused to receive.

The suit was commenced before a justice of the peace, taken by appeal to the Common-Law Chancery Court of Madison county, and from there to the Supreme Court of Tennessee, and by writ of error from this court it is now before us for review.

In all the trials in the State courts, judgment was rendered against plaintiff. The jurisdiction of this court is denied again, though it has been affirmed in the analogous cases of *Woodruff* v. *Trapnall*, 10 How., 208, and *Furman* v. *Nicholls*, 8 Wall., 44.

As the same facts are involved in the question of jurisdiction and the issue on the merits it may be as well to state them.

They appear in a bill of exceptions taken at the trial on the first appeal, which was a trial *de novo* before a jury. The defendant was a collector of taxes, to whom plaintiff had tendered $40 of the bills of the Bank of Tennessee, which with other lawful money tendered at the same time was the amount due. The offer of plaintiff was founded on the 12th section of the charter of the bank, enacted in 1838 by the Legislature of the State, which reads thus:

"Be it enacted that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand in gold or silver coin, shall be receivable at the treasury of this State, and by all tax-collectors and other public officers in all payments for taxes or other moneys due to the State."

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It was proved that the bills were issued subsequent to May 6, 1861, and were known as the "Torbet or new issue," and were worth in the brokers' market about twenty-five cents on the dollar.

The court charged the jury that if the notes tendered were issued subsequent to May 6, 1861, and during the existence of the State government established at that date in hostility to the government of the United States, then defendant was not legally bound to receive them in payment of plaintiff's taxes. And the reason given for this was that while the Constitution of the United States protected the contract of the section of the charter we have cited from repudiation by State legislation as to notes issued prior to the act of secession of May 6, 1861, it conferred no such protection as to notes issued while the State was an insurrectionary government, and that consequently the provisions of section 6 of the schedule to the constitutional amendment of 1865, which declared that all the notes of the bank issued after the date above mentioned, were null and void, and forbid any legislature to pass laws for their redemption, was a valid exercise of State authority. On this instruction the jury found a verdict for the defendant.

In the Supreme Court the judgment rendered on this verdict was affirmed without any opinion or other evidence of the grounds on which it was so affirmed.

There can be no question that the charge of the trial judge to the jury decided against the plaintiff in error a question which gives this court jurisdiction, and this is admitted by counsel, who ask us to dismiss the writ of error.

The ground assumed in support of the motion is, that we ought to presume that the Supreme Court did not decide the question which the court below did, but affirmed the judgment on the ground that, by the laws of Tennessee, no suit could be brought against the State or against the collector of taxes, and that the justice of the peace who first tried the case, and the court to which the appeal was taken, had no jurisdiction. It would follow, say counsel, that as this was a question of State law, it could not be reviewed in this court.

The answers to this are several and very obvious.

1. Where an appellate court decides a case on the ground that the inferior court had no jurisdiction, it in some mode indicates that it was not a decision on the merits, to prevent the judgment being used as a bar in some court which might have jurisdiction.—(*Barney* v. *Baltimore*, 6 Wall., 277; *House* v. *Mullen*, 22 Wall., 42; *Kendig* v. *Dean*, , at this term.)

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2. In the case of *Tennessee* v. *Sneed*, 96 U. S. R., 69, this court decided that the courts of Tennessee did have the jurisdiction which this suggestion denies them, and we will not presume, without very strong reason for it, that the Supreme Court of Tennessee disagreed with this court on that point.

3. There is not the slightest evidence in the record, nor any reason to be drawn from it, to believe that the court decided any such question. It nowhere appears that it was raised. Nothing like it is found in the bill of exceptions. There is no plea to the jurisdiction or motion to dismiss for want of it.

And we are bound by any fair rule of sound construction to hold that the Supreme Court, in affirming the judgment of the court below, did it on the only ground on which that court acted, or which was raised by the record.

That question was whether the 12th section of the charter of the bank constituted a contract which brought the issues of the bank after the 6th of May, 1861, within the protective clause of the Constitution of the United States against impairing the obligation of contracts by State laws. Of that question this court has jurisdiction, and we proceed to its consideration.

In the case of *Furman* v. *Nicholls*, the 12th section of the charter of the bank, the same now under consideration, was held to constitute a contract between every holder of the circulating notes of the bank and the State of Tennessee, that the State would receive the notes in payment of taxes at their par value. And it was held that the same provision of the State Constitution of 1865, which is relied on here, was void as impairing the obligation of that contract.

The case of *Woodruff* v. *Trapnall*, 10 Howard, 208, was referred to as being perfect in its analogy, both in the character of the bank and its relation to the State, and the contract to receive its notes in payment of taxes. In the case in 8th Wallace, however (which is the identical case before us, except that in the former case the notes were issued prior to May 6, 1861), the court, out of abundant caution said, that it did not consider or decide anything as to the effect of the civil war on that contract, or to notes issued subsequent to that date. We are invited now to examine that point, and to hold, that as to all such notes the 12th section creates no valid contract.

In entering upon this inquiry, we start with the proposition that unless there is something in the relation of the State of Tennessee and the bank, after the date mentioned, to the

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government of the United States, or something in the circumstances under which the notes now sued on were issued, that will repel the presumption of a contract under the 12th section, or will take the contract out of the operation of the protecting clause of the Federal Constitution; this court has established already that there was a valid contract to receive them for taxes, and that the law which forbid this to be done is unconstitutional and void.

Those who assert the exception of these notes from the general proposition are not very well agreed as to the reasons on which it shall rest, and we must confess that as they are presented to us they are somewhat vague and shadowy. They may all, however, as far as we understand them, be classed under three principal heads.

1. The first is to us an entirely new proposition, urged with much earnestness by the counsel who argued the case orally for the defendant.

It is, in substance, that what was called the State of Tennessee prior to the 6th of May, 1861, became, by the ordinance of secession passed on that day, subdivided into two distinct political entities, each of which was a State of Tennessee. One of them was loyal to the Federal government, the other was engaged in rebellion against it. One State was composed of the minority who did not favor secession, the other of the majority who did. That these two States of Tennessee engaged in a public war against each other, to which all the legal relations, rights and obligations of a public war attached. That the government of the United States was the ally of the loyal State of Tennessee and the Confederated Rebel States were the allies of the disloyal State of Tennessee. That the loyal State of Tennessee, with the aid of her ally, conquered and subjugated the disloyal State of Tennessee, and by right of conquest imposed upon the latter such measure of punishment and such system of laws as it chose, and that by the law of conquest it had the right to do this. That one of the laws so imposed by the conquering State of Tennessee on the conquered State of Tennessee, was this one declaring that the issues of the bank during the temporary control of affairs by the rebellious State was to be held void; and that as conqueror and by right of conquest, the loyal State had power to enact this as a valid law.

It is a sufficient answer to this fanciful theory that the division of the State into two States never had any actual existence. That, as we shall show hereafter, there has never been but one political society in existence as an organized

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State of Tennessee from the day of its admission to the Union in 1796 to the present time. That it is a mere chimera to assert that one State of Tennessee conquered by force of arms another Tennessee and imposed laws upon it. And finally, that the logical legerdemain by which the State goes into rebellion and makes while thus situated contracts for the support of the government in its ordinary and usual functions, which are necessary to the existence of social life, and then by reason of being conquered repudiates these contracts, is as hard to understand as similar physical performances on the stage.

2. The second proposition is a modification of this, and deserves more serious attention. It is, as we understand it, that each of the eleven States who passed ordinances of secession and joined the so-called Confederate States, so far succeeded in their attempt to separate themselves from the Federal government, that during the period in which the rebellion maintained its organization, those States were in fact no longer a part of the Union, or if so, the individual States by reason of their rebellious attitude were mere usurping powers, all of whose acts of legislation or administration are void, except as they are ratified by positive laws enacted since the restoration, or are recognized as valid on the principles of comity or sufferance.

We cannot agree to this doctrine. It is opposed by the inherent powers which attach to every organized political society possessed of the right of self-government. It is opposed to the recognized principles of public international law, and it is opposed to the well-considered decisions of this court.

"Nations or States," says Vattel, "are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of *obligations* and *rights*."—(Law of Nations, § 1.)

Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength—(Wheaton's International Law, § 17.) Such a body or society, when once organized as a State by an established government, must remain so until it is destroyed. This may be done by disintegration of its parts, by

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its absorption into and identification with some other State or nation, or by the absolute and total dissolution of the ties which bind the society together. We know of no other way in which it can cease to be a State. No change of its internal polity, no modification of its organization or system of government, nor any change in its external relations short of entire absorption in another State can deprive it of existence or destroy its identity.—(See Wheaton's International Law, § 22.)

Let us illustrate this by two remarkable periods in the history of England and France.

After the revolution in England which dethroned and decapitated Charles the I., which installed Cromwell as supreme, whom his successors called a usurper; after the name of the government was changed from the Kingdom of England to the Commonwealth of England, and when, after all this, the son of the beheaded monarch came to his own, treaties made in the interregnum were held valid, the judgments of the courts were respected, and the obligations assumed by the government were never disputed.

So of France. Her bloody revolution, which came near dissolving the bonds of society itself, her revolutionary directory, her consul, her Emperor Napoleon, and all their official acts have been recognized by the nation, by the other nations of Europe, and by the legitimate monarchy when restored, as the acts of France, and binding on her people.

The political society, which, in 1796, became a State of the Union by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee, and the same State of Tennessee. Its executive, its legislative, its judicial departments have continued without interruption and in regular order. It has changed, modified and reconstructed its organic law, or State Constitution, more than once. It has done this before the rebellion, during the rebellion, and since the rebellion. And it was always done by the collective authority, and in the name of the same body of people constituting the political society known as the State of Tennessee.

This political body has not only been all this time a State, and the same State, but it has always been one of the United States—a State of the Union. Under the Constitution of

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the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force, which, in many other instances, establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which, in this case, would have been, to the extent of its success, a destruction of that Constitution. Failing to do this, the State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement.

In the case of *Texas* v. *White*, 7 Wall., 700, the first and important question was, Whether Texas was then one of the United States, and as such, capable of sustaining an original suit in this court by reason of her being such State. And this was at a time when Congress had not permitted her, after the rebellion, to have representatives in either house of that body.

Chief Justice Chase, in delivering the judgment of the court on this question, says: "The ordinance of secession, adopted by the convention, and ratified by a majority of the citizens of Texas, and all the legislation to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligation of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have been foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war of conquest and subjugation. Our conclusion, therefore, is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred."

In the case of *White* v. *Hart*, 13 Wall., 651, Mr. Justice Swayne, after a full consideration of the subject, states the result in this forcible language: "At no time were the rebellious States out of the pale of the Union. Their constitutional duties and obligations were unaffected and remained the same." And he shows, by reference to the formula used in the several reconstruction acts, as compared with those for the original admission of new States into the Union, that in regard to the States in rebellion, there was a simple recogni-

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tion of their restored right to representation in Congress, and no re-admission into the Union.

These cases, and especially that of *Texas* v. *White*, have been repeatedly cited in this court with approval, and the doctrine they assert must be considered as established, in this forum at least.

It would seem to follow that if the State of Tennessee has, through all these transactions, been the same State, and has been also a State of the Union, and subject to the obligations of the Constitution of the Union, that the contract which she made in 1838, to take for her taxes all the issues of the bank of her own creation, and of which she was sole stockholder and owner, was a contract which bound her during the rebellion, and which the Constitution protected then and now, as well as before. Mr. Wheaton says: "As to public debts—whether due to or from the State—a mere change in the form of the government, or in the person of the ruler, does not affect their obligation. The essential power of the State, that which constitutes it an independent community, remains the same; its accidental form only is changed. The debts being contracted in the name of the State, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal Constitution. The new government succeeds to the fiscal rights, and is bound to fulfill the fiscal obligations of the former government."—(International Law, sec. 30.) And the citations which he gives from Grotius and Puffendorf sustain him fully.

We are gratified to know that the Supreme Court of the State of Tennessee has twice affirmed the principles just laid down in reference to the class of bank-notes now in question. In a suit brought by the State of Tennessee against this very Bank of Tennessee, to wind up its affairs and distribute its assets, that court, in April, 1875, decreed, among other things, "that the acts by which it was attempted to declare the State independent, and to dissolve her connection with the Union, had no effect in changing the character of the bank, but that it had the same powers, after as before those acts, to carry on a legitimate business, and that the receiving of deposits was a part of such legitimate business." "That the notes of the bank issued since May 6, 1861, held by Atchison and Duncan, and set out in their answer, are legal and subsisting debts of the bank, entitled to payment at their face value, and to the same priority of payment out of the assets of the bank as the notes issued before May 6, 1861."

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At a further hearing of the same case in January, 1877, that court re-affirmed the same doctrine, and also held that the notes were not subject to the statute of limitation, and were not bound by it—(*State of Tennessee* v. *The Bank of Tennessee*, not reported.) This decision was in direct conflict with Schedule 6 of the constitutional amendment of 1865, which declared all issues of the bank after May 6, 1861, void, and it necessarily held that the schedule was itself void as a violation of the Federal Constitution.

3. The third proposition on which the judgment of the courts of Tennessee is supported, is that the notes on which the action is brought were issued in aid of the rebellion, to support the insurrection against the lawful authority of the United States, and are, therefore, void for all purposes.

The principle stated in this proposition, if the facts of the case come within it, is one which has repeatedly been discussed by this court. The decisions establish the doctrine that no promise or contract, the consideration of which was something done or to be done by the promisee, the purpose of which was to aid the war of the rebellion, or give aid and comfort to the enemies of the United States in the prosecution of that war, is a valid promise or contract, by reason of the turpitude of its consideration.

In the case to which we have already referred, of *Texas* v. *White and Childs*, 7 Wall., 780, the suit was for the recovery of certain bonds of the United States, which, previous to war, had been issued and delivered to the State of Texas. During the rebellion, the Legislature of that State had placed these bonds in the hands of a military commission, and they were delivered by that committee to White and Childs to pay for supplies to aid the military operations against the government. This court held that while the State was still a State of the Union, and her acts of ordinary legislation were valid, it was otherwise in regard to this transaction. As this is the earliest assertion of the doctrine in this court, and this branch of the opinion received the assent of all the members of the court but one, and has been repeatedly cited since with approval, we reproduce a single sentence from it: "It may be said," says the court, "perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, personal and real, and providing remedies for injuries to person and estate, and other similar acts which would be

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valid if emanating from a lawful government, must be regarded, in general, as valid, when proceeding from an actual though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid."—(8 Wall., 733.)

In *Doane* v. *Hanouer*, it was held that due-bills given in purchase of supplies, by a purchasing agent of the Confederate States, were void, though in the hands of a third party; and in support of the judgment, Mr. Justice Bradley said: "We have already decided, in the case of *Texas* v. *White*, that a contract made in aid of the late rebellion, or in furtherance or support thereof, is void. The same doctrine is laid down in most of the circuits, and in many of the State courts, and must be regarded as the settled law of the land"—(12 Wall., 345.)

The latest expression of the court on the subject was by Mr. Justice Field, without dissent, at the last term, in the case of *Williams* v. *Bruffy*, in which the whole doctrine is thus tersely stated: "While thus holding that there was no validity in any legislation of the Confederate States, which this court can recognize, it is proper to observe that the legislation of the States stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the State prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States did not impair, or tend to impair, the supremacy of the national authority, or the just rights of the citizens under the Constitution, they are, in general, to be treated as valid and binding"—(96 U. S. R., 192; see *Horn* v. *Lockhart*, 17 Wall., 570; *Sprott* v. *United States*, 20 Wall., 459.)

There is, however, in the case before us, nothing to warrant the conclusion that these notes were issued for the purpose of aiding the rebellion, or in violation of the laws or the Constitution of the United States. There is no plea of that kind in the record. No such question was submitted to the jury which tried the case. The sole matter stated in defence, either by facts found in the bill of exceptions, or in the decree of the court, is that the bills were issued after May 6, 1861, while the State was in insurrection, and, therefore, come within the amended Constitution of 1865, declaring them void. The provision of the State Constitution does not go upon the ground that the State bonds and bank-notes

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which it declared to be invalid, were issued *in aid of the rebellion*, but that they were issued by *a usurping government*, a reason which we have already demonstrated to be unsound. Not only is there nothing in the Constitution or laws of Tennessee to prove that these notes were issued in support of the rebellion, but there is nothing known to us in public history which leads to this conclusion. The opinion of the Supreme Court, which we have already cited, states that the bank was engaged in a legitimate business at this time, receiving deposits, and otherwise performing the functions of a bank; and though, as is abundantly evident, willing enough to repudiate these notes as receivable for taxes, that court held them to be valid issues of the bank, in the teeth of the ordinance declaring them void.

It is said, however, that, considering the revolutionary character of the State government at that time, we must presume that these notes were issued to support the rebellion.

But while we have the Supreme Court of Tennessee holding that the bank, during this time, was engaged in a legitimate banking business, we have no evidence whatever that these notes were issued under any new law of the rebel State government, or by any interference of its officers, or that they were in any manner used to support the State government. If this were so, it would still remain that the State government was necessary to the good order of society, and that, in its proper functions, it was right that it should be supported.

We cannot infer, then, that these notes were issued in violation of any federal authority.

On the other hand, if the fact be so, nothing can be easier than to plead it and prove it. Whenever such a plea is presented, we can, if it comes to us, pass intelligently on its validity. If issue is taken, the facts can be embodied in a bill of exceptions or some other form, and we can say whether those facts render the contract void. To undertake to assume the facts which are necessary to their invalidity on this record is to give to conjecture the place of proof, and to rest a judgment of the utmost importance on the existence of facts not found in the record, nor proved by any evidence of which this court can take judicial notice. We shall, when the matter is presented properly to us, be free to determine, on all the considerations applicable to the case, whether the notes that may be then in controversy are protected by the provision of the Constitution or not. And that is the only question of which, in a case like the present, we would have jurisdiction.

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The judgment of the Supreme Court of Tennessee is, therefore, reversed, and the case remanded to that court for further proceedings in accordance with this opinion.

WAITE, CJ. and BRADLEY and HARLAN JJs. dissented on the ground that the notes were issued by what they term the insurgent or rebellious government of Tennessee, and in aid of the Confederate government.—EDS.

JUDGMENT REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

TROGDEN *v.* THE COMMONWEALTH.

1. On an indictment under § 24, ch. 188, of the Code of 1873, against T., of the firm of T. & Co, for obtaining goods by false pretences from M. on the 28th February, 1878. The evidence of B. and O. that T. had made the same representations to them on the same day, *is admissible* to shew the *fraudulent intent* of the accused in the commission of the offence charged.
2. On the 15th March, 1878, L. having received an order to send some goods to T. & Co., obtained from B. a copy of the representations made to him by T. on the said 28th February, 1878, which were the same representations made to M. He mailed a copy to T. & Co., asking if that statement represented the true condition of their affairs? and received, by due course of mail, a letter signed T. & Co., saying that it did, and that the business was still prospering. HELD: The testimony of L.; his letter to T. & Co. containing the statement, and the answer received by him, are admissible as evidence in this case to shew the *intent* of the accused.
3. Whenever the *intent or guilty knowledge* of a party, charged with crime, is a material ingredient in the issue of the case; other acts and declarations of a similar character tending to establish such intent or knowledge, are proper evidence to be admitted; provided, they are not too remotely connected with the offence charged; and what are the limits, as to the time and circumstances, is for the Court, in its discretion, to determine.
4. Although under the Statute of Virginia, the obtaining goods by false prerences is made *larceny*, and an indictment under the same for *larceny* is sufficient; yet every ingredient entering into the offence of obtaining goods by false pretences, must be shewn as fully as if the statute had not thus passed.
5. On the 1st of April, 1878, T., the accused, filed his petition in the Bankrupt Court to have the concern of T & Co., composed of himself, C. L. T., and J. W. A., adjudicated bankrupts, and they were so adjudicated on the 26th April, 1878. In the petition and schedules filed by T. in this bankrupt record, different representations were made as to the affairs of the concern of T. & Co. on the 28th February, 1878, when the offence was alleged to have been committed, from those stated by him in some of the representations made to M. The whole record of the Bankrupt Court was offered in evidence by the Commonwealth, to which the accused, by counsel, objected *generally*, without pointing out any part of the record as objectionable. The

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Court below admitted the whole record. HELD: It was *not error*, under the circumstances, to do so. The statements contained in the petition and schedules in that record, made by the accused, were admissible as admissions or declarations of the facts therein stated, and, while the schedules and statements made by the other partners, are not evidence against the accused, he cannot by a *general* objection to the *whole* record, impose upon the trying court the duty of examining every part of it, to see whether, perchance, there is not something in it not admissible in evidence. It is his duty to point out to the Court such portions of the record as come within the scope of his objection, and this rule applies as well in civil as in criminal cases.

6. One of the representations made by T. to M. was that "J. W. A., one of his partners, owned real estate in Randolph county, North Carolina, of the value of $3,000, unincumbered." In the progress of the trial, the Commonwealth offered in evidence, what purported to be a copy of a list of real and personal estate given by J. W. A. to the Assessor of Randolph county, N. C., and certified as correct by the Register of Deeds in that county. HELD: This paper was *not* admissible for any purpose in this case.
7. If, by the admission of improper evidence, the accused *may have been prejudiced*, even though it be doubtful, whether in fact he was so or not, it is sufficient ground for reversing the judgment.
8. The Court below instructed the jury "that they must believe from the evidence, beyond all reasonable doubt, that the alleged false pretences were believed by M.; that but for them, he would not have parted with his property; *i. e.*, that they had the prevailing and controlling influence in making M. part with his property." HELD: The instruction correctly expounded the law.

The facts are sufficiently stated in the head notes and opinion of JUDGE STAPLES.

William W. & Beverly T. Crump and S. M. Page for the plaintiff in error.

John Howard (for the Attorney General) for the Commonwealth.

STAPLES J. The accused was convicted in the Hustings Court of the city of Richmond, of obtaining, by false pretenses, certain goods from the mercantile firm of M. Millhiser & Co. During the trial numerous exceptions were taken to the rulings of the court, which are now to be considered. It was proved that the accused, at the time of the commission of the alleged offence, was a resident of Greensboro, N. C., and a member of a firm, consisting of himself, J. W. Allred and Cicero L. Trogden, doing business under the style of Trogden & Co.; that on or about the 28th of February, 1878, the accused came to the city of Richmond and represented to Millhiser & Co. that the concern of which he was a member, had, when they commenced business a year before, a cash capital of $2,700, a stock of goods, then

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on hand, worth $4,000, according to an inventory taken just before he left home; that the debts of the concern amounted to about $400, none of which were due, and that J. W. Allred, one of the partners, owned real estate in Randolph county, N. C., of the value of $3,000; and upon these statements he obtained from Millhiser & Co. the goods mentioned in the indictment. Having proved these facts, the Commonwealth introduced Charles A. Baldwin and A. Oppenhimer, also merchants of Richmond city, and proposed to show by these that the accused had, on the same day, made to each of them statements similar in all respects to that made to Millhiser & Co., with reference to the conditions and circumstances of Trogden & Co., and of J. W. Allred individually. The only difference being that in the case of A. Oppenhimer the representations were made after the goods were purchased, but before they were taken away. To the introduction of this evidence, the accused, by his counsel, objected upon the ground that it was illegal and irrelevant, and upon the further ground, that the accused was then under indictment for obtaining the goods of Gardner, Carlton & Baldwin, of which concern, Charles A. Baldwin was a member. The court overruled the objection and admitted the evidence, to which the accused excepted; and this is subject matter of the first and second bills of exceptions.

The Commonwealth next introduced Lewis H. Blair, of the firm of Lewis H. Blair & Co., who testified that having obtained from Charles A. Baldwin, a copy of a statement in his possession, the same made by the accused, touching the condition of the concern of Trogden & Co., he inclosed that statement in a letter addressed to Trogden & Co., Greensboro, N. C., and asked if the same was correct; and in due course of mail, a day or two after, he received a letter dated 18th March, 1878, signed Trogden & Co., in which it was said, the statement was a true one, and the business of the firm still prospering. To the admission of this testimony, as also to the introduction of the letters in question, the accused objected, but his objection was overruled, and he again excepted; and this is his third bill of exceptions.

Before considering the main question presented by these bills of exceptions, it will be well to dispose of a preliminary point, arising upon the admissions of the letter mentioned in the third bill of exceptions, signed Trogden & Co., and addressed to Lewis H. Blair & Co. It is insisted that this letter, for ought that appears, may have been written by some other member of the firm, that there is nothing to

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connect the accused with it—nothing to show that he wrote it or that he ever saw it. It is sufficient to say, that the accused resided at Greensboro, N. C., and was the only member of the concern that did reside there, and that he had the exclusive management and control of the business. These facts justify the presumption that the accused is the writer of the letter. At all events they were sufficient to warrant its admission to the jury in the absence of countervailing evidence.

The real question arising upon the three bills of exception, is whether evidence of other false pretenses is admissible upon this indictment. This question has been very ably argued by counsel on both sides, and is one of the very first impression in this State. It has created great difficulties in the minds of some of the judges. The subject has received a very careful consideration, and all the authorities referred to in the argument, with many others not referred to, have been fully examined. After the most deliberate reflection, I think the Hustings Court did not err in receiving the evidence; and I will now proceed to give the reasons for this opinion.

I do not dispute the value of the rule which confines the evidence to the matter in issue, more especially in criminal prosecutions, involving the life or liberty of the accused. It is of the utmost importance to him that the facts laid before the jury, shall consist exclusively of the transactions which form the subject of the indictment, and which alone he can be expected to come prepared to answer. It is not just to him to require him to answer for two offences when he is indicted for one, and thus to blacken his character and to create impressions on the mind of the jury unfavorable to his innocence. This is the doctrine of the courts in every well regulated system of jurisprudence. And yet, when we come to examine the cases bearing upon the question, it is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions. For example, in prosecutions for altering forged notes, for passing counterfeit money and for receiving stolen goods, evidence is always admissible of other transactions of a like character, although they may amount to distinct felonies, provided they are not too far removed. What are the limits as to time and circumstances in such cases it is for the court, in its discretion, to determine. Nor is it an objection that the offences thus proved are the subjects of separate indictments. Roscoe, C. Evidence

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86, 3 Russell on Crimes, 285. The object of this evdence is simply to show the guilty knowledge of the accused.

There is another class of cases in which it is held permissible to prove other offences for the purpose of showing the guilty intent of the accused. Thus upon an indictment for maliciously shooting at the prosecutor, it has been held proper to show, that the accused had twice shot at the prosecutor the same day, for the purpose of rebutting the idea of accident, and of establishing the willful intent. *Rex* v. *Voke*, Russ & Ry, 531. And so upon a prosecution for administering sulphuric acid to horses with intent to kill them, evidence is admissible that the prisoner had frequently mixed sulphuric acid with horses' corn. *Rex* v. *Mogg*, 4 C. & P., 364. Upon an indictment for a libel, the publication of other libels, not laid in the indictment, may be given in evidence to show the *quo animo*, the defendant made the publication in question. 1 Green, sec. 53. Indeed the cases upon this subject are almost innumerable as may be seen upon examination of the books on criminal law. 3 Rus. on Crimes, page 285, 87, 88. Roscoe 86-94.

In *Botteimby* v. *United States*, 1 Story Rep., p. 135, Mr. Justice Story has very clearly stated the principle upon which this sort of evidence is received. He says: In all cases where the guilt of the party depends upon the intent, purpose or design, with which an act is done, or upon his guilty knowledge, I understand it to be a general rule, that collateral facts may be examined into in which he bore a part, for the purpose of establishing a guilty intent. In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, that is, other acts and declarations of a similar character, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud, it will be otherwise impossible satisfactorily to establish the true nature and character of the act. The remarks of Bigelow J. in *Coole* v. *Moore*, 11 Cush., 216, are to the same effect. Now, upon a prosecution for obtaining goods by false pretenses, the indictment must aver the fraudulent intent, and the Commonwealth must prove it. It is the very gist of the offence. *Annable's Case*, 24 Gratt., 563, 570. It is not sufficient that the accused knowingly states what is false. It must be shown his intent was to defraud. Such intent is not a presumption of law, but a matter of fact for the jury. Being a secret operation of the mind, it can only be ascertained by the acts and representations of the party. A single act or representation in many cases would

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not be decisive, especially where the accused has sustained a previous good character. But when it is shown that he made similar representations, about the same time, to other persons, and by means of such representations obtained goods, all of which were false, the presumption is greatly strengthened that he intended to defraud.

One of the counsel for the accused, in a very able argument upon this branch of the case, insisted that when the accused obtains goods by falsely representing himself a man of property, the jury must infer the guilty intent, and therefore evidence of collateral facts is unnecessary and irrelevant, and can only mislead the jury.

It may be conceded that when goods are obtained by false representations of the kind mentioned, and this is the whole case, the jury may justly infer the fraudulent intent. But it frequently happens, in a large majority of cases, there are numerous facts and circumstances sometimes of a minute and varied character, throwing light upon the conduct and motives of the accused. It is impossible for the court to foresee what may be developed in the progress of the trial. When evidence is offered of other transactions to show the guilty intent of the accused, is the court to say the intent is already conclusively proved, and the evidence is therefore irrelevant? What would be thought of a judge who would thus prejudge the case and invade the province of the jury? The learned counsel would hardly concede the fraudulent intent of his client upon any state of facts. In the case before us, we have but a small portion of the evidence; it is, of course, impossible for us to say what testimony was adduced by the accused upon the question of his particular intent. And yet we are asked to say, that the evidence set out in the three bills of exception is irrelevant upon the assumption that without it the jury must have found the guilty intent of the accused. The opinion of this court in *Walsh's Case*, 16 Gratt., 541, has a strong bearing upon this question. There the distinction is plainly drawn between guilty knowledge or intent as a presumption of law, and guilty knowledge or intent as a presumption of fact—a mere inference to be drawn by the jury. In the latter case, whether the jury may find the accused guilty upon a given state of facts, they are not bound to do so. They are to weigh all the circumstances and draw from them such conclusion as they may think warranted by the evidence.

In this class of cases it has been held, that even the admission of the accused, that the act was done with a fraudulent

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or malicious intent, cannot preclude the Commonwealth from proving it by any proper evidence. *Commonwealth* v. *McCarthy*, 119 Mass., 334; *Priest* v. *Groton*, 103 Mass., 530.

But let us see what are the authorities on the question. In civil cases the decisions are abundant, which hold that on the question of intent to defraud by false pretenses, other acts or representations of a like character, done at or about the same time with that in issue, are admissible with a view to the *quo animo*. The case of *McKinney* v. *Douglas*, 4 Green, 172, is an example. There a suit was to avoid a sale on the ground of the false and fraudulent conduct of the purchaser in representing himself to be a man of great property and credit, when he was not; and it was held proper for the vendor to give evidence of similar false pretexts, successfully used to other persons in the same town about the same time, to show a general scheme to amass property by fraud. In *Hennequin* v. *Naylor*, 24 New York, p. 139, for the purpose of proving the fraud, the vendor relied in part upon the fact that the defendant had purchased of several persons large bills of goods, the plaintiff among the rest, just on the eve of suspension. See also *White* v. *Varney*, 10 New Hamp., 291, 477; Rawley, 12; Mass., 307; *Murphy* v. *Bruce*, 23 Bar., 561; *Allen* v. *Matthews*, 3 John., 234; *Omsted* v. *Hatailey*, 1 Hill, 317; 1 Phillips Ev., 653, 773. These decisions are directly in point, and are entitled to great weight, if the rules in criminal are the same as in civil cases—that they are so in general, so far as the means of ascertaining truth are concerned, is established by a great weight of authority. 1 Bishop's Crim. Procedure, sec. 502; 1 Green, sec. 65; Roscoe's Crim. Ev., p. 1; and the cases cited by these authors; *Grayson's Case*, 6 Gratt., 723.

As, however, it may be said that the rule confining the evidence to the point in issue, should be more rigidly applied in criminal than in civil cases, let us examine some of the decisions based upon criminal prosecutions. The case of the *Commonwealth* v. *Eastman*, 1 Cush., 216, was an indictment for obtaining goods or money by false pretenses. It was ably argued and carefully considered. The court, in commenting upon one branch of the case, says: Evidence of other purchases of goods than those charged in the indictment, made by the defendants from other persons during the month of March, 1844, under similar circumstances with the transaction charged in the indictment, was admitted for the purpose of showing the nature of the business of the defendants and the extent of the purchases made by them, and also as bearing up-

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on the *bona fide* character of the dealings of the defendants with the particular individuals alleged to be defrauded. This species of evidence would not be admissible for the purpose of showing that the defendant had also committed other like offences, but simply as an indication of the intention in making the purchases set out in the indictment. It is analagous to the proof of the *scienter* in indictments for passing counterfeit money, by showing that the defendant passed other counterfeit money to other persons about the same time. Such evidence is always open to the objection that it requires the defendant to explain other transactions than those charged in the indictment, but when offered for the limited purpose above stated, that of showing a criminal intent in the doing of the act charged, it has always been held admissible.

This decision was followed by the case of *Commonwealth* v. *Tuckerman*, 10 Gray, 173, an indictment for embezzlement, and upon the trial, evidence was admitted of other acts of embezzlement of different amounts and at different times, for the purpose of showing the fraudulent intent. The next case is that of *Commonwealth* v. *Jeffries*, 7 Allen, 548, for obtaining goods by false pretenses. In both cases the decision in Eastman's case was cited, commented upon and approved. And in all the cases the principle govering, in prosecutions for passing counterfeit money, is applied to prosecutions for obtaining money by false pretenses.

The counsel for the accused in this case have cited the case of *State* v. *Tarpage*, 57 New Hamp., 295, and have read extracts from the opinion of Chief Justice Cushing. The learned judge discusses with great force and learning the rules governing the admission of collateral facts, to show the intent of the accused. And although it is obvious he is not favorably inclined to the admission of such evidence, still he concedes there are cases in which it is admissible. After enumerating these cases, he proceeds as follows: In cases of indictment for obtaining goods under false pretenses, it very often happens that the respondent has been in some kind of business, of which buying and selling goods on credit makes a part, and in such cases the difficulty is, to draw the line between the points where legitimate business ceases and fraud begins. In such cases a single purchase of goods on credit might happen in the ordinary course of business, but if a party should make several purchases of goods at a time when he was in failing circumstances, that fact would have some tendency to show that he knew he was in failing circumstances and that he did not intend to pay for them; of course the effect of such testi-

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mony would depend upon the number and amount of such purchases, the after disposition of the goods purchased, and all the other circumstances. See also *State* v. *Johnson*, 33 New Hamp., 441; *Horey* v. *Grant*, 52 New Hamp., 569; *Defrese* v. *State*, 3 Heisk, 42 Ala., 532.

The case of *Wood* v. *United States*, 16 Peters, 342, is, perhaps, a more satisfactory authority than any cited. There, upon an information against the defendant for failing to invoice certain goods imported by him, with design to evade the duties and to defraud the Government, it was decided that other invoices of articles imported into New York and consigned to the defendant, was proper evidence to show the fraudulent intent. Judge Story, in delivering the opinion of the Court, said: The question was one of fraudulent intent or not, and, upon questions of that sort, where the intent of the party is the matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate and establish his intention. Indeed, in no other way would it be practicable in many cases to establish such intent or motive. For the single act taken by itself, may not be deemed either way, but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with absolute certainty. These views the learned Judge illustrates and enforces by argument and by reference to authority.

The most recent case on this subject is that of *Bielschofsky* v. *The People of the State of New York*, decided by the Supreme Court of New York, and reported in 3 Han., p. 46. It was a prosecution for obtaining goods upon false pretenses. It was decided to be competent to prove other offences committed by the accused with the view to show his intent in the particular offence charged, although it might incidentally prejudice the character of the accused in the mind of the jury. Upon a writ of error to the Court of Appeals of New York, this judgment was affirmed. So that we have the decisions of two of the highest Courts of New York upon the very points involved here. Against this array of authorities, we have the case of *Reg* v. *Holt*, Bell, C. C., 280, in which, upon an indictment for obtaining money upon false pretenses, it was held not permissible to show that the prisoner had obtained money by similar false pretenses within a week afterwards, for the purpose of establishing the intent. As the case was not argued and no

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reasons are given in the opinion of the Court, it is impossible to say upon what grounds the decision was placed, possibly the subsequent pretenses were considered as too remote in point of time. The decision has not been approved by writers on criminal law—Roscoe Criminal Evidence, 24. Opposed to this are the two cases of *Rex* v. *Roebuch*, D. & B., 24, and *Queen* v. *Frances*, 2 Cr. Cases, Reserved Law Rep., 128, decided in 1872. This last case is in entire harmony with the American decisions already cited, so that the English doctrine sustains fully the view taken by the Courts in this country.

It has been said that whatever may be the rule elsewhere, under our statute obtaining goods upon false pretenses is made larceny, and, upon a prosecution for larceny, it is not admissible to prove other larcenies by way of showing the intent. Without stopping to controvert the conclusion reached by this position, it is sufficient to refer to *Annable's Case*, 24 Gratt., 507, in which it was held, that whilst the statute declares that the party obtaining goods by false pretenses, is guilty of larceny, it is not intended to dispense with the proof requisite to show that the goods were obtained by false pretenses. Every ingredient entering into the offence of obtaining goods by false pretenses must be shown as fully as if the statute had not passed.

My opinion, therefore, is, that the Hustings Court did not err in admitting the evidence set out in the three bills of exceptions already adverted to, such evidence not being too remote in time or place to throw light upon the intent of the accused in the main transaction. I think, however, that court ought to have explained to the jury that this evidence was only to be considered by them in connection with and as explanatory of such intent, and not as proof that the accused had committed other offences not charged in the indictment.

Passing from this point, we come to the fourth bill of exceptions, which presents the question of the admissibility as evidence of the record in bankruptcy. And first, it is objected, there is no proof that the accused is the identical W. F. Trogden who filed the petition and schedule in bankruptcy, and who was adjudicated a bankrupt by the District Court of the United States for the Western District of North Carolina. It is very true that no witness swears to the identity of the accused, but the evidence is, nevertheless, conclusive upon that point. When the accused came to Richmond, in February, 1878, he represented that the concern of which he was a member consisted of himself, J. W.

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Allred and Cicero Trogden, and that it was doing business, at Greensboro, North Carolina, under the style of Trogden & Co. The petition in bankruptcy is signed by W. F. Trogden, of Greensboro, and represents that he is a member of the firm of Trogden & Co., consisting of himself, J. W. Allred and Cicero L. Trogden. In the list of creditors filed among the proceedings in bankruptcy, are the names of Millhiser & Co., A. Oppenhimer and Gardner, Carlton & Baldwin, whose debts are stated to have been contracted on the 28th February, 1878. It is not within the bounds of probability that there were two mercantile firms in Greensboro, N. C., with the same style and name—with the same number of partners, and all having identically the same names, and each of these firms should be debtor in the same amount to three mercantile firms in this city for goods purchased the same day. Upon this state of facts, there can be no doubt that the proof of identity is complete.

The next inquiry is to what extent and for what purpose is the record in bankruptcy evidence in this case.

Without entering into a discussion of the question so laboriously argued by counsel as to the admissibility and effect of records in civil cases, upon the trial of criminal offences, I deem it sufficient to say that, in my view, this record is competent to show that the copartnership of Trogden & Co. and the individuals constituting said copartnership were, on the 20th of April, 1878, duly adjudicated bankrupts by the District Court of the United States. Apart from the consideration that an adjudication in bankruptcy is in the nature of a decree *in rem* as respects the status of the debtor, it plainly appears that the whole proceeding in this case was had at the instance and upon the application of the accused. The record is also competent to show the petition and schedules filed by the accused, the statements therein contained and any other act done or declaration made by the accused in the progress of the proceedings in bankruptcy. And this upon the plain principle that a record is always evidence against a party as containing a solemn admission or judicial declaration in regard to a particular fact or facts. In such case, however, it is admitted not as a judgment conclusively establishing the matter, but as a deliberate declaration or admission that the fact was so. 1 Green on Evidence, sec. 527, n.

My opinion, farther, is that the several schedules filed by J. W. Allred and Cicero Trogden, also constituting a part of the record in bankruptcy, are not legal evidence against the

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accused. They are simply the admissions in writing of those persons. The accused had no opportunity of controverting these statements, and no particular interest in doing so. And even though it appeared that the accused was afforded an opportunity of controverting the admissions of his copartners, it would be unjust that, upon a criminal charge involving his liberty and character, he should be prejudiced by a mere default in protecting his interest in a civil proceeding. Starkie on Evidence, 301. If, therefore, upon the trial in the Hustings Court an objection had been made to the introduction of this evidence, it would have been the duty of the Hustings Court to exclude it or to instruct the jury to disregard it. A difficulty, however, arises from the fact that the accused made no objection to any specific part of the record, but contented himself with a general objection to the whole. Several decisions of this Court in civil cases have held that it is the duty of the objecting party to lay his finger upon the exceptionable parts of the record, so that the mind of the trying court might be brought to bear upon them, instead of making a motion equivalent to the rejection of the whole record. *Harrison* v. *Brown*, 8 Leigh, 706, *Friend* v. *Wilkinson & Hunt*, 9 Gratt., 31, *Parsons* v. *Harper*, 16 Gratt., 76. The same rule must necessarily prevail in criminal cases. The accused cannot, by a general objection to the whole record, impose upon the Court the duty of examining every part of it to see whether, perchance, there may not be something in it not admissible as evidence. It is his duty to point out such portion of it as comes within the scope of his objection. I think, therefore, the objection to the entire record, in this case, was too broad, and the Hustings Court committed no error in overruling it as made.

With respect to the fifth bill of exceptions, I think the Hustings Court did not err in admitting as evidence the written statement therein mentioned. This statement was the same made by the accused to Samuel Hirsh, a member of the firm of Millhiser & Co., on the 28th February, 1878. It was forwarded on the 2d March to another member of the firm then in the city of New York. The latter, after receiving the statement and after making certain inquiries in New York, telegraphed to his house in Richmond to ship the goods purchased by the accused to him in Greensboro. This statement must be treated as a representation made to the firm and every member of it. It constitutes material evidence to show the grounds upon which both partners acted, the one in selling and the other in directing the delivery of the goods to the accused.

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In the further progress of the trial, the Commonwealth offered in evidence what purported to be a copy of a list of real and personal estate given in by J. W. Allred to the Assessor of Randolph county, N. C., and certified as correct by the Register of Deeds in that county. This paper was objected to by the accused, but his objection was overruled, and this is the subject of the sixth bill of exceptions. It does not appear when the list was made out by Allred, or when it was returned by the Assessor, or when the copy was certified by the Register, for the assessment, the list and the certificate are all without date. The paper did not tend, therefore, in the slightest degree, to show the falsity of the representations made by the accused on the 28th February, 1878, with respect to the real estate owned by Allred in Randolph county.

But this is not all; the paper purports to be a copy of a list on file in some office or other place of deposit in North Carolina. Such a copy would not be evidence in any court unless the original is a matter of record, or unless there is a statute making the copy evidence. We know nothing of the functions or duties of the Assessor, or of the Register of Deeds in North Carolina. All these matters are regulated, not by the principles of the common law, but by North Carolina statutes, of which the Virginia courts cannot take judicial notice. If the Commonwealth wished to rely upon a paper of this sort, it ought to have brought the North Carolina statutes here, and proved them as other facts, and it ought to have shown by these statutes that a copy of this sort is made legal evidence.

But to prevent all misapprehensions on a future trial, I will say that, in my opinion, this paper, whether a copy or the original, is not legal evidence against the accused in this case for any purpose. It is nothing more than a statement of Allred's on oath, it may be, made to some North Carolina officer of the amount and value of his real and personal property. It was not made in the presence of the accused; it was a matter in which he had no interest or concern, and no opportunity was ever afforded him of cross-examining the person who made it. It is difficult to find even a plausible ground upon which such a paper or statement can be used upon a criminal trial.

The learned counsel representing the Commonwealth here seemed to think, however, that the evidence was very immaterial, and the accused could not have been prejudiced by it. How is it possible for us to say what effect it had on the mind of the jury? The whole purpose of introducing it wa

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to show that the accused had made a false statement to Millhiser & Co., when he represented that his copartner, Allred, owned $3,000 worth of real estate in Randolph county. If the paper proved anything, it proved the falsity of that representation, and so the jury must have considered it. Besides, at the present term, this court has held, as it has held on repeated occasions, that if the accused *may have been prejudiced* by the evidence, even though it be doubtful whether, in fact, he was so or not, it is a sufficient ground for reversing judgment.

My opinion, therefore, is, that the Hustings Court erred in admitting the evidence set out in the sixth bill of exceptions. *Payne* v. *Commonwealth*, and cases there cited, decided at the present term.

The next subject of inquiry is the seventh bill of exceptions, from which it appears that the Hustings Court, in response to an inquiry of the jury, instructed them they must be satisfied, from the evidence, that the alleged false pretenses were believed by Millhiser & Co.; that but for them they would not have parted with their goods—that is, that they had the prevailing and controlling influence in making Millhiser & Co. part with their property. To this instruction, the accused excepted. Upon this point, it is sufficient to say that the instruction is in accordance with the decision of this court in *Fay's Case*, 28 Gratt., 912, and with the current of authority elsewhere.

The questions arising upon the eighth bill of exceptions have been already considered and disposed of in connection with the first, second and third bills of exception. They do not, therefore, require any further notice at our hands.

The ninth bill of exceptions, and the last, is to the refusal of the Hustings Court to set aside the verdict and grant the accused a new trial. According to the certificate of the judge of that court, the application for a new trial was based exclusively upon the ground that the facts relating to the belief of Millhiser & Co. in the statement of the accused, were insufficient to show that this statement was the cause, or the predominating cause, of the delivery of the goods. In other words, that Millhiser & Co. did not give entire credence to the representations of the accused, but proceeded to obtain elsewhere information upon the subject, and upon that information they relied in giving the credit. The true inquiry as is conceded, is, whether the false pretense, either operating alone or with other causes, had a controlling influence, or that, without such pretense, the owner would not have parted

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with his goods. Upon this point, the evidence is decisive. It was proved by both members of the concern of Millhiser & Co., that they would not have shipped the goods but for the statements made by the accused. It may be that the information obtained in New York had some influence upon their minds, but this is perfectly consistent with the idea that they would not have given the credit without the statement. The question was peculiarly one for the jury. If they believed the witnesses, this court cannot set aside the verdict, unless the finding is shown to be in conflict with, or wholly unsupported by, the evidence. My opinion, therefore, is, that the Hustings Court did not err in overruling the motion for a new trial upon the ground set forth in the ninth bill of exceptions. The result is, that the judgment must be reversed for the error already indicated, the verdict set aside, and a new trial awarded.

The other judges concurred.

JUDGMENT REVERSED ON THE GROUND OF THE ADMISSION OF THE ASSESSMENT OF ALLRED'S PROPERTY ONLY.

NOTE.—We think the Appellate Court was right in reversing the judgment in this case, on the ground of the admission, by the Court below, of the paper offered to shew the assessment of Allred's property, because it seems that paper was without any date, and not properly authenticated. But when the Court says "it is difficult to find even a plausible ground upon which *such a paper or statement* can be used upon a criminal trial." With all respect, we reply: That one of the false pretences alleged in the case, was the statement made by the accused—that his partner, "Allred owned real estate in Randolph, county, N. C., of the value of $3,000, unincumbered." It seems to us that the *best evidence* of what was the real value of that real estate, and thus test the truth or falsity of that statement, was the *law's mode*, of ascertaining that value, this was, *by the assessment, made according to law*. Doubtless, this was the theory on which the Hustings Court admitted this paper, and we must say that it seems to us a "*plausible*" one. It seems, too, that the counsel for the accused simply objected to the admission of this paper without stating any ground of objection. Doubtless, if the attention of the Court below had been called to the informalities of this paper, it would never have been admitted until those were cured.—ED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

SUTHERLAND *v.* OLD DOMINION INSURANCE COMPANY.

On the 13th October, 1876, B. F. Sutherland effected an insurance in the Old Dominion Insurance Company, of Richmond, Va., of $50 on his storehouse and $450 on his stock of groceries, &c., therein, for one year, and paid the premium. One of the conditions in the policy was that "if the assured shall have, or shall hereafter make any insurance on the property hereby insured, or any part thereof, without the consent of this Company written herein, * * this policy shall be void." This was the first policy ever taken out by the assured, and he answered, satisfactorily and in good faith, the questions asked by the agent of the Company.

On the 21st November, 1876, S. having made some additions to his stock, attempted to effect a further insurance of $50 on his storehouse and $200 on his stock of groceries, &c., for one year, in the Connecticut Fire Insurance Company, of Hartford, and paid the premium. One of the conditions in this policy was that "if the assured shall have, or shall hereafter make any other iusurance on the property herein insured, or any part thereof without the consent of the Company written hereon, * * * this policy shall be void." Ignorantly, or unintentionally, S. made no mention of the first insurance to the agent of the Connecticut Company, and, for like reasons, obtained no written consent of the first Insurance Company (Old Dominion) to effect the insurance in the second (Connecticut) Company.

On the 29th November, 1876, the storehouse and stock were entirely consumed by an accidental fire, and S. sustained a loss amounting to $779.41. He applied to both Companies, and both refused payment, for the violation of the before recited provisions in the policies, and he brought suit on each of them. Before the trial of the case, S. admitted that the policy issued by the Connecticut Company was void, by reason of the violation of the said provision in the policy; dismissed the suit against that Company and offered to cancel that policy in Court. But the Old Dominion Company still replied that its policy was void, because of the violation of said provision in it, in taking the second policy, and, under instructions to that effect, given by the Circuit Court, the jury found a verdict for the Company, and S. appealed. HELD, ON A WRIT OF ERROR BY THE SUPREME COURT OF APPEALS.

I. The condition in the first policy, that if other insurance should be effected without the written consent of the Company, that that policy should be *void*, related only to other *valid* insurance, and the fact that the insured attempted to effect a second insurance, which was *invalid*, by reason of a violation of the like condition in its policy, could not have the effect of avoiding the first policy, and the Company issuing said first policy *is liable*, notwithstanding the attempt to effect the second *void* policy.

II. The second policy must, *at the time of the loss, be inoperative, so that no action can be maintained on it;* but it is not necessary that it shall be *absolutely* void. It is sufficient if it is simply *voidable*.

From the Circuit Court of the city of Petersburg, Va.

The facts are sufficiently stated in the head notes and opinion of the Court.

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R. H. Jones, Jr., S. D. Davies, D. A. Hinton, for the plaintiff in error.

B. H. Nash, for the defendant in error.

ANDERSON J. The plaintiff had a policy of fire insurance in two Companies on the same property—one in the Old Dominion Insurance Company, and the other in the Connecticut Hartford Insurance Company. In both policies there was a condition against other insurance, prior or subsequent, except with the consent of the Company written on the policy. A part of the property was destroyed by fire soon after the second policy was issued; and this suit was brought against the Old Dominion Company, which issued the first policy, to recover the loss.

No objection is made to that policy in its inception. It was valid and operative until it was rendered void, if it were so rendered void, by issuing the second policy. And if it is rendered void thereby, it is because the plaintiff effected insurance by the second policy on the same property without notice to the defendant Company, and without its consent written on the policy. The defendant relies on that as rendering his policy declared on in this suit void. But the instrument of evidence on which it relies, shows, upon its face, that it was void, if the insured had a prior insurance upon the same property, because no notice of it nor assent of the second insurer is written on the policy, as one of its conditions required. And the very plea of the defendant is an admission that the second insurance is subsequent, and is an insurance on the same property. And that being admitted, the policy shows upon its face, by the terms of the condition on which it was issued, that it is void. Being a void policy, can it annul and render void the prior policy of the defendant? Is the condition of the prior policy against subsequent insurance, which was to work a forfeiture, a condition against an abortive attempt to effect a subsequent insurance? or an incomplete and unperfected contract of insurance, which is invalid? Or is it a condition against a valid subsequent insurance? That is the subject of inquiry in this case; and, upon it, there is some contrariety of opinion.

Some hold that it does not mean *insurance*, but only what the subsequent underwriter regarded and treated at the time as insurance. Others hold that the terms of the condition import that the prior policy shall be void if the assured shall make subsequent *insurance*, which means *indemnity*, not what

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he and the underwriter might *suppose* was insurance, when it was not. The language of the policy is, "If the assured shall have insurance, or shall hereafter make any other insurance." *Any other* insurance than what? Than that which he is in the act of receiving from the defendant, which was insurance in fact. It was indemnity against loss, and any *other* insurance means any other indemnity against loss. I think this is the plain and obvious meaning of the language.

And that it imports what was the intention of this Company, I think further appears from the forty-second article annexed to the policy, which is as follows: "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the insured shall be entitled to recover of this Company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, &c. There is no question that the insured might effect other insurances. The language is not other valid insurances, but simply other insurances, which must have been understood to mean valid, inasmuch as it is provided that there shall be a proportionable abatement from the first policy, if it should be effected. And the insurer must be presumed to have used the term insurance, or other insurance, in the same sense in the former clause, in which it uses it in this clause.

The defendant, in stipulating against subsequent insurance upon the pain of forfeiture, cannot be understood as stipulating against any mere attempt to make insurance; or what the assured, and the subsequent insurer believed to be insurance, though it was not such; or an incomplete and unperfected contract of insurance. To give it that construction would make it a stipulation, not that the assured was to forfeit his policy if he obtained additional insurance, but should be punished for attempting such a thing. It would require a very latitudinous construction to make the language mean that.

Upon what rule of construction can we wrest the language from its natural legal and ordinary import, in order to subject the assured to a forfeiture of his indemnity for loss, for the benefit of the maker of the policy? All conditions or exceptions are to be construed most strongly against those in whose favor they are made, is an established rule of construction. Why should it be departed from in this case? It seems to me that there is a peculiar fitness in its application to policies of insurance. The policy is framed by the in-

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surer, in the absence of the assured, who inserts the condition for his own benefit, without consulting the assured, who drafts it with all its multifarious conditions and restrictions to suit itself, and though it be "an institution necessary for the protection of vast interests embarked in manufacturing, and on consignment of goods in warehouses," and therefore should be upheld; I am not aware of any rule, or respectable precedent, that would warrant a court by construction to so alter, or enlarge, or restrict the meaning of its terms in favor of the insurer, to give to the contract the meaning hereinbefore indicated—not even for the attainment of so desirable an object as to secure diligence and care and honesty on part of the assured, in the protection of his property against destruction by fire. And, in this case, it would seem that such a motive could not have operated in the incursion of the condition in question, inasmuch as by the forty-second clause, before recited, the effecting other insurances by the assured, could be no inducement to carelessness and negligence in the protection of his property against destruction by fire, or to the destruction of it by his own criminal agency.

I am of opinion, therefore, that the condition made by the defendant, in the policy which is the foundation of this suit, against further insurance, is not applicable to an *invalid* contract for other and additional insurance, and that the policy of the defendant is not avoided, by an abortive attempt to make other assurance, which was never completed or perfected

And, in this position, I think I am sustained by the overwhelming weight of authority.

Parsons, in his work on Maritime Law, says: Some policies provide that in case of any other insurance on the same property, the contract shall be null and void. But the obtaining a policy from another underwriter, will not have this effect, if it be void for any cause, although it be on account of the fault of the insured, as by his misrepresentations—2 Pars. on Marit. Law, p. 100, 101.

Flanders on Fire Insurance, p. 49, 50, states the doctrine to be well settled, that if the second policy against which the contract stipulates, is itself a void one, or one that cannot be enforced, it does not avoid the first, notwithstanding the clause of forfeiture.

May, in his work on Insurance, p. 439, states the general principle to be, that subsequent insurance void by its own terms, because it is additional and without notice of prior insurance, is no insurance within the meaning of the usual condition against other insurances.

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Wood on Fire Insurance, the most recent work on this subject, p. 586, § 348, states the doctrine thus, "A condition that, if other insurance shall be obtained without the consent of the Company, the policy shall be void, relates to other *valid* insurance, and the policy is not avoided by the procurement of other policies, that, for any cause, are invalid." But the entire invalidity of such other insurance must be established. The other policy or policies *must, at the time of the loss, have been inoperative, so that no action could be maintained to enforce them.* It is not necessary that they should have been absolutely void; it is sufficient if they were voidable." These eminent writers cite numerous authorities in support of the doctrine as they have announced it. And they refer to the decisions which are in real or apparent conflict with their enunciation of the doctrine. I have not met with a single text-writer, who controverts their views, or who holds that the prior policy is avoided by the procurement of other policies which are invalid.

It would be impossible, within the limits of an opinion, to review all the cases on this subject. I must be content with a reference to the following judicial decisions as fully sustaining the proposition, as a general principle of law, that in order to avoid a policy on account of a subsequent insurance, against an express condition therein, it must appear that such subsequent insurance is valid, and can be enforced. If it cannot be enforced, it is no breach of the prior policy. *Hubbard & Spencer* v. *The Hartford F. Ins. Co.*, 33 Iowa R., 326, supported by a well considered and able opinion of Beck J. *Jackson* v. *Mass. Mutual Ins. Co.*, 23 Pick., 418; *Clark* v. *New England Ins. Co.*, 6 Cush., 343; *Gale* v. *Belknap Ins. Co.*, 41 N. H., 170; *Stacey* v. *Franklin Ins. Co.*, 2 Watts & Serg. (Penn.), 506; *Philbrook* v. *New England Mut. Ins Co.*, 37 Me., 137; *Schenk* v. *Mercer County Mut. Ins. Co.*, 4 Zabr. (N. J.), 447; *Jackson* v. *Farmers Ins. Co.*, 5 Gray (Mass.), 52; *Gee* v. *Cheshire County Mut F. Ins. Co.*, 55 N. H., 65; *Rising Sun Ins. Co.* v. *Slaughter*, 20 Ired., 520; *Thomas & al.* v. *Builders M. F. Ins. Co.*, 119 Mass., 121; *New England Ins. Co.* v. *Schettler*, 38 Ill., 166; *Knight* v. *Eureka F. & M. Ins. Co.*, 26 Ohio St., 664. In the foregoing decisions there is a difference of views upon some questions in relation to the general subject. But, with perfect unanimity, all of them maintain the proposition hereinbefore announced.

It is held in *Philbrook* v. *The N. E. Mutual Fire Insurance Company*, that the prior policy is valid, even though the subsequent policy is not avoided by the underwriter issuing

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it, but the loss thereon is paid, the policy being legally invalid and such as the plaintiff could not have enforced. In *Jackson* v. *Mass. Mut. F. Ins. Co.*, it was held that the subsequent insurance must be a valid and legal policy, and effectual and binding upon the insurers. Assuming it to have been made for the direct benefit of the plaintiffs, it was wholly nugatory and of no effect, and cannot for this reason be now set up to defeat the policy made by the defendants. In *Hardy and al.* v. *Union Mut. F. Ins. Co.* (4 Allen, 221), it was held, "if such second policy was void, it did not vitiate the first. It is open to the plaintiffs to take this ground, and deny the validity of the second policy." In this case it was claimed, that the plaintiff had received since the loss, the amount of their stipulated insurance on the subsequent policy. The court said the point of inquiry is, whether in fact at the time of the loss, the plaintiff had a valid claim against the defendants on their policy. They had such a claim if the second policy was then invalid; as the taking of an invalid policy did not constitute a breach between the plaintiffs and the defendants in reference to a subsequent policy. The facts which occurred subsequently to the loss do not constitute a case of estoppel in favor of the defendants. In *Gale* v. *Insurance Co.*, the court said: "We regard the law as settled, that when, in a policy of insurance against fire, it is stipulated that the policy shall be void if any other or subsequent insurance shall be, or be made, without the consent of the company or its directors, and another is made by other insurers without such consent, which contains a similar provision, the second policy is inoperative and invalid; it does not bind the insurers, and therefore does not avoid the first policy." In *Gee* v. *Insurance Co.*, 55 N. H., 67, the court said, obtaining a nugatory policy in some other company, has been held, over and over again, not to constitute any contract at all. It confers no rights on the one hand, and imposes no obligation on the other. It is not a contract; it is a mere nullity. In a recent case, decided by the Supreme Court of Massachusetts, 119 Mass. Rep., *supra*, the court said, it is for the defendant to show that such instrument (the subsequent policy), was a valid and legal policy, effectual and binding upon the insurers. If it was invalid, so far as the property in question was concerned, there would, by legal intendment, be no second insurance upon it, and therefore no avoidance of the first policy. The policy of the Merimack Company, who was to have been the second insurer, was also upon the condition, that without the consent of this company, no other

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insurance shall exist upon the property insured by it, and no such consent was given, and the plaintiffs therefore failed to do what was necessary, in order that a contract might be perfected with it, and having effected no valid subsequent insurance, they have not avoided the prior policy with the defendant. The whole question comes clearly within the decided cases. In *Clarke* v. *N. E. Mut. F. Ins. Co.*, 6 Cushing, *supra*, the court held that "if the plaintiffs have failed to perfect their contract with the subsequent underwriters, by omitting to have the prior assurance allowed of, and specified on the policy as required, it is difficult to imagine in what way the prior insurance can be invalidated or effected. It is a vain, nugatory, void act. Opposed to all this array of authority, we refer to *David* v. *The Hartford Ins. Co.*, 13 Iowa, 69; *Bigler* v. *The New York Central Ins. Co.*, 20 Barb., 635; and same case, 22 New York R., 402; *Lackey* v. *The Georgia Ins. Co.*, 42 Ga., 457; and *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters, 497. Other cases have been cited, but need not be specially noticed, as they do not seem to be opposed to the doctrine enunciated. These are the principal cases relied on for the defendant, and upon close inspection, I think it will be found, that whilst they are in conflict with some points decided in some of the cases I have cited, they have decided nothing in conflict with the position which I have announced, and which is sustained by the vast array of authority to which I have referred.

In the Iowa case of *Hubbard* v. *Hartford Ins. Co.*, it was held that a breach of the condition does not absolutely render void and of no effect, the policy; it simply renders it voidable, its binding force and effect being subject to be defeated at the option of the company issuing the instruments. If no objection be made by the company on account of the breach of the condition, the policy may be enforced, as though no forfeiture had ever happened. The act of the company whereby it is shown that the instrument is treated as avoided, must be shown in order to defeat recovery thereon. If no such act or objection on the part of the company be shown, the contract will be considered binding." But that may be shown even at the hearing. The Supreme Court of New Hampshire holds otherwise. In *Gale* v. *Insurance Co.*, 41 N. H., p. 176, the court said: "The policy is neither utterly void nor voidable in the sense that it is a valid and binding contract, and to be so treated for all practical purposes, until it is avoided. On the contrary, it is an instrument invalid and inoperative, binding upon nobody until, and unless it

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should be ratified and confirmed by some further act on the part of the insurer, with knowledge of the fact which caused the invalidity, either by an express assent to be bound, or by some implied waiver of the objections. There is an intrinsic absurdity in holding that to be an insurance, by which a party is bound to make good another's loss, only in case he pleases to do it."

It is not necessary in this case that we should decide between these conflicting opinions. If either be right, the plaintiff is entitled to recover. For it appears from the certificate of facts that the plaintiff brought suit against the Connecticut Insurance Company upon its policy, and that before the trial of this suit, being satisfied that he could not enforce it, because of the prior insurance which rendered it void, he admitted that the said policy was void, and dismissed the suit, and offered in open court to cancel the policy. We may infer from the existence of the suit, that the resistance of the plaintiff's demand by the Connecticut Insurance Company was upon the ground that the policy was avoided by reason of the prior insurance and from the dismission of the suit by the plaintiff, with the admission that the policy was void and the offer to cancel it; that the policy is invalid and cannot be enforced. Consequently the prior policy has not been invalidated and rendered void by it. And this is held to be the law in *Gale* v. *Insurance Co.*, and all the cases of that class, and is likewise so held in the Iowa case, *supra*. And in that case Judge Beck maintains that his conclusion is not in conflict with *David* v. *The Hartford Ins. Co.*, 13 Iowa, nor with *Bigler* v. *The New York Central Ins. Co.*, 20 Bart., 635, and same case, 22 New York, 402. In the latter case, the suit was brought to enforce the prior policy, and was defeated upon the ground that it was avoided by a subsequent policy, which was shown to be valid by a judgment in favor of the assured, and that a draft had been given in satisfaction of the judgment.

In *Lackey* v. *The Georgia Ins. Co.*, 42 Ga., the court says: "The question here turns not so much on the contract as upon our statute. * * * And this law would make void the first policy, though nothing was said in it about a second policy." The case, therefore, the court said, "turned rather on the law than on the contract." The remaining case relied on by the defendant's counsel, of *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters, is not analogous to this case. The suit there was brought against the Washington Insurance Co. to enforce the second policy which had a condition

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to be void if the property was insured by a prior policy. The defence was that there was a prior policy of the American Insurance Co., of which the defendant had not been notified. The plaintiff replied that the prior policy was invalid and void because it had been obtained by false representations. The point decided by the Supreme Court was raised by exceptions to the ruling of the lower court, rejecting the plaintiff's instruction, and to the instruction given by the court, and is thus stated by Mr. Justice Story. He says the instruction offered by the plaintiff "proceeds on the ground that although the policy of the American Insurance Co., of 6th December, 1836, was good upon its face, yet if in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was deemed utterly null and void, and therefore as a null and void policy, notice thereof need not have been given to the Washington Insurance Co. at the time of underwriting the policy declared on. The court refused to give the instruction, and on the contrary instructed the jury, that if the policy of the American Insurance Co. was, when that at Washington Insurance office was made, treated by all the parties thereto as a subsisting and valid policy and had never in fact been avoided (but was still held by the assured as valid) then that notice thereof ought to have been given to the Washington Insurance Co., and if it was not, the policy declared on was void." The Supreme Court held that the court below did not err in refusing to give the instruction moved by the plaintiff, and that the instruction given was correct. This was the only point decided in that case, which has any relevancy to this. And Mr. Justice Story, in stating reasons for the decision, assumes that a policy which has been procured by misrepresentation of material facts, is not, therefore, to be treated in the sense of the law as utterly void *ab initio*, but is merely voidable and may be avoided by the underwriters upon due proof of the facts, but until so avoided, it must be treated for all practical purposes as a subsisting policy. He says the policy to this very day has never been avoided, and the assured, if he pleases, may bring action thereon to-morrow. It will also be remarked that these remarks of Judge Story are made only with regard to a policy *procured by false representations*. His remarks were not made with reference to such a case as this. There is no analogy between the two cases. That was a suit by the assured to enforce a subsequent policy which he had effected with another company, and which was resisted by the defend-

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ant upon the ground that by the terms of the policy it was void, because at the time he had an insurance of the same property in another company, of which he had not notified the defendant; to avoid which defence, he alleged that the prior insurance was void, because it was procured by those under whom he claimed by misrepresentations of material facts—that is, by fraud. But the Supreme Court held that inasmuch as it was treated at the time the second policy was issued by all the parties thereto as a subsisting and valid policy, and had *never* in fact been avoided, *but was then held by the assured as valid*, it must be regarded as a valid policy until the facts of the fraudulent representation was shown; and Mr. Justice Story remarked that "it may well be doubted whether a party to a policy can be allowed to set up his own misrepresentations to avoid the obligations deducible from his own contract."

We do not think that any decision made in that case applies adversely to this. The cases are totally unlike. There is no proof or even allegation of fraud or misrepresentation here. The facts certified tend strongly to prove that the plaintiff, in effecting the second policy, was unconscious of violating any condition in the first policy, or of doing any thing that he had not a right to do. He seems to have been led into the error by relying on the agent or the company to give him all the information it was necessary for him to have—he having had no experience in such business—who failed, perhaps from inadvertence, to give him this important information. All that has been said against a party taking advantage of his own misrepresentation of material facts, or fraud, has no application to this case. It has not the slightest bearing upon any principle involved in its decision. Nor is there anything decided by the Supreme Court in *Carpenter* v. *The Washington Ins. Co.*, which is opposed to the doctrine as declared in this opinion, and which is sustained by the highest courts of nine or ten of the American States, and, we may add, positively denied by none—sustained by courts which were presided over by a Gibson, a Bigelow, and a Shaw, names which have shed lustre on the judicial ermine; and a doctrine which has been recognized and approved by all the eminent and learned writers on the law of insurance. Are we to be told that a doctrine so fortified and sanctioned by this overwhelming array of authority, and which, we may add, is supported by reason, is to be overturned, not by the decisions of two or three courts, but by the *dicta* of a few judges, however eminent?

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The decisions of the Supreme Court of the United States on questions peculiarly and exclusively belonging to that jurisdiction, are a final disposition of the subject. But it is not inconsistent with the profound respect which that august tribunal ought to command, to say, that the decisions of the Supreme Courts of the States, when the subject is clearly within the limits of their jurisdiction, are entitled to equal respect. And though we would reverently bow to the authority of a court, over which the illustrous Taney presided, and of which a Story was an associate justice, within the exalted sphere of its jurisdiction, we could not regard the *dicta* or reasoning of one of its justices, however eminent, or even its decision, as outweighing the judgments of the Supreme Courts of the American States, on questions within the limits of their respective jurisdictions.

We do not feel called on to notice further the *dicta* and reasoning of Judge Story, than merely to suggest, that that eminent judge, in his high appreciation of the advantage and importance of these insurance institutions, and in his earnest desire to uphold them, as required by a sound public policy, seems to have been unmindful of the rights of the assured, has been led into the error of giving a construction to the acts and instruments of writing of the insurer, which, it seems to us, violates well established rules of construction, and for which we can find no precedent, and which would impair the rights of the assured; and if adopted and sanctioned by the courts, would thereby do more to discourage insurance and injure those institutions than an adherence to the established rules of construction.

Upon the whole, I am of opinion that the judgment of the court below is erroneous and that it be reversed with costs.

MONCURE P. and STAPLES J. concurred in the opinion of ANDERSON J. CHRISTIAN and BURKS JJs. dissented.

JUDGMENT REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

CAMMACK *v.* SORAN.

The consideration for the sale and conveyance of land is a debt due at the time by the vendor to the purchaser. The purchaser is a purchaser for valuable consideration within the meaning of the Registry Acts of Virginia, and such a purchaser having purchased and received a conveyance of the land, without notice of an attachment, which had been previously levied upon it, but which had not been docketed, is entitled to hold the land free from the lien of the attachment.

Wm. Cammack brought an action of debt in the Circuit Court of Richmond county, Va., against T. W. Soran, a non-resident of Virginia, to recover the sum of $1,114.89, with interest. The case was regularly proceeded in by publication, and in October, 1872, an attachment was sued out in the case, and levied on a tract of land in said county, but said attachment was not docketed. In April, 1874, Mary L. Stephens filed a petition in the cause, in which she alleged that she was the owner of the land levied on under the attachment; that she had purchased the same of Soran for the sum of $3,274.72, which had been paid in full, as appeared by the deed from Soran to her, bearing date January 25, 1872, and recorded in Richmond County Court clerk's office February 15, 1873; that at the time of the purchase, and execution of the deed, she had no knowledge of the suit brought by Cammack or the attachment, said attachment not having been docketed. Cammack answered the petition, insisting that Mrs. Stephens was not a *bona fide* purchaser for valuable consideration without notice, within the meaning of the Registry Acts, and he alleged, that the only consideration for the purchase by the petitioner was a debt due to her from Soran, and that she did not part with any money, or other valuable thing, or release to Soran any right, or suffer any loss in consideration of said pretended purchase.

From the evidence, it appeared, that Soran, who was the brother of Mrs. Stephens, and her agent in collecting the assets of her late husband's estate, of which she was the administratix, was indebted to her, and this indebtedness was the consideration for the sale and purchase of the land. It was a fact, also, that she had no notice of the attachment when the conveyance was made to her, and that the transaction was *bona fide* on her part. In June, 1874, the cause was heard, when the parties waived all other questions, except

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those presented by the petition and answer, when the Circuit Court sustained the petition of Mrs. Stephens and her claim to the land, as against the lien of the attachment; but the plaintiff having established his claim against Soran, judgment was rendered against him for $1,114.89, with interest and costs. Cammack obtained a writ of error and supersedeas to the Supreme Court of Appeals, when it was held as stated in the head-note.

H. O. Claughton for the plaintiff in error.

Walker & Walker for the defendant in error.

STAPLES J. delivered the opinion of the court, in which the other judges concurred.

JUDGMENT AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

WEBB'S CURATOR *v.* WYNNE.

Webb died in the spring of 1873, and in consequence of a controversy about his will, Lacy was appointed curator of his estate. In the lifetime of Webb, he had rented his farm, "Northberry," to Wynne, under a verbal contract to pay an annual rental of one-fourth of the crops raised on the farm. In June, 1873, the curator caused a written notice to be served on Wynne that the possesssion of said farm would be demanded of him on the 1st of January, 1874. On the 1st of January, 1874, Wynne refused to surrender the possession of the farm, and went on to prepare the land for crops. The curator then instituted his action of unlawful entry and detainer, to recover said possession, and at the June Term, 1874, of the County Court of New Kent, obtained a verdict and judgment for the possession of the farm "Northberry." To this judgment a writ of error was awarded. Pending these proceedings, Wynne had raised on the farm, the possession of which had been adjudged to belong to the curator, large crops of wheat and oats.

In August, 1874, the curator filed his bill, in which he set forth the foregoing facts; charged that Wynne was about to ship the crops beyond the limits of the State; charged his insolvency, claimed the crops as the property of Webb's estate, because raised on the farm since the period when the possession had been adjudged to belong to him, the curator; prayed for an injunction to enjoin and restrain the removal of said crops, and that they might be placed in the hands of a receiver of the court. The injunction was granted, but was afterwards dissolved by an order in vacation, and from this order dissolving said injunction, an appeal was taken by the said curator. HELD:

The order of dissolution was *plainly erroneous.* If the curator was entitled to the possession of the premises after the 1st of January, 1874, then all the crops raised on the land went with it, and Wynne could not claim them.

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At the time of filing the bill, and when the injunction was dissolved, the curator had a judgment of a court of competent jurisdiction, holding that he was entitled to said possession, and until this judgment was reversed, it fixed the rights of the parties in this respect. Instead of dissolving the injunction, the Circuit Court should have directed an account to be taken of the amount and value of the crops, and the amount of the rent due from Wynne; and if, upon the final determination of the action of unlawful entry and detainer, the possession of the farm should be determined to belong to the curator, then the value of said crops should be decreed to him; and if the action of unlawful entry and detainer should be determined in favor of Wynne, then out of said crops, should be decreed to be paid any balance of rent due by Wynne to the estate of Webb.

From the Circuit Court of New Kent county.

The facts and points decided are sufficiently stated in the head-notes.

W. W. Gordon for the appellant.

George P. Haw for the appellee.

CHRISTIAN J. delivered the opinion of the court, in which the other judges concurred.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

PRICE'S EX'ORS, &C., *v.* HARRISON'S EX'OR, &C.

Wm. B. Price died in June, 1865. Among the debts of the decedent was one due by him, as trustee for the children of B. J. Hicks. According to the statute in force at the time of the death of the decedent, where the assets in the hands of the personal representative, after payment of funeral expenses and charges of administration, were insufficient for the satisfaction of all demands, it was required that they should be applied—"first, to debts due the United States; secondly, taxes and levies assessed upon the decedent previous to his death; thirdly, debts due as personal representative, guardian or committee, where the qualification was in this State, in which debts shall be included a debt due for money received by the husband, acting as such fiduciary in right of his wife; fourthly, all other demands ratably, except those in the next class; fifthly, voluntary obligations." Code 1860, ch. 131, § 25.

By an act passed July 11, 1870, in the clause describing the debts of the third class, was added the words, "trustee for persons under disabilities." On a claim by the children of Hicks to be included in said *third* class. HELD: I. The assets must be distributed according to the statute in force at the time

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of the death of the decedent. The act of July 11, 1870, is not retrospective, and the children of B. J. Hicks are not entitled to priority, as they were not embraced in the said third class by the statute in force at the date of the death of the decedent.

II. In the construction of statutes, the primary object is to discover the intention of the Legislature, and where that intention can be indubitably ascertained, the courts are bound to give it effect whatever they may think of its wisdom or policy. Where the language is free from ambiguity, and the intention plainly manifested by it, there is no reason for construction. The general rule is, that a legislative act should be read according to the ordinary and grammatical sense of the words, but if terms of art are used, which have a fixed technical signification, they should be generally construed according to this known meaning.

III. The Legislature can pass retrospective laws, provided, they are not *ex post facto*, do not impair the obligation of contracts, disturb vested rights, nor otherwise contravene the fundamental laws; but statutes must be construed to have a *prospective* operation, only unless their terms shew clearly a legislative intention that they should act *retrospectively*.

IV. Where particular sections of statutes are amended and re-enacted, the portions of the amended sections, which are merely copied without change, are not to be considered as repealed and again enacted, but to have been law all along, and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act.

V. *Quære.* Whether the rights of creditors of a decedent, to payment of their debts out of his estate, according to the order prescribed by the law in force at the death of such decedent, are so far *vested* as to be beyond legislative interference?

From the Circuit Court of Brunswick county.

The facts and points decided are sufficiently stated in the head-notes.

L. R. Page and *Wm. L. Royall* for the appellants.

Jones & Bouldin for the appellees.

BURKS J. delivered the opinion of the court, in which the other judges concurred.

DECREE AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

KEENE *v.* CABELL.

George C. Cabell, as special commissioner under a decree of the Circuit Court of Danville, in the case of *Puryear, &c.,* v. *Baptist, &c.*, sold certain real estate, and among other pieces, he sold eight unimproved lots near Danville to Mrs. E. B. Keene. She paid all of the purchase-money except $2,362.50, and in default of this sum, the commissioner was directed to re-sell said lots. He thereupon advertised all eight of said lots for sale, for cash as to such sum as would pay the said sum of $2,362.50, and stated in the advertisement that reasonable credits would be given as to the residue of the purchase-money. Shortly after the appearance of this advertisement, Mrs. Keene presented her bill for an injunction to restrain the said Cabell, commissioner, from selling these eight lots, on the terms of his advertisement, alleging, among other things, that "it would be an especial outrage and wrong upon your oratrix, because it would force her to part with the whole property, and let it pass into other hands at greatly less than its value, while a portion of the lots sold on reasonable terms, would pay all that there is now due on the purchase of said lots." Upon this bill an injunction was awarded, but was afterwards dissolved, without answer and without evidence.

Upon an appeal to the Supreme Court of Appeals. HELD:

This was plainly an error. The Circuit Court ought not to have entered a decree for the sale of the whole of the lots, if it appeared that a portion only of them was necessary to pay the balance of the purchase-money due, and whatever were the terms of the decree in "*Puryear* v. *Baptist*," under which the sale was ordered; after the injunction was awarded, the Circuit Court, treating the bill of injunction as a petition in that case, ought either to have amended the decree in that case, and directed a sale of so many of the lots as it appeared might be necessary to pay the balance of the purchase money. Or, if it was uncertain what portion was necessary, have referred the matter to a commissioner, to ascertain and report what was necessary to be sold, and then decreed according to the report.

From the Circuit Court of the town of Danville.

The facts and points decided sufficiently appear in the head-notes.

E. Barksdale, Jr., for the appellant.

J. H. Carrington for the appellee.

CHRISTIAN J. delivered the opinion of the court, in which the other judges concurred.

DECREE REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

RICHMOND AND DANVILLE RAILROAD COMPANY *v.* MORRIS.

1. Morris purchased a ticket to go from one station to another on the Richmond and Danville Railroad. The passenger train having passed before he bought the ticket, he got in a passenger car attached to a freight train; he fell asleep soon after getting in the car; was waked up by the conductor between the stations to get his ticket, and then fell asleep again, was waked up again by the conductor when the train got to the station to which he was going, and told by him to get off, that he was at his destination, and the train stopped long enough for him to have gotten off, but he failed to do so, and fell asleep again. The train was then put in motion, and while the train was backing, the conductor woke him up again and told him to jump off. M. jumped off, was run over by a portion of the train, had an arm cut off and was otherwise injured. It was 11 o'clock at night when the train reached the station, at which the accident occurred, dark and raining. There were only two lanterns at the station, one in the hands af the conductor, and the other in the hands of a servant of the railroad company, employed at the station. HELD: While the railroad company was guilty of culpable negligence in not providing proper stationary lamps at the station, and while the conductor was also guilty of negligence, and this negligence on the part of the company and its agent, was the proximate cause of the injury to M., yet M. was also guilty of such contributory negligence as will prevent him from recovering damages for the injuries sustained by him.
2. One, who by his negligence has brought an injury on himself, cannot recover damages for it. But where the defendant has been guilty of negligence also in the same connection, the result depends on the facts; the question in such cases is, 1st. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant? Or, 2nd. Whether the plaintiff, so far contributed to the misfortune by his own negligence or want of care and caution, that but for such negligence, or want of ordinary care and caution on his part, the misfortune would not have happened? In the former case, the plaintiff is entitled to recover. In the latter, he is not. Citing *Railroad Company* v. *Jones*, 95 U. S. R., 439.
3. Persons to whom the management of railroad companies is entrusted, are bound to exercise the strictest vigilance; they must carry the passengers to their respective destinations, and set them down safely, if human care and foresight can do it. They are responsible for every injury caused by defects in the road, the cars or the engines, or by any species of negligence, however slight, which they or their agents may be guilty of. But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness or folly.
4. A railroad company is not liable for an accident which the passenger might have prevented by ordinary attention to his safety, even though the agents in charge of the train are also remiss in their duty. Citing *Railroad Company* v. *Aspell*, 23 Penn St., 147, 149; *B. & O. R. R. Co.* v. *Sherman's adm'r*, Supreme Court of Virginia, not yet reported.

From the Circuit Court of Halifax county.

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The facts and points decided sufficiently appear in the head notes.

H. H. Marshall and F. L. Smith, Jr., for plaintiff in error.

Ould & Carrington for defendant in error.

BURKS J. delivered the opinion of the court, in which the other judges concurred.

JUDGMENT REVERSED AND NEW TRIAL AWARDED.

SUPREME COURT OF APPEALS OF WEST VA.

SPECIAL TERM, 1878.

HALE, &C., *v.* MORGAN, &C.

P. W. Morgan, sheriff of Kanawha county, having in his hands tax bills to the amount of $250, against the Steele lands, in said county, levied the same on a raft of timber in the possession of one Hezekiah Scott, in said county. And a doubt arising, as to whether said raft was liable to the levy, the sheriff demanded of the owners of said Steele lands, an indemnifying bond, which was given by J. P. Hale, representing the owners of said lands, with J. N. Smith and C. C. Lewis as his sureties. The ordinary indemnifying bond was given under § 4, chap. 107 of the Code of West Va., which is authorized where an officer is required to levy an "execution or warrant of distress." The property was sold under the levy and a suit was brought by the sheriff, suing for the benefit of Scott on the bond against the obligors, who appeared, demurred to the declaration, which being overruled, they then pleaded, and on issue being joined, a verdict was rendered for the plaintiff for $235.41. The defendants moved the court to set the verdict aside, which was also overruled and judgment rendered thereon. And the defendants obtained a writ of error to the Supreme Court of Appeals. HELD:

I. The demurrer to the declaration ought to have been sustained. The bond is not good as a statutory bond. It is not good at common law, being against public policy.

II. Where a suit is brought in the name of one person for the benefit of another, and a judgment is rendered for the defendant's costs, such judgment must be against the relator for whose benefit the suit was brought.

From the Circuit Court of Kanawha County.

The facts and points decided are sufficiently stated in the head notes.

Wm. A. Quarrier, D. A. Ruffner for the plaintiff in error.

J. W. Wingfield, T. B. Swann, for the defendant in error.

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JOHNSON J. delivered the opinion of the court in which the other judges concurred.

JUDGMENT REVERSED, AND SUIT DISMISSED AT THE COSTS OF THE RELATOR SCOTT.

SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

GLASSCOCK *v.* WELCH, &C.

James K. Skinker drew his check, dated "Broad Run Station," January 4, 1861 (the year was by mistake written *1861* for *1862*), for $2,100, payable to the order of Henry Glasscock, and delivered it to the latter. On the 8th of March, 1862, Glasscock endorsed the said check to Sylvester Welch, in part payment of a tract of land purchased on that day from him. At the time the check was drawn, and at any period of the war the drawer, Skinker had sufficient Confederate money (but no other kind) in bank to meet it, and the evidence shewed that it was expected by Glasscock, when the check was given, that it was to be paid in Confederate currency; indeed, nothing was said about the kind of currency in which it was to be paid, but at that time, Confederate money was the prevailing currency of the State, and nearly all checks on the banks were paid in it. When the check was handed by Skinker to Glasscock, he said he didn't know what he could do with the money, when it was suggested by the wife of Skinker, that Glasscock had better buy with it Welch's farm; and then G. asked S. to go and see W. and make an offer to purchase his farm, by giving him the check which S. had given him, and $1,000 which W. owed G., and that he (G.) would give him his bond for the residue of the purchase-money of the land at the price of $30.05 per acre, the price paid by Welch for the same. On the same day that the check was drawn, and this conversation had between Skinker and Glasscock, the former went down and submitted the latter's proposition to purchase, to Welch, to which Welch replied that he would go down in a day or two and see Glasscock and close the bargain with him. On the said 8th of March, 1862, the contract between Glasscock and Welch for the sale of the farm was closed—Glasscock giving Welch a bond which he held of his for $1,000, the check of Skinker for $2,100, and his (G's) bond, payable six years after date, for $1,197.15, the balance of the purchase-money for the farm at the price of $30.05 per acre. G. then demanded of W. a deed for the land, which W. said he would execute to him as soon as his vendors had made him a deed, which he did not then have; but he said he would give G. a receipt for the whole purchase-money, which he did, treating the check and $1,000 bond as so much money, and put him in possession of the farm. The check was not presented to the bank for payment for six months after Welch got possession of it. When it was so presented, payment was demanded in specie, but this was refused by the bank, which offered, at the same time, to pay it in Confederate money. This Welch declined to receive, claiming that he had not sold his land for Confederate money. He alleged this, but failed to establish it, the preponderance of the evidence showing that nothing was said about the kind of money in which the purchase was made, and that he understood the check to be payable in Confederate money. Suit was brought by Welch against Skinker on the check, but he was held not to be liable, because payment of it was declined by the holder, as before stated.

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On a bill filed by Glasscock against Welch for specific performance of the contract of the sale, the Circuit Court held that he was not entitled to the same. ON AN APPEAL TO THE SUPREME COURT OF APPEALS. HELD:

The check drawn by Skinker was payable in Confederate money; it was received by Glasscock as such, endorsed by him to Welch with the same understanding; and if there was a different understanding and agreement, it should have been so expressed at the time; that upon the payment by Glasscock to Welch of the amount due on the bond given for $1,197.15, payable at six years, he is entitled to a deed with general warranty from Welch for the tract of land purchased as aforesaid.

There were other questions in the case, but this was the only one decided by the court.

The facts and points decided are sufficiently stated in the head-notes.

Jno. S. Mosby for the appellant.

Jones & Bouldin and *John A. Meredith* for the appellees.

MONCURE P. delivered the opinion of the court, in which the other judges concurred.

DECREE REVERSED ON POINT ABOVE INDICATED.

SUPREME COURT OF APPEALS OF WEST VA.

SPECIAL TERM, 1878.

CHESAPEAKE & OHIO RAILROAD COMPANY *v.* WINKLER.

Winkler was employed to do certain work by Cole, Hubbard & Co., who were sub-contractors under J. J. & T. J. Powers, Jr., who had a contract to do certain work on several sections of the Chesapeake and Ohio Railroad Company. This work was done on Section 36, but when, or of what it consisted, does not appear. For part of the work, Cole, Hubbard & Co. executed and delivered to Winkler, on May 2d, 1871, their check for $120, which was protested for non-payment May 20, 1871. Some time between the 20th and 31st of May, 1871, Cole, Hubbard & Co. executed and delivered to Winkler their note for $170. This indebtedness C., H. & Co. have never paid

In the contract between Winkler and J. J. & T. J. Powers, Jr., which was introduced in evidence by the Railroad Company, there is a clause in these words, viz.: "If out of any monthly estimate paid to the contractor, he shall fail to pay the wages of the laborers for that month, it shall be at the discretion of the engineer thereafter to provide for the payment of the laborers for each month, according to such rules as he shall prescribe."

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In May, 1871, it came to the knowledge of the engineer of the Railroad Company, that neither J. J. & T. J. Powers, Jr., nor their agents, Cole, Hubbard & Co., were paying the wages of laborers employed by them on Sections 186 and 187, two of the sections mentioned in the contract. Accordingly, on the 30th of that month, a notice was posted on such sections, signed by said engineer, to the effect, that the amounts due up to date would be paid on the 16th *proximo*, by the agent of the Railroad Company, on the ground, at Hurricane Bridge. The notice required those presenting claims, to have them signed as correct by the parties who employed them. If the parties refused, the claims were required to be sworn to before a justice of the peace. Winkler, supposing his claims to be embraced in the notice, presented them to the clerks of the company's engineer, at the office of Cole, Hubbard & Co., but payment was refused. It appears that on the 16th June, 1871, a clerk of the company's engineer paid out a large amount of money at or near Hurricane Bridge, for work done in May, 1871, on Sections 186 and 187; that the said payments were made to men for work done on those sections under Cole, Hubbard & Co.; that the check and due bill were not paid, because the engineer did not think they came within the terms of the contract, or the notice to laborers, and that the entire amount due the contractors for work done on those sections, and some $30 in excess of the amount due, was paid out to laborers before Winkler's claims were presented, so that when they were presented, there was nothing in the hands of the Railroad Company, or its agents, due to J. J. & T. J. Powers, Jr., or Cole, Hubbard & Co.

Winkler sued the Railroad Company in *assumpsit*, for the amount of his claims. Besides the common counts, there were five special counts in the declaration, the nature of and defects in these will appear from the points hereafter stated as decided; there was a demurrer to the declaration and to each count, which was overruled, and there were exceptions taken by the Railroad Company in the Circuit Court to certain evidence offered by the plaintiff, and instructions given and refused, which will also be sufficiently indicated by the points decided. There was a verdict and judgment in the Circuit Court in favor of Winkler against the Railroad Company for $333.50. ON A WRIT OF ERROR TAKEN BY THE RAILROAD COMPANY TO THE SUPREME COURT OF APPEALS. HELD:

1. A promise of one to pay the debt of another, though in writing, must be founded on a consideration to make it binding; and if there is an attempt made to declare on it specially, the count or counts must set forth the consideration.
2. A special count that shews a consideration for a promise of one, to guuarantee the debt of another, and does not allege that the other has not paid the debt, is fatally defective.
3. Where a writing purporting to be signed by an agent, is offered in evidence and objected to, it is error to admit it, until the agency and the agent's authority to sign it is proved.
4. If a paper offered in evidence is objectionable on its face, and the only objection is as to the time it should be introduced, its relevancy not then being apparent, it is not error to admit it, if other evidence is subsequently introduced shewing its relevancy. The court will not control a party in the mere order of introducing his evidence.
4. It is error to instruct the jury, hypothetically, upon a state of facts, when there is no evidence in the case tending to prove such facts.
6. It is error to instruct the jury that the evidence in the case is insufficient to sustain the declaration.

From the Circuit Court of Cabell county.

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The facts and points decided sufficiently appear in the head-notes.

Wm. H. Hogeman for the plaintiff in error.

John H. Riley and *Henry C. Flesher* for the defendant in error.

JOHNSON J. delivered the opinion of the court, in which GREEN P. and HAYMOND J. concurred.

JUDGMENT REVERSED.

CHANCERY COURT OF THE CITY OF RICHMOND.

KLOSS, &C. *v.* O'NEIL, &c.

S., trustee, held certain real estate for the sole and separate use of P., the wife of J., during her life, free from the marital rights of her husband, &c., "and upon the further trust, that said S. shall sell, convey in trust, or otherwise dispose of said property as said P. may direct, by a writing, attested by two witnesses, to take effect during her life, or by a writing in the nature of a last will and testament, to take effect after her death, and at the request of said P. in the event of a sale during her life, the said trustee shall either pay the proceeds over to her, or invest the same as she shall desire; and in default of such disposition of said real estate, or of the proceeds thereof, the said trustee shall, at the death of the said P., release, convey and deliver to said J., or if he be dead, to the child or children of the said J. by the said P. his wife, in fee, whatever of said property, its increase, profits, proceeds, and any substituted therefor which shall then remain." Not long after the execution of this deed, S., the trustee, died, and M. was substituted in his stead, on the 13th May, 1863. Three days after his appointment, M., trustee, acting in conformity with the terms of the deed, to his predecessor, sold the property therein conveyed, for $3,555, and on the 17th July, 1863, O. and wife sold and conveyed the property now in controversy to M., trustee for P., for $3,650, but with no further declaration of trust named in this deed to M., trustee. By deed of 17th August, 1863, M., trustee, and P., conveyed the last named property to J. the husband of P. This deed contained a written direction, signed by P. and attested by two witnesses, to the trustee, to make the same, it was acknowledged by the trustee and P. before a notary, but there was no privy examination of P. By deed of May 29th, 1865, J. and M. his wife (P. his former wife having died, and he having married a second time) conveyed the same property to O., whose heirs at law still hold it under the last named deed. On a bill filed by the heirs of J. against the heirs of P., claiming this property on the ground that the deed to J., the grantor of P., was void, because there was no privy examination of P. thereto, who was then a married woman, and that the property conveyed thereby was held by M., trustee, differently under the deed of July 17th, 1863, from that named in the deed to S., trustee. HELD:

I. Under the circumstances of this case, the property conveyed by the deed of July 17th, 1863, "to M., trustee for P., although there was no further declaration of trust therein, was simply substituted for, and a re-investment

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of, the funds derived from the sale of the property, held in the deed first to S., trustee, for whom M., trustee was substituted; and as the said deed to J., of August 17th, 1863, was executed in conformity to requirements of the *first* deed, and there was no undue influence exerted by J. on P., it is a *valid* deed, and therefore the title of the heirs of O., the grantor of J., cannot now be successfully assailed by the heirs of J.

II. The rule for the construction of such trusts and powers depends upon the substantial intention of the parties, and they will be construed equitably and liberally in furtherance of such intention.

III. *Quære.* Whether P. had the power to create different terms of trust from those by which the property conveyed in the first deed was held, in the case of a sale of that property, and re-investment of the proceeds?

The facts are sufficiently stated in the head notes and opinion, for a proper understanding of the points decided by the Chancellor.

Dooley, Ould & Carrington, for the plaintiffs.

A. M. Keiley, for the defendants.

FITZHUGH J. It appears that the relief sought by the bill is to set aside and annul the deed from John Messersmith, trustee to John Kloss, dated August 17, 1863, and to restore the possession of the lot in said deed mentioned to the plaintiffs.

This relief is asked on the ground that while that deed purports to be executed by Paulina Kloss, a married woman, yet it is not executed by her according to the requirements of law regulating conveyances by married women, and that the execution is void as to her; and that the request signed by her and witnessed by two witnesses, does not add validity to the conveyance, because no such requirement is provided for by the deed by which said property was conveyed to the trustee—that conveyance being simply to "John Messersmith, trustee for Paulina Kloss," without any declaration of trust.

On the other hand, the defendants claim that while it is true there is no clause in the deed of July 17, 1863, from O'Neil to Messersmith, trustee for Paulina Kloss, empowering the trustee to sell at her request, yet the property now in controversy was purchased with the proceeds of the sale of other property which was held by Messersmith under deeds which required him to sell not only the property thereby conveyed, but any substituted therefor, on the written request of Paulina Kloss, attested by two witnesses, and that the property now in controversy, was property so substituted and held by Messersmith under trusts declared by the other deeds

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above referred to. And as the conveyance to O'Neil was made in conformity with the requirements of the trusts, declared on said other deeds, the conveyance was legal and valid.

It appears that by deed dated November 7, 1862, Peter Fahr and wife conveyed to John Schad, trustee, certain property therein described, in trust for the sole and separate use of Paulina Kloss during her life, free from the debts and marital rights of her husband, &c. "And upon the further trust that said Schad shall sell, convey in trust, or otherwise dispose of said property as said Paulina Kloss may direct, by a writing, attested by two witnesses, to take effect during her life, or by a writing in the nature of a last will and testament, to take effect after her death. And at the request of said Paulina, in the event of a sale during her life, the said trustee shall either pay the proceeds over to her, or invest the same as she shall desire. And in default of such disposition of said real estate, or of the proceeds thereof, the said trustee shall, at the death of the said Paulina, release, convey and deliver to said John Kloss, or if he be dead, to the child or children of the said John Kloss, by the said Paulina, his wife, in fee whatever of said property, its increase, profits, proceeds, and any substituted therefor which shall then remain."

Not long after this deed of trust was executed and recorded, Schad, the trustee, died, and then by a decree of the Circuit Court of Richmond, made on the 13th of May, 1863, in the case of *Paulina Kloss, &c.* v. *Kloss, &c.*, John Messersmith was appointed trustee in the place of Schad, and was invested with all the powers, and subject to all the duties, which Schad had as trustee in his life time.

Three days afterwards, viz.: May 16, 1863, Messersmith, the substituted trustee, in accordance with the requirements of the trust deed to Schad, conveyed three parcels of the property in that deed to Patrick Larkin and Patrick Burke, severally, for the aggregate consideration, as shown by those deeds, of $3,555.

And then on the 17th of July, 1863, James O'Neil and wife conveyed the property now in controversy to "John Messersmith, trustee for Paulina Kloss," for the sum of $3,650.

Then by deed dated August 17, 1863, Messersmith, trustee, conveyed the last named property to John Kloss. In this deed Paulina Kloss united and acknowledged it before a notary, but there was no privy examination. It contained a

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written direction to the trustee to make the conveyance, signed by Paulina Kloss, which was attested by two witnesses.

Afterwards, by deed dated May 29, 1865, John Kloss and Mary, his wife (Paulina Kloss having died in the meantime, and John Kloss married a second time) conveyed the same property to James O'Neil, whose heirs-at-law still hold it under this last named deed.

The title of the heirs of James O'Neil, deceased, to the property in question, depends upon the validity of the deed of the 17th of August, 1863, from Messersmith, trustee, to John Kloss. If that deed was sufficient in law to pass the title to John Kloss, then his deed to O'Neil necessarily passed a good title to him.

Under the powers and trusts in the deed to Schad, trustee, I am quite clear that Mrs. Paulina Kloss was authorized by proper deeds to convey the property in that deed mentioned to Larkin and to Burke; and if the subsequently acquired property bought of O'Neil and described in the deed of July 17, 1863, from O'Neil and wife to Messersmith, trustee (being the property now in controversy), was subject to the trusts contained in the deed to Schad, then I am also of opinion that it was competent and lawful for Mrs. Paulina Kloss, through her trustee, to have conveyed the property to her husband, John Kloss, provided the requirements of the latter deed were observed. See *Muller* v. *Bayly*, 21 Grat., 529. For by the trusts of that deed, the trustee was required to "sell, convey in trust, or otherwise dispose of said property as said Paulina might direct," &c., and, at her request, in the event of a sale during her life, the trustee was to pay the proceeds to her, or invest the same as she should direct. She had unrestricted control over the trust estate held under the deed to Schad.

Again, if the property conveyed by the said deed of July 17, 1863, was subject to the trusts contained in the deed to Schad, then I am of opinion that the said deed of July 17, 1863, was made and executed in the mode prescribed by the trust deed to Schad, and was, in that case, a valid deed and effective to pass the title.

But, on the other hand, if the deed of July 17, 1863, was an independent instrument, wholly disconnected with the trust deed to Schad, and not subject to the trusts in that deed, then I am of opinion that, in that case, Messersmith, the trustee in that deed held the dry, naked, legal title without any declaration of trust; and no mode of disposition

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being prescribed in that instrument, Paulina Kloss could only have made a valid conveyance in the mode prescribed by law for married women; and, as this was not done, the deed is fatally defective and passed no title—*McChesney* v. *Brown*, 25 Gratt., 400.

According to this view, the case turns upon the question whether the trusts contained in the deed to Schad were intended by the parties to be applicable, and can, by a proper construction of the several deeds, be made to apply to and control the deed of July 17, 1863, from O'Neil and wife to John Messersmith, trustee for Paulina Kloss. For I understand the rule to be that such trusts and powers depend on the substantial intention of the parties, and that they are construed equitably and liberally in furtherance of that intention. 4 Kent. Com. marg. p. 319.

All the transactions which are now the subject of controversy, occurred within a brief space of time. The original deed declaring the trusts to Schad, was dated November 7, 1862. Schad died, and Messersmith was substituted as trustee May 13, 1863. Three days afterwards, viz.: May 16, 1863, Messersmith, substituted trustee, conveyed the armory property to Larkin & Burke for $3,555. About sixty days thereafter, namely, July 17, 1863, the property in controversy was bought of O'Neil for the sum of $3,650, and conveyed, by him and his wife, to Messersmith, trustee for Paulina Kloss, without any declaration of trust; and, thirty days afterwards, (that is August 17, 1863), Messersmith, trustee in the mode prescribed by the original deed to Schad of November 7, 1862, conveyed the property in question to John Kloss, her husband; Mrs. Kloss uniting in the deed, as required by the original trust to Schad. The recitals in this last named deed from Messersmith, trustee, to John Kloss, seem to me to be conclusive of the intention with which the deed from O'Neil and wife to Messersmith, trustee for Paulina Kloss, was made. I think the fair construction of these recitals show that the property in question was substituted for that originally conveyed to Schad, and was held by Messersmith, as trustee, subject to the trusts declared in the deed to Schad, and that Messersmith had as full power to convey this substituted property as he had to convey the armory property embraced in the original trust deed.

In the deed to Schad, the trust is declared in effect to cease at the death of Mrs. Kloss, and, at that time, the trustee is directed to convey *in fee* to John Kloss, or, if he be dead, to the child or children of John Kloss, by Paulina Kloss, what-

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ever of said property, its increase, profits, proceeds, *and any substituted therefor*, which shall then remain. I think it is evident that the trust as thus declared contemplated a change of the original trust property and the substitution of other property for it, for it provides, in so many words, for the disposition of the substituted property. As the trust ceased at the death of Mrs. Kloss, and no new property could be acquired by the trustee after that event, it follows that the substituted property must have been acquired in the lifetime of Mrs. Kloss; and, as the trustee was required to dispose of the substituted property after her death, it must also follow that the trustee held it during her lifetime, subject to the trust. Otherwise it would involve the anomaly of the trustee under this original declaration of trust, having the power to convey property after her death which he did not hold as trustee during her lifetime. I, therefore, think that the trustee held the substituted property as he held the original property and subject to the same trusts, and that the recitals in the deed to Kloss of August 17, 1863, was in accordance with the legal effect of the trust, declared in the deed to Schad of November 7, 1862; and was, in this respect, substantially a true recital.

Then, as to the question whether the property now in controversy was substituted for the original trust property, I remark, that the recitals throughout treat this property as substituted. The whole purpose of the recitals seem to have been to show that fact. They are useless for any other purpose: and the effect of the recitals seem to declare this to be substituted property as clearly as if it had been so announced in so many words. As to the effect of such recitals, see *Bower* v. *McCormick*, 23 Gratt., 327, &c. The truth of these recitals, as to the fact that this was substituted property, is strongly corroborated by the facts shown by the deeds themselves. Here was a married woman having a separate estate, with the power of sale. Her trustee, under her direction, sold the armory property for $3,555. About sixty days afterwards the O'Neil property was bought for $3,650, and the conveyance made to the same man, as trustee, without any thing more in the way of the declaration of a trust. It is not shown that she had any other estate than that shown by the deeds in this record. Then, whence came the money to buy the O'Neil property, if not from the proceeds of the sale of the armory property? This, with the recitals is conclusive to my mind as to the substitution of this property for the original trust property.

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I am further of opinion that these conclusions, namely, that the property in question was substituted property, and that it was held as substituted property, subject to the trusts in the original deed to Schad, are not inconsistent with the terms of the deed from O'Neil and wife to Messersmith, trustee for Paulina Kloss, of July 17, 1863, but, on the contrary, are in accordance with the proper construction of that deed.

Under the deed to Schad, it is provided that in the event of a sale during the lifetime of Mrs. Kloss, the trustee shall either pay the proceeds over to her or invest the same as she shall desire. Now, conceding that Mrs. Kloss had such absolute control over the trust fund as to create new and different trusts from those in the original trust deed, if she thought proper to do so (a proposition I am not prepared to admit as to investments, for it is not clear to my mind that the re-investment must not be held subject to the original trust). But conceding this, then as the O'Neil deed has failed to declare any new or different trusts, it must be presumed that the parties intended to abide by and adhere to the old. That when she directed the O'Neil property to be conveyed to Messersmith, trustee for her, she did not intend, and did not in law or in fact, create a new trustee with a new and different trust from the old, but that she intended, and did in law and in fact have the property conveyed to him, who was already her trustee of record under declared and well known trusts open to the inspection of all.

If I am correct in these views, then the deed to John Kloss was and is a valid deed. It is one made in accordance with the trusts which, I think, governed it; and, as no improper influences have been shown to have been exerted by the husband over the wife, the deed in favor of the husband must stand as good and valid.

For these reasons, I am of opinion that the bill of the plaintiffs must be dismissed with costs.

LET DECREE GO ACCORDINGLY.

MISCELLANY.

Messrs. Editors,—Would it not be well to pepper the solemn decisions and dissertations to which the *Law Journal* is necessarily devoted, by occasionally committing, to "the rigidity of type," some of the "good things" of our brethren, now laughed at over the walnut and wine, but soon to be forgotten, unless thus preserved? A little effort in this direction would insure a compilation that would honor the fame of the best makers of "*mots*."

As a contribution, please accept this true tale of Tom August.

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During the period of that miserable travesty of statesmanship known as "Reconstruction," which every week brought some fresh villainy from Washington in the shape of Federal legislation, Col. August was employed in a cause in our Circuit Court, then presided over by a carpet-bag judge ——, the genius who was so puzzled to know the meaning of the "p. q." which followed so many attorney's names in the papers of his court.

The trial turned on the question whether a certain deed was properly stamped, and Tom was reading from the Statutes at Large to support his view, when his adversary, one of the carpet-bag variety, by the way, blandly interrupted:

"Colonel, excuse me, you are reading from the former law; that has been repealed. Here is the last act of Congress," handing Tom the book.

"*The last Act of Congress?*" said Tom, with a look of most solicitous inquiry.

"Yes," replied M.

"Glory to God!" said Tom, with a fervor that would have graced a pulpit, "how honest people must rejoice!" K.

JURY SPEAKING—VIEWS OF JOHN S. FLEMING.—1. Never tire the jury. If their interest flags, try to amuse and divert, but if their attention is exhausted, bring the argument to a speedy close.

2. End when you have finished what you have to say. Don't go out of the way to gather flowers. If they bloom by the wayside you may pluck them.

3. Never attack a witness unless you are confident of your ability to maintain the attack.

4. Speak to the point in as clear and logical a manner as possible. Avoid high-flown words and phrases which cannot be understood by the jury; but use forcible and plain language. The mass of mankind are possessed of more common sense, and are better able to appreciate the logical sequence of good reasoning, than they ordinarily have credit for.

5. Inform yourself of the character and antecedents of the jurymen. Some one or more among them will have a peculiarly powerful influence in effecting a result. Address yourself to him or them—taking advantage of their antecedents, prepossessions, prejudices, and usual habits of thought. In criminal cases, reject from the panel all clergymen, and all religionists of the Calvinistic faith. As a general rule, they are stern in the infliction of justice, carrying to an extreme, reverence for law. Convivial men, in such cases, are usually lenient jurors. Their excesses frequently place them in situations where they need the charity of the world, and the tendency of their minds is to extend mercy to the criminal wherever palliating circumstances attend the commission of crime. When the case is one upon which much feeling is aroused, reject all political aspirants, and all expectants of office at the hands of the people, or candidates for public favor in any shape or form. The demagogue or time-server, though he may not have the malice deliberately to sacrifice the weak and unfortunate upon the shrine of his miserable and contemptible personal hopes and wishes, is ever ready to lend a willing ear to every circumstance calculated to bring his own mind into unison with the clamor of the multitude, and reluctantly credits mitigating or opposing testimony. Besides, very few men have an opinion of their own, but bend before one popular breaker as the wisp of straw flutters in the breeze.

KIRKLAND, CHASE & CO. *v.* BRUNE & CO.—In our report of this important case in the December number, 1878, of the Journal, we made a mistake in saying that the other judges concurred in the opinion of CHRISTIAN J. We should have stated that *Moncure* P. and *Burks* J. concurred in the opinion of *Christian* J., and that *Staples* J. said he was not prepared to say that a deed of trust, conveying *choses in action*, need not be recorded, to make it valid against creditors and purchasers; the question was not free from difficulty, and he was not prepared to express an opinion on the subject. He thought, however, the special assignment in that case, for the benefit of creditors, sufficient to vest the title in the assignee, as against the attaching creditor, and upon that ground he concurred in affirming the decree of the court below, and *Anderson* J. concurred in what was said by *Staples* J

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JUDGE RIVES' ACTION IN THE REYNOLDS' CASES.—We have read with great interest and pleasure the report of the Senate Committee, appointed to inquire and report upon this very important matter, prepared by Gen. Bradley T. Johnson, of Richmond. This paper shews great research, learning and ability, and entitles its author to be considered, what we already believe him to be, one of the ablest constitutional lawyers in this country.

To the Editors of the Virginia Law Journal:

I beg to be allowed the medium of your valuable Journal to call attention to a remarkable error in regard to obtaining judgments by default, which Mr. Barton, in his Law Practice, has adopted from the faulty syllabus of the case of *Turnbull for, &c.*, v. *Thompson & als.*, 27 Gratt.. 306.

To obtain an irreversible judgment by default, requires strict regularity of proceedings and conformity to the statutory regulations on the subject. The desirability of obtaining such a judgment, whenever it is possible, is appreciated by every member of our profession. So the mistake, which I am about to point out, seems to me to be one of importance, and the point involved to be one of some interest.

Mr. Barton states, in his Law Practice, page 118, note *, that "thirty days must elapse between the service of process and the judgment, and the day of service may be included in the count. *Turnbull for, &c.*, v. *Thompson & als.*, 27 Gratt., 306."

Mr. Barton evidently fell into the error by relying on the faulty syllabus of the case cited. In that very case *thirty days* had *not* elapsed between the service of process and the judgment; but only *twenty-eight* days, making, in that case, one *calendar month*, as required by the statute, had intervened. The cause of the error will appear by comparing the syllabus of the case with the opinion of Judge Staples. It arose from the mistaken idea that thirty days was the "month" required by the statute to elapse between service of process and final judgment. (V. C. 1873, c. 166, § 6.) Now, the term "month" at Common Law always meant *lunar month* of twenty-eight days, unless the contrary appeared, and the calendar or solar month might be twenty-eight, twenty-nine, or thirty-one days as well as thirty. (2 Bl. Com. 141.) By statute in Virginia, it is declared that in *statutes* "month" shall always mean calendar month, unless it be otherwise expressed. (V, C. 1873, c. 15, § 9.) So it is evident that the time required by statute to elapse between the service of process and final judgment is not "thirty days," but *one calendar month* as set down in the almanac; which time, in some cases, *may* be twenty-eight, twenty-nine or thirty days, and, in some cases, *must* be *thirty-one* days.

Richmond, Va., January 9, 1879. JAMES LYONS, JR.

[See also *Dillard* v. *Thornton*, 29 Gratt. & S. C. 1st Va. Law Journal, 73.—ED.]

BOOK NOTICES.

AMERICAN DECISIONS. VOL. VI. By JOHN PROFFATT, L. L. B. &c., San Francisco, 1878. A. L. Bancroft & Co., through J. W. Randolph & English, Richmond, Va.

We have received the sixth volume of these very valuable reports, which is not inferior to any of the preceding volumes of which we have spoken so highly. We say again, that they should find their place in the library of every lawyer, and will be found useful not only to those who have the full reports, but to those who have not. The able editor has certainly done his work with real ability and discrimination. The work of the enterprising publishers is first-class in every way.

THE MEMPHIS LAW JOURNAL.—We are glad to number among our list of exchanges this valuable journal, which will compare favorably, in matter and style, with any that we receive. We are glad to see that our old class-mate and friend, Wm. C. Folkes, of the Memphis bar, is connected with this work, and he cannot fail to give ability and interest to it.

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THE

VIRGINIA LAW JOURNAL.

FEBRUARY, 1879.

UNCOMMUNICATED THREATS.

"On the trial of an indictment for murder, threats and declarations of hostile purpose and feeling, made by the deceased on the day and near the time of killing, and his acts and conduct indicative of an intention to execute such threats are admissible in evidence, as parts of the *res gestæ*, though the threats were not communicated to the defendant." *Pitman* v. *State*, 22 Ark., 354.

The *direct* question as to the admissibility of uncommunicated threats under any circumstances, whether parts of the *res gestæ* or not, as far as the writer can learn, seems never to have been passed upon, either by the Supreme Court of Appeals or the late General Court of this State. It is a question, too, which some of the text-writers on criminal law, and on evidence avoid, or upon which they fail to express an opinion. Among the latter class of writers is, I believe, Mr. Greenleaf. It is a question which has been the source of diverse adjudications by able and highly learned courts; and it might be difficult to say upon which side was the greater number of adjudications; although the advocates of the admission of uncommunicated threats of the deceased or prosecutor, do not hesitate to say, in support of their view, that they have with them, not only the number, but the weight of authority; but give no general rule *pro* or *con* from text-writers, except when threats are narrowed down to the *res gestæ;* while upon the other hand, those who hold such evidence inadmissible, simply claim a general rule, without citing any long acquiesced-in principle.

Suppose this question as passed upon by the Supreme Court of Georgia in Keener's Case, 18 Ga., 194, decided in 1855, were propounded to a Virginia lawyer: "Three days

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before Keener killed Reese, the latter threatened to take the life of the former; and these threats were never communicated. Should the threats have been admitted on Keener's trial for the murder?" An answer without investigation would most probably be in the negative, followed by these expressions: "Admitting that Keener acted in self-defence, what influence could these uncommunicated threats have on his action, and it matters not at *what time* these threats were made." The answer has a strong reason in it in reference to remote threats uncommunicated, and quite likely does prevail in the inferior courts of this State, and will likely prevail in the Supreme Court; but surely this reason cannot overwhelm a stronger one which would admit such threats as of the *res gestæ* as in *Pitman's Case*, *supra*. It seems the difficulty is, that those who reject uncommunicated threats follow their idea and rule throughout, and lose sight of the fact that a stronger rule and reason intervenes, making such evidence admissible as explanatory of the principal fact and as parts of the *res gestæ*.

Now, if potent reasons (and they are strong, too,) can be found to admit uncommunicated threats, though remote, then add to them the general rule of text-writers, that "all circumstances and declarations cotemporaneous with the main fact under consideration, and so connected with it as to illustrate its character are admissible (1 Green. Ev., sec. 108), would seem undoubtedly to make the ruling in Pitman's case correct, and the law of this State.

These questions generally arise upon the theory of self-defence, and such evidence is offered to illustrate the character of the transaction.

Let us take a trial for murder, where the defendant relies on self-defence—would these remote, uncommunicated threats, under the law of homicide in this State, be inconsistent with the theory of such defence, or irrelevant, or its prejudicial effect to the Commonwealth warrant the suppression of any good it might be to the accused?

"On a trial for murder, the necessity relied on to justify the killing must not arise out of the prisoner's own misconduct." *Vaiden's Case*, 12 Gratt., 717.

"There must be reasonable ground for believing there is a design to commit a felony or to do some serious bodily harm, and imminent danger of carrying such design into immediate execution—there must be some overt act. *Stoneman's Case*, 25 Gratt., 887.

In *Scoggin's Case*, 37 Cal., 677, 1869, it is said: "If a

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deadly encounter occurs between two persons, in which one is killed, if the survivor claim self-defence, evidence of those who witnessed the transaction may leave it in doubt which of the two was the assailant; * * * * that a threat might corroborate whatever evidence there was that the deceased was the assailant." In other words, might tend to show that the accused did not bring the necessity by his own misconduct. Such encounters in these days, when men are equipped with arms, by art brought to perfection, are often ended in an instant. "When the existing circumstances, and the overt act" of the victim, all in that moment, might warrant the accused in taking the life of his assailant, and all in the sight even of many persons, who, with human imperfection, see differently, and leave the transaction clouded with doubt, as to who was the aggressor and who was in fault. He who deliberately makes up his mind to slay his fellow-man, often concerts his plans for a certain hour of darkness and place of secret. The intended victim, through some failure of his enemy's movement, has time to protect himself and slays his assassin in self-defence, without any human eye to exonerate him; and that weeks before the fatal affray, the deceased threatened that on a certain hour, at a certain place, he intended to slay the accused, corresponding with the main transaction; though these threats were never communicated, would it not seem monstrous to exclude them? Would not a court and a jury in all these cases be better satisfied to hear these threats? thereby to know the better who was in fault.

If A says "I have a Derringer with which I intend to kill B," and not within the sight of a human being they meet and B kills A, and this Derringer is found on the person of or near by A, with signs of its preparation for action, would not the proof of those threats, though uncommunicated, tend to establish an overt act on part of A which warranted B in slaying him? and that B was acting from appearances of imminent danger? Of the cases holding this view may be cited *Campbell's Case*, 16 Ill., 17; *Keener's Case*, cited; *Stokes' Case*, 53 N. Y.; *Sloan's Case*, 47 Mo., 604; *Arnold's Case*, 15 Cal., 476; *Scoggin's Case*, 37 Id., 677; *Little's Case*, Tenn, April, 1872. *Cornelius' Case*, 15 B. Monroe, 539; *Goodrich's Case*, 18 Vt., 116; *Haller's Case*, 37 Ind., 57; *Pitman's Case* cited, and many cases quoted and cited in these.

In *Keener's Case* threats were admitted to show the *quo animo* with which the deceased went to the place of the fatal encounter. In *Stokes' Case* it is in substance said that threats would make an attempt to execute them more probable when

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an opportunity occurred, and when communicated the more readily the belief of the accused would be justified as to the precise extent of the probability; but that threats are as apt to be attempted to be executed when not communicated as when they are so. The question is, whether the attempt was in fact made. This statement as to remote uncommunicated threats is not made with a view to uphold that doctrine, for that is not the province of this paper, but to show the array of great courts that do adopt it, and to connect their ideas and reasons with the reasons for admitting threats when they are intimately connected with the principal fact combining the two views to make the latter stronger.

Now, there is one point which might be urged against admitting remote threats uncommunicated, which cannot be urged against those as recent as in *Pitman's Case*, that is, if made a week or fortnight before the principal fact, the attempt in furtherance of the threats in cooling time may be desisted from, the hasty language regretted, or may be made in braggadocio; but when the parties are actively engaged for the fatal and final combat, when the blood is hot, when the mind is fixed and filled with desperate rage, these passions force the truth spontaneously. It cannot be repressed. The serious combat is too close to engage in the braggadocio of a coward.

The combatants, perchance, have their excited partizans, who see acts with the eye of friends; and the question comes before a calm tribunal all left in doubt, would not the recent threats and declarations of the deceased, as heard before the last excitement by calm passersby, shed light on the truth—who was in fault—who began the affray—did the accused act strictly on the law of self-defence? It is in the investigation of the fatal moment that the presiding judge, almost as a sole and final arbiter, determines the admissibility of evidence under the *res gestæ*, as said by Mr. Greenleaf in the section quoted, "according to the degree of its relation to the fact, and in the exercise of a sound discretion."

Is the adjudication in *Pitman's Case* quoted, correct? "The affairs of men," says Mr. Greenleaf, "consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others. * * * Those surrounding circumstances constitute parts of the *res gestæ*, and may always be shown to the jury along with the principal fact. 1 Green. Ev., sec. 108. This entire section is quoted and adopted by the court of this

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State in Little's Case, 25 Gratt., 921. Pitman attempted to prove by a witness that he (witness) had just a few minutes before the killing met the deceased in Greenwood, * * * and that deceased said he was going down to Head's to get him a double-barrelled shot-gun, and that he intended to return immediately and shoot Pitman down like a dog," &c., &c. But the court refused to permit such statements, unless it was first proved that they had been communicated to Pitman before the killing. Pitman was found guilty, and judgment was reversed by the Supreme Court, the court using this language, "it is true that the declarations of Thompson in question were not communicated to Pitman, but we put their admissibility upon the ground that they were of the *res gestæ*, tending to explain the conduct and motives of the deceased just before the killing; and if they conduced to prove that he did not go into the street, and advanced towards Pitman with the intention of making the attack, and not of acting on the defensive, it is not unreasonable to suppose that Pitman may have seen some indication of his intention in his appearance, or in the manner in which he demeaned himself in approaching."

Declarations of the intention of the accused—his threats—are always admissible against him, and it is said in *Stokes' Case* that there is no difference in this principle and admitting threats of the deceased. The difference is only in the degree. Mr. Stephens, in his Digest of the Law of Evidence, says, "When any act done by any person is a fact in issue, or is relevant to the issue, the following facts are relevant (among others): all statements made by or to that person, accompanying and explaining any such act." Stephens' Dig. Law, Ev., chap. 2, art. 2, and note 5, art. 3. The overt act of the deceased in Pitman's Case was a fact in issue, and relevant to the issue, and his declarations came within the above rule, which rule was quoted approvingly in case of *Scott & Boyd* v. *Shelor*, Court of Appeals of Virginia, reported in September number, 1877, *Virginia Law Journal.*

Mr. Wharton, in his Crim. Law, vol. II, sec. 1,027, says: "It is, of course, admissible for the defendant to show threats or other circumstances of a recent nature, which would tend to lead him to believe that his life was in danger. But such threats, without any overt act, when sought to be introduced by the defendant in his justification of a homicide, must be shown to have been communicated." To sustain his text, he refers to Keener's Case; Atkins' Case, 16 Ark., 568; Lombard's Case, 17 Cal., 316.

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By reference to Keener's Case, whence the words of the text seem to have been coined, it does not stop in the unqualified manner of Mr. Wharton. From the clause, above spoken of, it would seem that the overt act of the deceased must be determined as a condition precedent, and that on a theory of self-defence, without this act were determined, the evidence would be inadmissible. This being so, the presiding judge would have to determine before the evidence what might be in doubt, and what the evidence might tend to show; at all events, he would be trespassing upon the province of the jury—what I apprehend a Virginia court will not do. But the case of Keener does not require the overt act as necessary to its *admissibility*, but that the overt act must be coupled with it before the accused can *justify*, therefore this condition should go to the meaning and weight of such testimony, rather than to its admissibility, all of which would be reached by instructions as a matter of law to the jury. *Atkins' Case* cited, says, unqualified by that, uncommunicated threats are inadmissible; but this decision is founded on *Powell's Case*, 19 Ala., where the court say they will not assert there *may* be cases where such testimony might be admissible. So far as *Lombard's Case*, 17 Cal., is concerned, the law is now settled in California by *Scoggin's Case*. Mr. Wharton also refers to sec. 641, vol. I, of his Criminal Law, using this language: "When, however, it is shown that the defendant was under a reasonable fear of his life from the deceased, the deceased's temper, in connection with previous threats, &c., is sufficiently part of the *res gestæ* to go in evidence as explanatory of the state of defence in which the defendant placed himself."

Let us now throw into the scales the weight of our own adjudications so far as they go. In *Dock's Case*, 21 Gratt., 909, it was proved that on the morning that the deceased was murdered, as he arose from the breakfast table, he said he would go to Mrs. Reid's house to see if he could employ her husband or son that day to work, if the prisoner would not work that day, and he left the house with that declared purpose to which evidence of the declarations of the deceased in the absence of the prisoner the latter objected—objections overruled, and on writ of error, held to be admissible as parts of the *res gestæ*.

In Little's Case, 25 Gratt., 921, it was held that a statement made by the accused in a few minutes after the homicide and near the place were admissible for the accused as parts of the *res gestæ*.

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Now, if the peaceful intent with which the deceased happened to go to the place of his death can be proved by his declarations unknown to the accused as in Dock's Case, what is the difference in principle where threats of hostile intent are shown in favor of the accused? If the accused, by declarations of his own, as in Little's Case, can make testimony for himself, why not declarations of the deceased, which would tend to show that the accused had to act on self-defence? It is submitted that there can be no difference.

S. C. GRAHAM.

Tazewell Courthouse, Va.

NOTE.—The question of the admissibility of "uncommunicated threats" has been always classed among the *disputed* questions of criminal law, and we have been amazed in the very cursory examination which we have been able to make, to find that most of the eminent writers on criminal law have nothing whatever to say on the subject. We are inclined to the opinion, that most of the views expressed by the writer of the foregoing article, are supported by the authorities cited by him, and that he has done much by his article, to take this question out of the category of *doubt* in which other writers have either directly, or by their silence, placed it. We simply propose to add a few additional authorities to those already referred to by Judge Graham, to shew that the tendency of recent decisions is decidedly in the direction of the views indicated by him. Indeed, in the corresponding section (§ 1,027) of *Wharton's Criminal Law*, edition of 1874, (seventh edition), to that quoted by the writer, which was from the sixth edition, published in 1868. That eminent writer thus lays down the rule: "Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to shew that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant. The evidence is not relevant to shew the *quo animo* of the defendant, but it may be relevant to shew that at the time of the meeting, the deceased was seeking defendant's life," and in support of this text he refers to *Stokes' Case*, 53 New York; *Keener's Case*, 18 Ga.; *Campbell's Case*, 16 Ill.; *Holler's Case*, 37 Ind.; *Arnold's Case*, 15 Cal.; and *Scoggin's Case*, 37 Cal., all of which are cited in the foregoing article.

In *Wiggins* v. *People, &c., in Utah*, 3 Otto. (93 U. S. C. R.), 466, Mr. Justice Miller, delivering the opinion of the court, says: "Although there is some conflict of authority as to the admissibility of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by the decisions of courts of high authority," and in support of this, he refers to the section just quoted from the last edition of *Wharton's Criminal Law*, and the other authorities as cited above by that author. The threats in this case were made about an hour previous to the homicide, and certainly according to the definition as laid down in *Haynes* v. *The Commonwealth*, 1st *Virginia Law Journal*, 361, they were not admissible as parts of the *res gestæ*. Judge Christian, in delivering the opinion of the court in the last mentioned case, says: "Facts which constitute the *res gestæ* must be such as are so connected with the very transaction or fact under investigation as to constitute a part of it." The case of *Wiggins* v. *People, &c.*, supra, was decided in October, 1876.

In *Johnson* v. *State*, 54 Miss., 430, Chief Justice Simrall, in delivering the opinion of the court, says: "Whether recent uncommunicated threats are relevant or not, depends on the circumstances of each case. If the

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homicide is deliberate, evincing preparation, as by lying in wait and surprising the adversary, threats are not pertinent or relevant, and do not tend to excuse or justify. But where death ensues from a conflict, and a question is raised by the evidence, who was the aggressor, and whether the accused may or not have acted in self-defence, recent threats may aid the jury in coming to a satisfactory conclusion. Such we understand to be the reasonable rule, illustrated with more or less clearness in the cases referred to." Referring to Wiggins' Case, supra, and the other cases before referred to, *Chalmers J.* concurring in the opinion of *Simrall C. J.*, says: "Wherever the testimony leaves it doubtful whether the attack was made by the deceased or the prisoner, the threats of the former, whether communicated or not, should be admitted in evidence, not as constituting in themselves any defence of the homicide, but as tending to shew whether or not it was an act of self-defence. Uncommunicated threats may be admitted in evidence, therefore, even where there were witnesses to the killing, if their testimony leaves it doubtful who began the deadly encounter." Some of the threats admitted in this case were made three days prior to the homicide, and the same threats were repeated each day up to the day of the homicide. In the case of *Kendrick* v. *The State of Mississippi*, reported in the December 18, 1878, No. of *The Reporter*, page 781, the case of *Johnson* v. *The State* was cited with approval on this point.

In *The State* v. *Turpin*, 77 N. C. Reports, 473, decided in June, 1877, it was proved that the deceased, had a short time before the homicide, threatened to take the life of the prisoner, if he did not keep away from a certain Mrs. Tate's house, which threats had been communicated to him. The prisoner also offered other testimony to shew other similar threats made by the deceased, but which had not been communicated, which was rejected by the court below. *Bynum J.* in delivering the opinion of the court, says: "This evidence was competent, and should have been admitted for several reasons:

1st. The uncommunicated threats were admissible for the purpose of corroborating the evidence of the threats which had already been given.

2nd. They were admissible to shew the state of feeling of the deceased towards the prisoner, and the *quo animo* with which he had pursued his enemy to the house.

3rd. In ascertaining whether the prisoner had acted in self-defence, a most material question was, who introduced the rock into the conflict, and when and for what purpose? Whether for offence or defence was it used? As to this important inquiry, the evidence was wholly circumstantial, and the testimony of both the general character and threats of the deceased was competent under the principles laid down in Tackett's, Floyd's and Haynes' Cases. If the prisoner entered into the fight, armed both with the pistol and the rock, of which there was evidence by his admission that he usually went so armed, then it was a case of murder or manslaughter, as the jury might consider these other facts as indicating or not indicating malice. But the prisoner contends that the deceased provoked the fight, armed with the rock, as was evident from the severe contusions which he received in the struggle from some such instrument on the front and side of his head. And to corroborate this view and fix the ownership of the rock, the prisoner offered evidence both of the violent character and deadly threats of the deceased. In this aspect of the case, the threats were equally admissible, whether communicated or uncommunicated." Citing *State* v. *Keener*, 18 Ga.; *State* v. *Sloan*, 47 Mo.; *State* v. *Heller*, 37 Ind.; *Cornelius* v. *Commonwealth*, 15 B. Mon.; *People* v. *Scoggins*, 37 Cal.; *State* v. *Dixon*, 75 N. C. 1 Starkie on Ev., 39; Roscoe's Criminal Ev., 77. ED.

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THE VIRGINIA MARRIED WOMAN'S ACT.

A writer in the January No. of the *Law Journal* gives an opinion on what is known as "The Married Woman's Act," which I do not think can be accepted by the profession as sound law. The Statute of Descents and Distributions (Code of 1873) provides as follows:

"When any person shall die intestate as to his personal estate, or any part thereof, the surplus, after payment of funeral expenses, charges of administration and debts, shall pass and be distributed to and among the same persons, and in the same proportions, to whom and in which real estate is directed to descend." Then follow a number of exceptions, the third of which is in these words: "If the intestate was a married woman, her husband shall be entitled to the whole of the surplus of the personal estate." C. W. W., the writer above named, contends that, under the Married Woman's Act, the personal property of the wife now passes to her next of kin, irrespective of her husband, in default of disposition by her either in her lifetime or by will; that the provision of the statute (Code of 1873), giving the surplus, as above stated, to the husband, has been repealed. Is this true? It is a question that must frequently arise in the distribution of the personal estates of intestate married women, and its proper solution is a matter of some practical importance.

C. W. W. says, "The intention of the Legislature must govern us in solving this question, and must be found in the language of the act."

What is the legislative intent to be found in the language of the act? So far as any intent is indicated in the act, it was the purpose of the Legislature to protect married women, as far as practicable, against the consequences of their husbands' misfortunes, follies, or reckless disregard of their marital obligations.

It is not to be presumed that it was the intention of the Legislature to interfere with the rights of the husband further than was necessary to accomplish the end in view. The act secures to the wife the enjoyment of her property during coverture, and puts it within her power to devise and bequeath it, as if she were an unmarried woman. She can, if she desires to do so, transmit it to her children, or next of kin, and defeat the interest of her husband as to her personal estate. In giving her this power of dispo

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Legislature went, perhaps, as far as it was wise to go. It would only be in exceptional cases that it would be necessary or desirable to resort to the means which the law gives her, to intercept the husband's rights. This she can do, whenever, in her judgment, the occasion requires it.

Again, C. W. W. says, "Suppose the act had been silent as to curtsey, it cannot be controverted that such title in the husband would be at an end. The act is silent as to personalty, and the same result must necessarily follow." Would the husband's title to curtsey have been absolutely at an end, had not the act been silent about it?

As to the wife's real estate, not disposed of during her lifetime or by will, I think the husband's title to curtsey would not have been at an end. See *Moore* v. *Webster*, Law Rept., 3 Eq., 267, 8& 139; *Comer* v. *Chamberlain*, 6 Allen, 166; *Morgan* v. *Morgan*, 5 Madd., 248, 4 Kent Com., 31.

It might be admitted, however, that C. W. W. is right in his view as to curtsey, and yet his conclusion as to personalty does not follow at all.

This Married Woman's Act is not a marvel of legislative clearness; and notwithstanding the express terms used in reference to curtsey, I think it will be necessary for the courts to construe the act before we can be absolutely certain what the husband's rights are, in all cases, in his wife's lands. But whether the Legislature has been sufficiently explicit or not in defining and guarding the husband's rights in his wife's real estate, there was an obvious reason for manifesting its purpose in express terms. The authorities are not entirely harmonious as to when the husband is entitled to curtsey in his wife's separate real estate. As to curtsey in separate statutory lands, it has been laid down as sound law, that the curtsey of the husband will be taken away so far, and only so far, as the express terms of the statute or plain implication affirmatively require. If the statute simply makes the wife's lands separate estate, curtsey is not taken away. It may be done by express terms, or by necessary implication. In this condition of the law, when the Legislature came to pass the Married Woman's Act, in order to preserve the husband's right to curtsey, it was proper to do so in clear and explicit terms. But, on the other hand, it was not at all necessary that the Legislature should provide, in express terms, that nothing in the act should be construed to affect the husband's interest in the personal property of the wife, as to which she might die intestate.

It is to be presumed that the Legislature knew that there

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was a statute already in existence providing for that very case. A law may be repealed in express terms or by implication. It is not pretended that the provision contained in the Code of 1873, as to the distribution of the personal estates of intestate married women, has been repealed in express terms, but it is said that it has been repealed by implication. A repeal by implication is not favored. It is well settled by the authorities that if the former law may well subsist with the recent one, it will be upheld by the courts. It is only in the case of very strong repugnancy, or irreconcilable conflict, that one Act of Assembly is held to repeal another.

In *Bowen* v. *Lease*, 5 Hill, 221, C. J. Nelson says: "The invariable rule of construction in respect to repealing of statutes by implication, is, that the earliest act remains in force, unless the two are manifestly inconsistent with, and repugnant to, each other, and unless, in the latest act, some express notice is taken of the former, plainly indicating an intention to abrogate it As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, it is but reasonable to presume that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two is irreconcilable. See also *Williams* v. *Potter*, 2 Barb., S. C. R., 316; *Commonwealth* v. *Herrick*, 6 Cushing, 465, Bac. Abr. Stat. (D).

So little is repeal by implication favored, that it has been held that "when two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the former." *Blair* v. *Bailey*, 25 Ind., 165.

There is no repugnancy or conflict between the Married Woman's Act and the provision contained in the Code of 1873 in relation to the distribution of the personal property of married women who die intestate. There is no repeal in terms; the two acts may well subsist together; the earlier provision may be upheld without defeating the purposes and objects of the recent act. I think, therefore, in the light of the authorities above quoted, it may be safely held that there is no repeal of the earlier law by implication.

JOHN HUNTER, JR.

Richmond, Va.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

ORVIS *v.* POWELL.

1. The order in which real estate, which has been mortgaged and subsequently sold at different times to different purchasers, shall be subjected to satisfaction of the mortgage is, where the rule is established by State statute or the decisions of State Courts, a rule of property which will be followed by the Federal Court sitting in such State.
2. The right of redemption after sale on foreclosure in Illinois, as decided in *Brine* v. *Insurance Company* (96 Otto), re-affirmed.

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

Mr. Justice MILLER delivered the opinion of the court.

This is a suit in chancery to foreclose a mortgage executed by Henry H. Walker and Samuel J. Walker, to the appellee, covering forty acres of land in Cook county, Illinois. The mortgage was given April 8, 1869, to secure the payment of the sum of $40,500. Payments were made reducing the amount due at the date of the decree to $14,853.33. As payments were made releases had been executed as to part of the land, and before the suit was brought all the land had been conveyed, in distinct parcels, at different times, to different parties. The court in its decree ordered that these parcels should be sold separately, and in the inverse order of the dates of the conveyances made by the Walkers, until the amount due, as ascertained by the decree, was satisfied, so that the parcels first sold should be the last subjected to satisfaction of the debt. The decree made no provision for redemption after sale, as required by the statute of Illinois.

Three principal errors are assigned to the decree:

I. That the decree should have subjected all the property on which the mortgage was a lien equally and without regard to priority of conveyances by the mortgagees.

II. That the court erred in determining the order of these priorities.

III. That the decree made no provision for redemption after sale.

1. As regards the question raised by the first of these assignments, we are relieved from any discussion of what is the

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true equitable rule on the subject, because we consider that when such rule is adopted it is, within the decisions of this court, a rule of property affecting the title to real estate, and as such is to be governed, in its application in this court, by the law of the State where the land lies. In a case where no statute of the State makes provision on the subject, and no decisions of the State court have established a rule, it would be our duty to inquire what are the doctrines of the equity courts on the subject.

The Supreme Court of the State of Illinois having announced on very full consideration the rule which was followed by the Circuit Court, there was no error in that court in following it. (*Inglehart* v. *Crane*, 42 Ill. 261.)

2. In regard to the order in which the parcels of the land are subjected to sale, it is to be observed that no one can complain but Orvis, because he is the only party who has appealed from the decree.

So far as Orvis is concerned, the only error assigned which seems worthy of notice is, that Block 18 should have been subjected to plaintiff's debt first, because Walker, the mortgagor, was still owner of an equitable interest in it. This does not appear by any written instrument, but so far as it is established at all, it is by Walker's parol testimony. It thus appears, however, that Colbaugh and Powell held the title in trust to secure money advanced by them on a sale which had been rescinded, and it was by virtue of this recision that Walker had any interest in it. What the amount of the sum is for which Colbaugh and Powell held it is not shown, nor the value of the lot. But appellant's witness, Walker, states that the debt due these parties is more than the lot is worth, after paying some liens on it prior to theirs. As the title of Walker had passed from him to this lot long before that claimed by Orvis, we do not believe that the court was bound to prosecute an inquiry, through all the ramifications of Walker's dealing with this lot, dependent solely on conflicting oral testimony, to ascertain if Walker had a possible ultimate interest in it. Nor does it consist with the general course of equity practice to order a public sale of a very doubtful contingent interest, the value of which is incapable of estimation, and where any price given might do great injustice to the purchaser or to the party whose interest is sold, and which would lead to further expensive litigation. Besides, if in the end appellant has to pay any part of this mortgage, there is nothing to prevent his pursuing this equity of Walker's so far as may be necessary to indemnify him in an

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independent suit, where that matter may be fully investigated without further delaying the present plaintiff.

On the whole, we see no error to the prejudice of appellant in the order of sale adopted by the decree.

3. But we decided in *Brine* v. *The Hartford Insurance Co.*, at last term (96 U. S. R. 627), that a decree of foreclosure in the Circuit Court of the United States for the District of Illinois, which gave no time for redemption after the sale, was erroneous, and must be reversed. The larger part of the briefs of several counsel in this case is devoted to a consideration of the question there decided. It is sufficient to say that we are satisfied with the soundness of the opinion given in that case, and it must govern the one now before us.

The result of those considerations is, that the decree of the Circuit Court ascertaining the sum due the plaintiff, and fixing the order in which the various parcels of land shall be sold, and in fact all of said decree, is affirmed, except so far as it fails to give a time for redemption, and the case is remanded to that court with directions to amend the decree so as to allow redemption of each parcel which may be sold, as provided by the statute of Illinois on that subject. As appellant had to take this appeal to obtain correction of the error in this respect, he must recover costs.

SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

HARSHBERGER'S ADM'R AND ALS. *v.* ALGER AND WIFE AND ALS.

I. In 1851, H. and his wife, E., enter into an agreement by which they agree to a separation, and they unite in a deed by which certain real estate and $900 in money is conveyed to S., for the express use, support and maintenance of the wife, and if she should die before the whole of said $900 was paid to her, she might, by will or gift, dispose of the remainder of it as she should think proper. He covenants that E. may live separately from him, and that he will not claim any property of hers. And E. renounced all claim on him for support, &c., and to his property. This deed is executed by the trustee, S. In a short time after making this deed, H. removes to the West, and never returns. He dies in 1875. E. lived until 1871, having been helpless for the last year of her life, and unable to do any but very light work for two or three years previous. During this period, she is nursed and attended to by her daughter, A., who lives with her, and attends to her land as well as her own. E. dies without disposing of the remainder of the $900, amounting to $500 or $600, which is paid to H's adm'r. In 1877, A. sues the administrator of H. for compensation for services rendered E. in her lifetime. HELD:

1. QUÆRE: Whether deeds for voluntary separation of a husband and wife are valid?

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2. If such deeds are valid, the deed in this case vests the property conveyed in the trustee for the separate use of the wife.
3. Under the circumstances of this case, the husband was not liable for any debt contracted by the wife.
4. If A. can maintain this suit, it must be on the ground that the remainder of the $900 was the separate estate of E., the wife, charged by her in her lifetime with the payment of these services.
5. The liability of a married woman's separate estate for her engagements, depends upon her intention to charge it. Her intention to charge it must be made to appear.
6. As between parent and an adult child, whenever compensation is claimed in any case by either against the other for services rendered, or the like, it must be determined from the particular circumstances of that case, whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of any express contract, the question always is, Can it be reasonably inferred that pecuniary compensation was in the view of the parties at the time the services were rendered? and that depends upon all the circumstances of the case—the relation of the parties being one.
7. In this case, there having been no express contract proved, and, so far as appears, no claim or mention of such compensation by either the mother or daughter during the mother's life, and the services having been such as any child prompted by filial affection, and impelled by a sense of duty, might be expected, under the circumstances, to render cheerfully to an aged mother, a contract cannot be implied; and A. cannot recover.
8. If A. had a valid claim to compensation for her services, it accrued during the lifetime of E., and the statute of limitations then began to run, and this suit not having been brought until 1877, the statute is a bar to it.

This case was heard at Staunton, but was decided at Richmond.

In Febuary 1851, Samuel Harshberger, of the county of Rockingham, sold to five of his children, his tract of land in said county, supposed to contain about one hundred and eighty acres, at $40 per acre, and upon long credits, reserving a small lot and house, and some privileges. On the 12th of April, 1855, Harshberger, his wife, Elizabeth, and the said five children, entered into an agreement under seal, in which it was recited that an unpleasant state of things had existed between said Harshberger and his wife Elizabeth, and a difficulty has arisen in regard to the sale of said Harshberger's land to his children; and it was agreed that articles of perpetual separation between said Harshberger and his wife Elizabeth, should be executed between them, by which he should not be responsible in any manner for the debts or support of the said wife. It then provides that the five children should pay $900 more for the land than they had agreed to give; which was to be paid in eighteen equal annual payments of $50 each, for which the said five said children were to execute their notes to the said Elizabeth for her use and benefit; and she was to have twenty acres of the land during her life time, including the ground on which the loom house

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stands. In pursuance of this agreement, Harshberger and his wife, by deed dated the 10th of April, 1855, conveyed to the said five younger children the said land upon the considerations and with the reservations aforesaid. And by deed of the same date, to which Samuel Harshberger, Jacob Shank and Elizabeth Harshberger, wife of Samuel, were parties, after referring to the difficulties between said Harshberger and his wife, and the parts as to the twenty acres reserved and the $900 to be paid in annual instalments of $50 to Mrs. Harshberger, the deed provides that the land for this $900 shall be placed in the hands of said Shanks for the express use, support and maintanance of the said Elizabeth, wife of said Samuel; and if she should die before the whole of said $900 are due and paid, then she may by will or gift dispose of the remainder as she thinks proper. And Harshberger covenanted with the said Shank that he would permit his said wife Elizabeth, to live separate and apart from him, and that he would claim no property put into her possession under this deed, or that she might acquire by purchase or bequest. And in consideration of these provisions, said Elizabeth renounced all right to support and maintenance by said Harshberger, and to dower or alimony in his estate. After this deed was made, and before the late war, Samuel Harshberger removed to the western country, and never returned. After the war all of his daughters except Elizabeth, the eldest, also went west. Said Elizabeth and one grand-daughter, a young girl, about seventeen years of age in 1871, remained, and they and Mrs. Harshberger lived together, whether on the land sold to the children or on the twenty acres in which Mrs. Harshberger had a life interest is not clearly stated. Both parts of the land were cultivated or rented together, the daughter Elizabeth attending to it, as she did to all the housekeeping, cooking, washing, &c; generally doing the work herself with the help of the grand-daughter. For upwards of a year before her death, which occurred in 1878, Mrs. Harshberger was helpless, requiring constant attention and nursing, and for two or three years previous she could do only light work, such as sewing or knitting.

At the death of Mrs. Harshberger there was left of the $900 settled on her by the deed of separation, some six or or seven hundred dollars; and as she died without having made a will and her husband survived her, it reverted to him. He died in 1875, and his estate in Virginia was committed to D. H. Ralston sheriff of Rockingham, to whom the administrator of Mrs. Harshberger, J. P. Ralston paid over the said fund.

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The daughter Elizabeth having married Abraham Alger after the death of her mother, in April, 1877, they instituted their suit in equity in the Circuit Court of Rockingham county, against D. H. Ralston, as administrator of Samuel Harshberger, and the other distributees of said Harshberger and Jacob Shank, and in their bill they claimed that Mrs. Harshberger was indebted to the plaintiff, Elizabeth, for services rendered to her during her life, equal to $500; and that the balance of the said $900 was liable for her debts. And they prayed for the payment of this claim, and that the estate of Samuel Harshberger might be distributed among his distributees.

It was not alleged in the bill, nor was there any proof, that there was any agreement between Mrs. Harshberger and her daughter Elizabeth, that the daughter should be paid for her services, nor does it appear that any such claim was set up by the daughter until after the death of her father, Samuel Harshberger. What these services were is sufficiently stated in the opinion of Judge Burks.

At the August term 1877, the bill having been taken for confessed as to all the defendants, the court made a decree referring it to one of the commissioners of the court, to ascertain and report what estate there was in Virginia belonging to the estate of Samuel Harshberger, deceased, within the jurisdiction of the court and liable to distribution among his heirs. Also how much of the $900 in the bill and proceedings mentioned remains in the hands of Jacob Shank the trustee; and what debts of said Harshberger and his wife Elizabeth, remain unpaid, and their priorities.

Commissioner Bryan took several depositions as to the services rendered by the plaintiff, Mr. Alger, to Mrs. Harshberger, and in November, 1877, made a report, by which he made her an allowance of $4 a week for the last year of Mrs. Harshberger's life, for the year previous, $1 per week, and for three years before this last, of 75 cents per week, making in the whole, including interest to the date of the report, $550.41. And he reported an account of the estate of Samuel Harshberger, $1.624.41, and after paying Mr. Alger's claim of $550, leaving $1.074.

Harshberger's adm'r excepted to the report of the commissioner. 1st. Because there is no proof in the cause to sustain the claim allowed the complainants, Alger and wife, for services rendered Mrs. Harshberger.

2d. On the ground that there is no evidence to sustain said alleged claim against Samuel Harshberger, deceased, he be-

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ing separated from his wife at the time said alleged services were rendered.

3d. The statute of limitations is a conclusive bar to said claim of the plaintiff. Elizabeth Harshberger, died in the spring of 1871, and this suit was brought on the 19th of March 1877; more than five years after her death.

In January, 1858, Harshberger's adm'r filed his answer in the cause. He questions the allegations of the bill as to the services of Mrs. Alger to her mother, Mrs. Harshberger. He denies that complainants have a right to recover of the estate of Samuel Harshberger, whether the daughter lived with the mother and worked for her, or the mother lived with the daughter; he insists that the law will not imply a contract for pay for such services rendered, and there was no allegation in the bill, or proof of any express contract. He denies that Samuel Harshberger, who lived separate from his wife under articles of separation, could in any event be liable for his wife's debts. And he also pleads the statute of limitations.

The cause came on to be heard on the 12th of March, 1878, when the court overruled the exceptions to the report, and decreed that Ralston, administrator of Samuel Harshberger, should, out of the assets in his hands, pay to the plaintiff $504.51, and to the different distributees the sums reported by the commissioner. And thereupon the said administrator applied to a judge of this court for an appeal; which was awarded.

Wm. B. Compton, for the appellant.

G. W. Berlin, for the appellees.

BURKS J.—When the services were rendered, as claimed, for which payment is demanded in the suit by the appellees, Alger and wife, Mrs. Harshberger, the alleged beneficiary, was a married woman, living apart from her husband under a deed of separation executed many years before. On no conceivable ground can it be successfully maintained that the husband was ever personally liable for these alleged services. It is not pretended that they were rendered under any express contract made with him, or that he ever became bound by any subsequent ratification or acquiescence. He resided in a distant State, to which he removed soon after the agreed separation from his wife. He never returned to this State, and after his removal, there was never any correspondence

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or communication, so far as appears, between him and his wife or his daughter, Mrs. Alger, both of whom continued to reside in Virginia. It is equally plain, that there was no implied contract on his part for the alleged services; and this is so, whether the deed of separation be treated as partially valid, or wholly void. If the deed be considered as valid and binding on him to the extent of the covenants and assignments made by him, he was not bound even for necessaries furnished to the wife after the separation; for provision was made for her support and maintenance, with which provision she and her trustee were satisfied, and it was sufficient, as the large residuum of the trust fund undisposed of at her death clearly shows. Moreover, it was expressly stipulated in the deed, that he was not to be bound for the payment of any debts subsequently contracted by the wife. This covenant, to which the trustee was a party, was pursuant to a preliminary written agreement, containing a stipulation of like character, to which Mrs. Alger, then unmarried and *sui juris*, was also a party, she having an interest in the subject matter. If the husband was bound by his covenants, she was also bound by the agreement referred to, and, in such case, there could be no implied obligation on his part to discharge any liability on account of dealings or transactions between her mother and herself.

If, on the other hand, the deed be regarded invalid as to all the parties, in all respects, and for every purpose, still it is apparent, that the services, for which claim is made, were not rendered in reliance upon the personal credit of the husband. The presumption that the credit of the husband was the basis of the services is rebutted by all the circumstances; such as the absence and permanent non-residence of the husband, the agreed and actual separation from the wife, the possession by her, under a contract fully executed by him, of means provided by him for her continuous support and maintenance and sufficient for that purpose, and the perfect knowledge by Mrs. Alger of all these facts.

Of course, there could be no contract, express or implied, by which the wife could be personally bound; for, although by consent living apart from her husband, she remained subject to the disabilities of coverture. She could contract no debt, for which she could be held personally liable, either at law or in equity. There could be no personal judgment or personal decree against her on such debt.

From what has been said, it is obvious, that if the decree of the Circuit Court in behalf of the appellees, Alger and

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wife, for the amount allowed for services, can be sustained at all, it must be on the ground, that the fund subjected by the decree was the separate estate of Mrs. Harshberger, charged by her in her life-time with the payment for these services.

This fund is the remnant of what was settled by Samuel Harshberger to the use of his wife under the deed of separation, and it may be conceded, for the purposes of this suit, that the deed, to the extent of the provision therein made by the husband for the wife, was a valid instrument.

I do not deem it necessary in this case to enter at large upon the discussion of the general question of the validity of deeds of voluntary separation between husband and wife. The books abound in discussions of this question by judges and law-writers, and the weight of authority would seem to be, that while Courts will give no countenance or aid to either party in carrying into execution an independent executory agreement to live apart, because such an agreement is considered as against public policy, yet they will generally uphold and enforce against the husband such conveyances and covenants as he may have made for the maintenance of his wife, provided the separation has actually taken place, or is contemplated as immediate, and the provision for the wife is made through the intervention of a trustee, and the parties have not subsequently come together again. Notes to *Stapilton* v. *Stapilton*, 2 Lead. Cas. Eq. (4th Amer. ed.), Part 2, top pages 1696 to 1702 inclusive; 2 Bright's Husband and Wife, 307; 2 Story's Eq. Juris. § 1418; 1 Bishop on Marriage and Divorce (5th ed.), Ch. 37, § 630 to § 656, inclusive, and the numerous authorities cited by these authors; *Walker* v. *Walker*, 9 Wall U. S. R. 744 and cases there cited.

The case of *Switzer* v. *Switzer*, 26 Gratt, 574, is the only case, as far as I know, ever before this Court, in which the validity of a deed of separation was drawn in question. In that case, the Court set aside the deed, on a bill filed by the wife, but expressly waived the decision of the general question, as to whether any deed of separation was valid to any extent, or for any purpose.

The question need not be decided now. I only state what seems to be the weight of authority; and as a *concessum* to the appellees, let it be that the deed is valid to the extent before indicated. This conceded, it is quite plain, that the estate acquired by the wife under the deed is a separate estate. It is not so declared in express terms. That was not necessary; no particular phraseology is necessary to create such an estate. As in all instruments to be construed, the controlling

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test is the intent of the parties. *Prout* v. *Roby*, 15 Wall U. S. R. 471, 474; *Bank of Greensboro* v. *Chambers* and others, 2 *Va. Law Journal* 469. The conveyance and assignment were by the husband for the wife's "express use, support, and maintenance," and the deed contains a covenant of indemnity to the husband against the wife's debts. Such a deed necessarily excludes the husband's marital rights, and of itself imports a separate estate of the wife in the property set apart to her use; otherwise, it would be ineffectual for the purposes manifestly contemplated. *Leake, trustee* v. *Benson and als.*, 29 Gratt., 153, 156; *Steel* v. *Steel*, 1 Ired. Eq. Re., 452, 455; 1 Bishop on Law of Married Women, § 838, citing *Gaines* v. *Poor*, 3 Met. Ky. Re., 503. In that case, the words were "in trust for Mrs. Gaines." Bullitt J. is reported as saying, "In the case before us, though the contract does not employ any of the usual technical words to create a separate use, yet, as it shews that a separation was intended between Gaines and his wife, and the property was conveyed to Poor, in trust for her, in view of such separation, it is clear a separate use was intended."

It may be further conceded, that Mrs. Harshberger had the power to charge this separate estate with the payment of any debt she might create, restrained, perhaps, from anticipating any instalment of the money secured to her use before they became due, and that when the services were rendered for which a claim is asserted, the amount subject to be charged exceeded the estimated value of the services.

And it may be further conceded, that if Mrs. Harshberger contracted any debt or liability to her daughter Mrs. Alger for services rendered, such debt or liability was a charge on the separate estate.

The liability of a married woman's separate estate for her engagements depends upon her intention to charge it. Her intention to charge the estate must be made to appear. It may sometimes be implied. For example, if she execute a bond or note, whether as principal or surety, she must be presumed to have intended a charge on her estate, since in no other way can the instrument be made effectual. *Burnett and wife* v. *Hawpe's Exor.*, 25 Gratt., 481; *Darnall and wife* v. *Smith's adm'r and als.*, 26 Gratt., 878.

If the husband and wife are living together, and the wife, having a separate estate, purchase goods for herself or her family, or contract for services, it is not necessarily implied that she intends a charge upon her estate. It is rather to be inferred, in the absence of proof, direct or circumstantial, to

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the contrary, that in making the purchase or contracting for the services, credit was given to the husband, and that she was acting as his agent. If, however, she is living apart from her husband, with a separate estate, and especially if, under articles of separation, it has been stipulated that the husband is not to be bound for her debts, it must be inferred, I admit, that she intended to charge her own estate.

In *Johnson* v. *Cummings*, 1 C. E. Green's Rep., 97, the Chancellor said, "The general principle is that a married woman is enabled in equity to contract debts in regard to the separate estate, and the estate will be subject in equity to the payment of such debts. In order to bind the separate estate, it must appear that the engagement was made in reference to, and upon the faith and credit of the estate. But where a married woman, living apart from her husband and having a separate estate, contracts debts, the Court will impute to her the intention of dealing with her separate estate, unless the contrary is shown." Notes to *Hulme* v. *Tenant*, 1 Lead. Cas. Eq. (4th Amer. ed.) part 2, top p., 760.

With the concessions already made—that the deed of separation, to the extent of the estate settled to the use of the wife was valid, that the estate thus created was the separate estate of the wife, that she had the power to charge it with her debts to the extent indicated, and that if she contracted any debt or liability to her daughter for services, she must be presumed to have intended such debt or liability as a charge on her estate, the case is narrowed down to the single question, did she ever contract any such debt or liability? I am free to say, that I do not think she ever did.

Soon after the separation of Harshberger and his wife, as before stated, he left the State and never returned. All of the daughters except Mrs. Alger, left soon after the termination of the war. Mrs. Alger remained, and also a granddaughter of Mrs. Harshberger. They all lived together, whether in the house of the old lady, or in Mrs. Alger's house, does not distinctly appear. For about two months before her death, Mrs. Harshberger was confined to her bed by sickness and was helpless, and for some ten or eleven months immediately preceding, she could not rise from her bed without assistance, but when assisted she could get up and walk about the house. Before that time, it seems, she went about and did light household work. Her daughter and grand daughter, the latter being some seventeen or eighteen years old when her grandmother died, waited upon and nursed her while sick, and during the period of her sickness,

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and before that time, the two attended mostly to the household work, the daughter taking the chief management and also directing the farming and out-door business. Some of the witnesses speak of her chopping fire wood, but Mrs. Bloser, who had the best opportunity of knowing, says, "that they had people hired to chop wood." Supplies were derived in common from the land of Mrs. Harshberger and the land owned by her daughters, these lands being, it would seem, sometimes kept and cultivated and at other times rented out.

The Commissioner allowed Mrs. Alger for her services, $4 per week for the last year of her mother's life, $1 per week for the year next previous, and 75 cents per week for the three preceding years, with interest on the several annual sums from the end of each year, making in the aggregate $550.41 as of the 19th November, 1877.

Although these charges run through the last five years of Mrs. Harshberger's life, she was never heard once to allude to any agreement or understanding of any sort looking to compensation being made for these services. Had it been contemplated that the services should be paid for, some arrangement, no doubt, to that end would have been entered into and would most probably have been spoken of. It might be reasonably expected, that there would have been some writing between the parties showing the contract, or at least some verbal agreement made or acknowledged in the presence of witnesses; or as the old lady had the power under the deed to dispose of the residuum of her property by will, she might have bequeathed it or a part of it to her daughter. Nor did Mrs. Alger ever assert any claim for these services during the life-time of her mother, or so far as appears, ever mention the subject to her mother; nor did she ever assert any such claim against her mother's personal representative, who qualified some three years after her mother's death and proceeded to collect what was due to the estate, nor did she assert a claim against any one until after the death of her father in the year 1875, and the qualification of an administrator of his estate in the year 1876, after which, she and her husband filed their bill in this case against that administrator, seeking a distribution of the estate and payment for the services aforesaid.

Thus, as it seems to me, there is not only no express contract for the services proved, but no contract can be justly implied. The evidence rebuts the presumption of any contract. The services were just such as any child, prompted by filial affection and impelled by a sense of duty, might be

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expected, under the circumstances, to render cheerfully and gratuitously to an aged mother; and I am of opinion, that the services in this case proceeded from these praiseworthy motives, and from no expectation, at the time they were rendered, either on the part of the mother or daughter, that they were to be paid for. As said by a Pennsylvania Judge in a like case, "they were the results of the relation, not the fruits of a contract." Agnew J. in *Leidig* v. *Coover's Ex'ors*, 47 Penn. St. Rep., 535.

As between parent and child (adult), the common law imposes no obligation upon either to support the other, not even to furnish necessaries in the strictest sense of that term; but there is a high moral duty on each to render the other all needful assistance. In England and in some of the American States, there are statutes enforcing that duty. 2 Kent's Com. 207, 208 (side pp). We have no such statute in Virginia.

Whenever, therefore, compensation is claimed in any case by either against the other for services rendered or the like, it must be determined from the particular circumstances of that case, whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of any express contract, the question always is, can it be reasonably inferred, that pecuniary compensation was in the view of the parties at the time the services were rendered; and the solution of that question depends on a consideration of all the circumstances of the case, the relation of the parties being one of these circumstances.

In *Williams* v. *Stonestreet*, 3 Rand., 559, a charge by a son-in-law for nursing his father-in-law in his last illness was rejected, Judge Cabell, delivering the opinion of the Court, saying, "that there was no contract, express or implied, and considering the relation between the parties, the services were such that no compensation ought to have been expected." See 2 Parsons on Contracts (5th ed.) 46; Schouler on Domestic Relations, 372; Bump on Fraudulent Conveyances, 257; and the numerous authorities cited by these authors, on the doctrine of presumption in cases like the present.

If there had been a contract for compensation in this case, it is difficult to perceive how the bar of the act of limitations, relied on by the administrator, could be avoided. In demands strictly legal, of which equity has jurisdiction concurrent with the law Courts, equity follows the law literally in applying the statute of limitations, acting, according to what would seem to be the better opinion, in obedience to

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the requirements of the statute; while in cases of claims of an equitable nature, it acts by analogy, that is, it applies the same bar to such claims that would be applied at law, under the statute, to legal claims of analogous character. To some cases this rule has no application. It is never applied to controversies between trustee and *cestui que trust* in cases of subsisting technical trusts, cognizable only in courts of equity; and in cases of concealed fraud or mistake, the act is not allowed to run except from the discovery of the fraud or mistake. *Rowe* v. *Bently and als.*, 29 Gratt., 756, 759, *et seq*, and cases there cited.

If Mrs. Alger had any valid claim, it accrued in the life-time of her mother, was a claim against her mother's seperate estate, and was therefore an equitable demand. It could have been enforced only in a court of equity. A legal claim of like character must have been asserted within five years from the time right of action accrued thereon. The running of the statute, commencing in the life-time of Mrs. Harshberger, would not have been suspended by her death, or because of the lapse of time before there was an administrator of her estate. 1 Rob. Prac. (new ed.,) 591 and cases there cited. And so, on principle, of the equitable demand against her estate.

Upon the death of Mrs. Harshberger, her estate was devolved by operation of law on her administrator, whose duty it was to administer it, and after the payment of funeral expenses, charges of administration, and all debts against the estate, to pay over the surplus to her surviving husband, who was her sole distributee under the law (Code of 1873, Ch. 119, §10), or after his death to his administrator. The administrator of Mrs. Harshberger, therefore, should have been made a party to this suit; but inasmuch as it appears that pending the suit he had his accounts as administrator stated and settled by a commissioner of the Court, and he then paid over the balance in his hands to the administrator of the husband, which balance was thus brought under the control of the Court in the cause, and this proceeding seems to have been acquieseed in by the parties, his presence as a party was, perhaps, not indispensable.

In any view I can take of this case, I am of opinion, that the decree of the Circuit Court is erroneous, and should be reversed, that the exceptions of the appellants to the report of the commissioner, allowing the claim of the appellees, Alger and wife, for the services of Mrs. Alger should be sustained, and that the cause should be remanded to the Circuit

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Court for further proceedings to be had therein, in order to final decree, in conformity with the views herein expressed.

The other judges concurred in the opinion of Burks J.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

JANUARY TERM, 1879.

TREVILLIAN'S EX'ORS *v.* GUERRANT'S EX'ORS.

1. Where an execution debtor, has *choses* in action due to him at the date of the delivery to the sheriff, of an execution against him, and on which a lien is created under § 3 of chapter 184 of the Code of 1873; although the execution is returned unsatisfied, and the lien is not enforced in the lifetime of the debtor, such lien is not affected by his death, but continues, and may be enforced thereafter on said *choses* in action.
2. *Quære.* As to property, capable of being levied on, but not levied on, in the lifetime of the judgment debtor?

From the Circuit Court of Goochland county.

The facts are sufficiently stated in the opinion of the Court.

Guy & Gilliam and *Hudnall* for the appellants.

W. B. Pettit for the appellees.

STAPLES J.—This is an appeal from a decree of the Circuit Court of Goochland county. There is but a single point in the case, and that will be better understood by a brief statement of the facts. William Holland recovered a judgment for money against John M. Trevillian in the County Court of Goochland; an execution on this judgment was sued out on the 22d of June, 1871, and made returnable to the following September rules. The execution was returned by the sheriff unsatisfied. At the time of its delivery to the sheriff, Trevillian, the debtor, had funds to his credit in the Union Bank of Richmond, and he was also the owner of a Richmond City bond, amounting to about one thousand dollars. Holland, the judgment creditor, died in September or October, 1871, and Trevillian died about the 1st of May, 1872—no

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effort having been made in the lifetime of either to enforce the lien of the execution against these choses in action. The controversy here is between the representatives of Holland on the one hand, maintaining the execution lien upon the funds in bank and the proceeds of the Richmond City bond, and the other creditors of Trevillian controverting the lien and claiming the funds as assets in the hands of the personal representatives, to be applied ratably to all the debts of Trevillian.

The sole question, therefore, to be decided, and the only one intended to be, is whether the lien of an execution upon the debtor's choses in action, not enforced in his lifetime, continues after his death, as against the other creditors of the debtor.

This question must be solved by the provisions of sections three and four of chapter 188, Code of 1849—Code of 1873, chap. 184, page 1179.

The first of these sections declares that a writ of *fieri facias*, in addition to the effect it has under chapter 187, shall be a lien from the time it is delivered to the sheriff to be executed upon all the personal estate of the debtor, although not levied on, nor capable of being levied on, under that chapter, except that as against an assignee of any such estate for valuable consideration, or a person making payment to the judgment debtor, the lien, by virtue of this section, shall be valid only from the time he has notice thereof.

The fourth section provides that the lien acquired under the preceding section shall cease whenever the right of the judgment creditor to levy the *fieri facias* under which the lien arises, or to levy a new execution on his judgment, ceases or is suspended by a forthcoming bond given and forfeited, or by a supersedeas or other legal process. It is conceded that under the third section the lien of an execution upon the debtor's choses in action is a legal lien, and continuing in its nature; that it does not cease with the return day, and that it is good against all persons except an assignee for valuable consideration without notice. This is settled by the decisions of this court in *Puryear* v. *Taylor*, 12 Gratt., 401, *Evan's trustee* v. *Greenhow et. als.*, 15 Gratt., 153, *Chanon & Co.* v. *Boswell*, 18 Gratt., 216.

It is insisted, however, that, under the fourth section, whenever the right to levy an execution, under which the lien arises, or the right to levy a new execution upon the judgment ceases from any cause, whether it be payment of the debt, the statutes of limitation, or otherwise, the lien given

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by the third section also ceases; and, inasmuch as the right to levy a new execution terminates with the death of the debtor, the lien acquired under the original execution necessarily terminates with it, if not enforced in the lifetime of the debtor.

The argument of the learned counsel proves too much; for if the lien acquired under the third section ceases whenever the right to levy ceases from any cause, then the lien is lost whenever the return day of the execution passes without a levy, for there can be no levy after the return day. It is manifest it was not the design of the fourth section to provide for any case in which the lien of an execution might be at an end. It was unnecessary to do so. It was unnecessary to declare that the lien should cease upon the payment of the debt, or upon its discharge or extinguishment by any of the causes which, under the general law, would have that effect. In such cases the lien would, of course, cease without any special enactment so declaring. The real purpose of the section was to provide that certain causes should have the effect of putting an end to the lien, which perhaps of themselves, without some such provision, would not have accomplished that object. In other words, whenever the right to levy ceased or was even suspended by the forthcoming bond, given and forfeited, a supersedeas, or other legal process, the lien acquired by suing out the execution also ceased. A forthcoming bond sometimes operates as a satisfaction of the debt and judgment thereon, and sometimes a mere suspension of the right to sue out other executions. When forfeited, it is a bar to any further proceedings on the original judgment until quashed, even though defective; so that, if it is never quashed, the right to levy a new execution upon the original judgment ceases—is gone forever. The creditor must rely upon the security afforded by the bond and the judgment thereon. On the other hand, if the forthcoming bond be quashed, as faulty, the creditor has his remedy against the officer if he is in default, or he may resort to his original judgment, and sue out executions thereon, precisely as if no bond had been taken. But in either event, by the express terms of the fourth section, the lien of the original execution upon the choses in action is gone; so that the word *ceases*, upon which counsel lays so much stress, has its appropriate place and signification in connection with the operation of the forthcoming bond, and the same thing is true with respect to the supersedeas and other legal process.

The Legislature, in taking away the creditor's lien in this

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class of cases, must have supposed it was giving him a security equally, if not more efficient in many respects. It is easy to understand, therefore, why provision was made for the termination of the lien after a forthcoming bond, taken and forfeited, supersedeas bond and process of a like character. But it is difficult to understand upon what principle the creditor is allowed to acquire a lien only to be defeated without affording him any other security. It can scarcely be supposed it was the purpose of the Legislature that the death of the debtor should deprive one creditor of the results of his superior diligence for the benefit of other creditors who have been less diligent. At common law, when an execution is delivered to the sheriff, he may proceed to levy and sell, nothwithstanding the death of the debtor, and it may fairly be presumed it was intended to make the lien of the execution equally effective with respect to the choses in action.

It is true that the statutes relating to the administration of estates prescribe that the assets shall be applied to the payment of certain debts in the order of priority, and after that ratably to all other debts. But it has never been supposed that these statutes were designed to interfere with *bona fide* liens obtained in the lifetime of the debtor. The personal representative holding the assets for the benefit of creditors or legatees, does so in subordination to all valid incumbrances thereon, whether voluntarily given by the debtor or obtained against him by process of law.

It has been argued that while the provisions of chapters 187 and 188 (Code 1849) were doubtless designed as a substitute for the old *ca. sa.*, the lien of an execution under the section already cited is not in its effects co-extensive with the remedy by *ca. sa.*, unless, and until the creditor has proceeded to enforce the lien in the lifetime of the debtor, by process of garnishment or interrogatories to the debtor. Now, it may be conceded that the lien of the *ca. sa.* was merely *inchoate*, and could not be enforced so long as the debtor chose to remain in prison. But when he was once discharged by taking the oath of insolvency, the lien became perfect and complete, and all his goods and chattels, rights and credits, became vested in the sheriff for the benefit of the creditor, and neither the death of the debtor nor any other event could defeat this lien without the consent of the creditor. The revisors, in their report, say that chapter 188 was intended to provide for the creditor as efficient remedies as he had when the debtor was discharged by *taking the oath of insolvency.*—2 Rev. Rep., 926.

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In *Puryear* v. *Taylor*, 12 Gratt., 408, Judge Samuels, after quoting the language just given, said: "The revisors accordingly reported a section of the statute giving the creditor the remedy indicated by them, and the General Assembly, in substance, adopted the suggestion which is found embodied in section third, chapter one hundred and eighty-eight." And in *Chanon & Co.* v. *Boswell*, 18 Gratt., 225, the President, speaking for the whole court, said of the lien acquired under this third section: "In its nature, it is more like the lien for which, in part, it was intended as a substitute, and which a creditor formerly acquired when his debtor took the oath of insolvency."

These authorities settle it, beyond question, that the lien acquired under sections 3d and 4th of chapter 188 (Code 1849) upon the debtor's choses in action, is, in its nature, substantially the same as the lien of the *ca. sa.* after the debtor had taken the oath of insolvency—a lien complete and unconditional, and in no manner impaired by the death of the debtor. The remedies afforded by the other sections of the same chapter (188) were designed simply to enforce this lien of the execution. The lien itself is as complete and perfect without them as with them. It continues in full force, although the creditor should never resort to those remedies. This is fully settled by the case of *Chanon & Co.* v. *Boswell* already cited. Speaking of the interrogatories to the debtor, and the process of garnishment, the court says: "These proceedings do not give a lien, general or specific. They are merely a means founded by law for the enforcement of a legal lien which already exists." It may, therefore, be safely assumed that the lien of a writ of *fieri facias* upon the debtor's choses in action, although not asserted in the lifetime of the debtor or creditor, is not defeated or impaired by the death of either or both, and this lien may be enforced in a suit for the administration of the assets, or by the remedies provided in the same chapter, asserted in the proper court. The inconveniences which the learned counsel supposes will result to the personal representative from the existence of this lien, are, in a great degree, imaginary. An examination of the records will generally shew the executions in force against the decedent estate. Besides, the personal representative is not compellable to pay any debt in the absence of a specific lien until after the lapse of twelve months from the date of his qualification; and if after that period he makes such payment, he cannot thereby be held personally liable for any debt or demand against the decedent of equal or superior dignity, whether it be of record or not, unless before such payment

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he shall have notice of such debt or demand. Code of 1873, chap. 126, sec. 26. The various provisions authorizing the accounts to be laid before a commissioner for settlement, and creditors and others interested to be summoned to prove their claims, will generally secure the presentation of all demands against the estate. However this may be, the argument, *ab inconvenienti*, is one properly addressed to the Legislature, and not to the courts. For these reasons, we are of opinion there is no error in the decree of the Circuit Court, and the same must be affirmed.

The other judges concurred.

DECREE AFFIRMED.

NOTE.—In *McCance, survivor,* v. *Allen's ex'x, &c.*, decided in the Chancery Court of Richmond since the decision of the above case, Judge Fitzhugh has held, that the principles of this case apply as well to property *capable of being levied on*, but not levied on, in the lifetime of the judgment debtor, as to *choses in action.*—ED.

SUPREME COURT OF APPEALS OF VIRGINIA.

JANUARY TERM, 1879.

NOBLE AND WIFE *v.* CITY OF RICHMOND.

1. A municipal corporation, which, by its charter, has the power to lay out, improve, light and keep its streets in order, is liable in damages at the suit of an individual, who sustains injuries by reason of the neglect of said corporation to keep its streets in a proper and safe condition.
2. But this rule only applies to *municipal corporations*, proper, and not to *quasi* corporations, such as counties, townships and New England towns, unless they are so declared to be liable by some statute.
3. The grant of power in the charter of a city to the council to lay out, improve, light, &c., its streets, is a grant to the corporation, and is of such a character as to prevent its exercise by any other person or body.
4. The action cannot be maintained solely on the defects or want of repairs in the street or sidewalks, but the plaintiff must allege and prove that the corporation had notice of such defects (which notice may be implied), and that he was injured, either in person or property, in consequence of such defects in such street or sidewalk.

This was an action of trespass on the case, brought in the Circuit Court of the city of Richmond, by Wm. M. Noble and Olivia E. his wife, against the city of Richmond, for alleged injuries sustained by said Olivia E. by falling in a hole in the sidewalk of one of the streets of said city, while going to church at night, there being no light near said hole.

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The damages were laid at $5,000, and the plaintiffs averred notice to the city of the dangerous condition of the hole in the sidewalk, and its neglect in repairing it long before the accident. The defendant, by counsel, demurred to the declaration, on the ground that it was not liable in such an action, and the Circuit Court sustained the demurrer. The plaintiffs then applied for, and obtained, a writ of error to that judgment.

John S. Wise and *James Lyons, Jr.*, for the plaintiffs.

A. M. Keiley for the defendant.

ANDERSON J. This case was brought up upon a demurrer to plaintiffs' declaration, and raises the question as to the civil liability of municipal corporations for injuries to private persons, caused by defective and unsafe streets and sidewalks.

The city of Richmond—the defendant—is a municipal corporation, chartered by an act of the Legislature of Virginia. Among the many important powers vested by the charter in the Council, is the power over the streets and public alleys of the city—to close or extend, widen or narrow, lay out and graduate, pave and otherwise improve them; to have them properly lighted and kept in good order; they may build bridges in and culverts under the streets, and may prevent or remove any structure, obstruction or encroachment over or under, or in a street or alley, or any sidewalk thereof. And they are invested with power to prevent the cumbering of streets, avenues, walks, public squares, lanes, or bridges in any manner whatever.

The grant of these powers to the City Council is a grant to the corporation (16 New York R., p. 170. Opinion of Selden J. in *West* v. *The Trustees of the Village of Brockport.* In note), and the grant to the corporation is of a character to exclude its exercise by any other. The City Corporation, by its charter, has the exclusive power to keep the streets and sidewalks in repair and safe condition, and if they neglect to do it, there is no other who has the power to do it, and so it will not be done at all. The terms of the grant, therefore, imply a *duty* on part of the defendant to keep the streets and sidewalks of the city in good order and safe condition. And so, "where the duty to repair is not specifically enjoined, and an action for damages, caused by defective streets, is not expressly given (it is said, 2 Dillon on Municipal Corporations, § 789, p. 917, ch. 23), still both the duty and the liabil-

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ity, if there be nothing in the charter or legislation of the State to negative the inference, has often, and, in our judgment, properly been deduced from special powers conferred upon the corporation to open, grade, improve and exclusively control public streets within their limits, and from the means which, by taxation and local assessments, on both, the law places at its disposal to enable it to discharge this duty."

The means to perform the duty of maintaining the streets, in a safe condition, by authority to levy taxes or impose local assessments, is conferred upon the defendant by its charter. If this view is correct, it is undoubtedly a duty devolving upon the corporation of Richmond city—the defendant—to keep its streets and sidewalks in repair and in safe condition. If it neglects to keep any of them in repair and in safe condition, by reason whereof private persons, without fault on their part, have sustained injuries, is the city liable in a civil action for damages?

The books distinguish between municipal corporations proper and *quasi* corporations, such as counties and townships, and New England towns. It is almost universally considered that the latter are not liable to a civil action for damages occasioned by defective roads and bridges under their control, unless so declared by statute. There is no *common law obligation* upon them, it is held, to repair highways or bridges within their limits, and they are only obliged to do so by force of the statute. Even when the Legislature enjoins on them the duty to make and repair roads, &c., and grants the power to levy taxes therefor, it has generally been regarded as a public and not a corporate duty, and these political subdivisions of the State, on whom the duty is imposed, as State agencies, are not liable to a civil action for damages caused by the neglect to perform the duty, unless the action is expressly given by statute. But in a recent case (*Bigelow* v. *Randolph*, 14 Gray., Mass. 541), Mr. Justice Metcalf says: "This rule of law, however, is of limited application. It is applied, in the case of towns, only to the neglect or omission of a town to perform those duties which are imposed on *all* towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it at its request. In the latter cases a town is subject to the same liabilities, for the neglect of those special duties, to which private corporations would be, if the same duties were imposed or the same authority con-

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ferred on them, including their liability for the wrongful neglect as well as the *wrongful acts of their officers and agents.*" And this comports with the reason which has been assigned for the distinction betwen these *quasi* corporations and corporations proper—that is, municipal corporations—why the former are exempt, whilst the latter are not, from liability to damages in civil actions for injuries to private persons, caused by defects in the public highways, streets or sidewalks within their respective limits—to wit: that the duties are imposed on the former by the mandate of the law, without their assent, and the authority conferred on them as agents of the public without special advantage to them, not by their request; whilst upon the latter the power is conferred by their request, which may be wielded for their advantage, and the duties are voluntarily assumed by them, in consideration of special and valuable benefits, which, as corporations, they derive therefrom, and other privileges and franchises conferred by their charter. As was said in *Meares* v. *Commissioners of Willmington* (9 Iredell, 80), "when the sovereign grants power to a private corporation to construct a railroad, the grant is made for the public benefit, and is accepted because of the benefit which the corporation expects to derive by making money; so when the sovereign grants power to a municipal corporation to grade the streets and keep them in repair, the grant is made for the public benefit, and is accepted by the corporation for the benefit which it expects to derive by making it more convenient for the citizens—the members of the corporation—to pass and repass in the transaction of business, and by the greater inducements it holds out to others to frequent the town, and thereby add to its business. The stockholders in the one case and the citizens in the other derive special benefits which are not shared by the citizens of the State generally."

It is a general principle of law, and it is founded in reason, that where one suffers an injury by the neglect of another to perform a duty, in the performance of which he is interested, he has against him a right of action. This doctrine applies not only to individuals, but to private corporations aggregate, and it obliges such corporations to respond in a private action, though the action be not given by statute, for the damages which another has sustained by reason of its neglect or default to perform any corporate duty. *Riddle* v. *Proprietor of Locks and Canals, &c.*, 7 Mass., 169; *Wild* v. *Proprietors, &c.*, 6 Greenlf., 93; *Ward* v. *Turnpike Co.*, Spencer (N. J.), 323, 325; *Parnaby* v. *Canal Co.*, 11 A. & E., 223.

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The principle which lies at the basis of the decision in *Henley* v. *Mayor, &c.*, of *Lyme Regis* (5 *Bing.* 91; 3 *Barn. & Adolph*, 77), as stated by Mr. Justice Selden in *West* v. *The Trustees of the Village of Brockport* (16 New York R., 163 in note), and of the series of English cases, upon authority of which that case was decided, is, "That whenever an individual, or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such corporation or individual is liable, in case of neglect to perform such covenant, not only to a prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases, the contract made with the sovereign power, is deemed to enure to the benefit of every individual interested in its performance." In *Sawyer* v. *Com.*, 17 Gratt., Joynes J., speaking for the whole Court, announces the same principle, *i. e.:* "That when the authority, though for the accomplishment of objects of a public nature, and for the benefit of the public, is one, from the exercise of which the corporation derives a profit; or where the duty, though of a public nature and for the public benefit, may fairly be presumed to have been enjoined upon the corporation in consideration of privileges granted to and accepted by it, the exemption does not apply," and the reason he assigns, why the corporation is not exempt from liability in a civil action, though differently expressed, is substantially the same; that "the corporation is not acting merely as an agent of the public, and with a view solely to the public benefit, but that in the former (where it derives a profit), it is pursuing its own interest and profit, and in the latter is executing a contract, for which it has received a consideration." This Court, also, in *City of Richmond* v. *Long's adm'r*, recognized the doctrine, that where a municipal corporation acts in the exercise of powers, or the discharge of duties, in nowise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common law liability for the acts of its servants; and it does not matter, as was once intimated, if there be the absence of special rewards or advantages, it being considered and allowed that such gratuitous function is to be regarded as a burthen accepted under the charter in consideration of its privileges."

The case of *Henley* v. *The Mayor & Burgesses of Lyme Regis*, *supra*, went from the Common Pleas, through the King's Bench, to the House of Lords. And the counsel for the

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plaintiff in the House of Lords contended that every breach of a public duty, or neglect of what the party is bound to perform, working wrong or loss to another, is injurious and actionable, a principle hereinbefore alluded to, and cited *Sutton* v. *Johnston* (1 T. R., 784), and *Russel* v. *The Men of Devin* (2 T. R. 661). But it appears that the decision was not upon that ground, from the opinion of Park J., the only opinion given in the House of Lords, who, after quoting the charter, said, "Now, these words are undoubtedly an expression of the King's will, that the corporation shall repair, but they are not the less a consideration on that account; on the contrary, they show the consideration for the grant, the motives inducing the King to make the grant, and consequently the terms and conditions on which the grant was to be accepted."

Mr. Justice Selden, in *West* v. *Rrockport*, *supra*, very truly remarks, "That such charters are never imposed upon municipal bodies, except at their urgent request. While they may be governmental measures in theory, they are, in fact, regarded as privileges of great value, and the franchises they confer are usually sought for with much earnestness before granted. The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may, with propriety, be considered as affording ample consideration for an implied undertaking on part of the corporation, to perform with fidelity the duties which the charter imposes."

Mr. Justice Cooley, in a dissenting opinion in *Detroit* v. *Blackeby*, 21 *Mich.*, says, "The New York Courts have invariably held that when the people of the municipality accepted the charter which they thus solicited, a contract was implied on their part to perform the corporate duties. They have always denied that, in this respect, there was any difference between a municipal corporation and a private corporation or private individual, who had received from the sovereignty a valuable grant, charged with conditions," and he cites numerous decisions of the New York Courts, which fully sustain the assertion. He cites also the decisions of other States—of North Carolina, Pennsylvania, Indiana, Alabama, Connecticut, Illinois, Maryland and Wisconsin, and the two decisions of this Court, before referred to. He also refers to decisions of the Supreme Court of the United States. These cases, and others which might be cited, though all of them may not go to the full extent of his proposition, I think, fully maintain the doctrine, that municipal corporations are liable in civil actions for neglect of duties, in cases like the

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present, to a private citizen, who has been injured by such neglect. The doctrine of *Henley* v. *Mayor, &c.*, of *Lyme Regis*, as applied in *West* v. *Rockport*, Mr. Cooley says, is denied in no State, except in New Jersey, and in that State, the authorities to which he referred, seem to have been passed over in silence, and perhaps were not observed.

In the recent case of *Barnes* v. *District of Columbia*, 1 Otto, p. 551, the Supreme Court of the United States maintained the liability of municipal corporations to civil action for injuries to a private individual caused by their neglect to keep the streets or sidewalks in repair. Mr. Justice Hunt, in delivering the opinion in which a majority of the Court concurred, says, that the decisions holding the doctrine "that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them; and cites many of them, including the two Virginia cases cited *supra*. *Detroit* v. *Blackeby*, *supra*, is referred to and disapproved of, whilst the conclusions of Mr. Justice Cooley, in his dissenting opinion, are maintained.

But no one can maintain an action against the city, grounded solely on the defect or want of repair of the street or sidewalk, but he must allege and prove that the corporation had notice of the defect or want of repair—which notice may be implied—and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the street or sidewalk. *Weightman* v. *The Corporation of Washington*, 1 Black's R., p. 52. In this case, the defect in the sidewalk, and the injury caused thereby to the plaintiff, and that the Corporation had notice of it, are all averred in the declaration, and must be taken to be true on the demurrer.

For the reasons stated, and upon the authorities cited, we are of opinion that the plaintiffs, upon the case made by their declaration, were entitled to their action against the defendant for damages, and that the Court erred in giving judgment for the defendant. We are, therefore, of opinion to reverse the judgment with costs, and to remand the cause to be proceeded with, in conformity with the principles herein declared.

CHRISTIAN, STAPLES and BURKS JJ's. concurred.

MONCURE P. dissented.

JUDGMENT REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

KING'S EX'ORS *v.* MALONE AND ALS.

Daniel Malone, a few days before his death, made a deed by which, in consideration, as expressed in the deed, of one thousand dollars, he conveyed to his children, Ro. G. and Ella V. Malone, four hundred acres of land. Daniel Malone's estate proved to be insolvent, and John J. Crawford and C. W. Coker, two of his creditors, filed a creditor's bill against Ro. G. and Ella V., to set aside the deed to them, as having been made without consideration deemed valuable in law, and with intent to hinder, delay and defraud the creditors of said Daniel Malone. Robert G. and Ella V. Malone answered the bill, insisting that the deed was for valuable consideration, &c. Robert G. claiming that his father was indebted to him for services in an amount greater than $1500; and Ella, that he owed her for money loaned him at different times, more than $500. Whilst this suit was pending, Robert G. and Ella V. conveyed to their counsel, Jones & Bernard, one undivided third of the land conveyed to them by the deed from their father, in consideration of services rendered, and to be rendered in said suit. With this condition, "this deed is intended to pass no title whatsoever to said parties of the second part, unless they succeed in establishing the title of said parties of the first part to the tract of land hereinbefore mentioned." This case was decided in favor of the defendants.

Afterwards, Wiley King, another creditor of Daniel Malone, deceased, filed his bill against Robert G. and Ella V. Malone, and Jones & Bernard, charging that the deed to said Robert G. and Ella V. was without valuable consideration, and intended to hinder, delay and defraud the creditors of said Daniel Malone, and that the defendants had notice of the fraud. All of the defendants denied notice of any intention on the part of Daniel Malone to defraud his creditors. Robert G. and Ella V. relied on the same grounds, stated in their answers in the former case, and Jones & Bernard insisted that the conditions on which their deed was made had been performed, and that they were purchasers for value. The statements of Robert G. and Ella V. about the consideration in the deed were not responsive to the bill, and there was not proof sufficient to sustain them. The daughter offered none. The son proved that he lived with his family, consisting of a wife and child, with his father, and that he did work for him in the capacity of manager, &c., but there was no proof of any contract between him and his father as to the price at which he was engaged, and much of the evidence tended to shew that his services were worth no more than the expenses of his family, borne by his father. There was no debt recognized by the father as existing to be due either to him or his daughter at the time of the execution of the deed, and but for the suggestion of a bystander at the time of the execution of the deed, that the consideration had better be a monied one, and that it had better be put one thousand dollars, it would, in all probability, have been put in consideration of "love and affection."

HELD:

I. That upon the evidence in this cause, the deed to Robert G. and Ella V. was made without reference to any indebtedness of their father, Daniel Malone, to them, if any such existed, but upon a consideration not deemed valuable in law, and was therefore void as to the creditors of said Daniel at the date of said deed.

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II. That the condition annexed to the deed to Jones & Bernard was not performed by the decree in favor of Robert G. and Ella V. in the suit of Crawford & Coker, but as creditors of Daniel Malone, not parties to that suit, were not bound by the decree, the condition extended to any other suit brought by such creditors, and as in this case, the court held the deed to Robert and Ella void as to the creditors of Daniel Malone, Jones & Bernard, had no title to the undivided third of the land under the deed to them.

From the Circuit Court of Dinwiddie county.

The facts and points decided sufficiently appear in the head notes.

Collier & Budd, for the appellants.

Jones & Bernard, Samuel D. Davies, and Gregory, for the appellees.

BURKS J. delivered the opinion of the court, in which *Moncure P.*, *Christian J.* and *Staples JJs.* concurred.

Anderson J. dissented.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

HANNAH *v.* CLARKE, &C.

For many years Erwin owned a grist mill and Hannah a saw-mill, both of which were propelled by water power, the water taken from the same dam, and when there was not sufficient water in the dam to propel both, the grist-mill had the preference in the use of it. In 1851, Erwin sold the grist mill, with the preference to a certain quantity of water, to Clarke, Miller & Hall, and they changed the grist-mill to a paper-mill, and changed the water wheels from breast to overshot wheels, which required taking the water from the dam on a higher level. Soon after the fitting up of the paper-mill, Clarke, Miller & Hall filed their bill against Hannah and Erwin, alleging that Hannah was running his saw-mill so as to interfere with the working of their paper mill, and praying for an injunction to restrain him from so doing, and Hannah replied that Clarke, &c., were using more water in running their paper mill than was used in running the grist-mill, or conveyed to them by Erwin. The Circuit Court dismissed the bill, as to Erwin, and perpetuated the injunction as to Hannah, but without prejudice to his right to sue at law, &c., and thereupon Hannah applied for and obtained an appeal from said decree. HELD:

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1. That the relative rights of the respective proprietors of the grist and saw-mills, to the water power, continued the same after the sale to Clarke, &c., that they were before the sale.
2. Clarke, &c., had a right to convert their grist-mill into a paper-mill, and were entitled to the same priority over the owners of the saw-mill in the use of the water power for the operation of the paper-mill, to which they were previously entitled in the use of the water power for the operation of the grist-mill; but to no greater extent.
3. The case is one for the equitable jurisdiction of the court, and the court should proceed to ascertain, define and settle the rights of the parties to the use of the said water power.

From the Circuit Court of Augusta county.

Hugh W. Sheffey, for the appellant.

—— ——, for the appellees.

MONCURE P. read the decree of the court, in which the other judges concurred.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

JANUARY TERM, 1879.

YOUNG AND ALS. *v.* DEVRIES AND ALS.

At the August term, 1866, of the County Court of Loudoun, Devries & Co. obtained a judgment against Tazewell Lovett for $1.305.44, with interest and costs, which was docketed November 15, 1866. The real and personal estate of the judgment debtor having been exhausted, and the said judgment only partially satisfied, proceedings were instituted to subject the following real estate in the hands of vendees of the said judgment debtor, viz.: Lot No. 1, containing five acres, three roods and eight poles, sold by Lovett and wife to Frederick Miller, and taken possession of under a *written contract*, dated July 25th, 1854, but never recorded. The *deed* to same was executed January 9, 1868, and recorded January 10, 1868.

Lot No. 2, containing ten acres, sold by Lovett and wife to Ellen Kelly and others, and taken possession of under a *written contract* dated February 25, 1857, but never rec rded. The deed to this lot was executed January 25, 1867, and recorded March 8, 1867.

Lot No. 3, containing five acres, sold by Lovett to Mary Kelly and others, and taken possession of under a *written contract* dated March 22, 1856, but never recorded. The *deed* to this lot was dated November 27, 1866, acknowledged January 12, 1867, and recorded January 23, 1867.

Lot No. 4, containing 216 acres, 2 roods and 17 perches, was sold to Abram Young by Robert Morris, who had purchased from Lovett about a year or two before, and was put in possession under a *parol* contract; having paid part of the purchase-money, he then sold to Young, who was put between Young and Morris, and the purchase-money was paid under a

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written contract. The *deed* for this was made and acknowledged directly from Lovett and wife to Young, February 2 1868, but not recorded until December 17, 1866.

Lot No. 5, containing 29½ acres, was sold to William Brislau and Michael Brislau, part in March, 1859, and the residue in 1861. They took possession at once under a *parol* contract, and paid the purchase-money. But the deed was not executed to them by Lovett and wife until December 13, 1866, and recorded on the 14th December, 1866. The Circuit Court held that all five of these lots of land were liable to the lien of the appellee's judgment obtained at the said August term, 1866, and docketed November 15, 1866, and decreed a sale of said lands in default of payment of the amount due on said judgment; and from this decree, Young, Miller, Ellen Kelly, Mary Kelly, Brislau and others, the vendees of said lots of land, appealed. HELD:

1. Lots Nos. 1, 2 and 3 having been sold, and taken possession of, by the parties respectively under *written* contracts, which were never recorded as required by § 5 of chap. 114 of the Code of 1873, and the deeds to the same having been recorded subsequently to the date of the judgment, and there being no evidence of any pre-existing *parol* agreements, they were properly subjected to the lien of said judgment, citing *Edson* v. *Huff*, 29 *Gratt.*, 338; *March, Price & Co.* v. *Chambers*, 2*d Va. Law Journal*, 437.
2. The purchasers of Lots Nos. 4 and 5 having been let into possession under *parol* contracts, having paid the purchase-money, and being in a condition to call upon the vendor for specific execution before the judgment was rendered, they did not hold, under titles, which come within the purview of the registration acts, but under equitable titles, which could not be affected by said acts, and they were, therefore, not liable to the lien of said judgment, although the deeds to the same were not recorded until subsequently to the obtaining and docketing of said judgment. citing *Floyd* v. *Harding*, 28 *Gratt.*, 401; *Withers* v. *Carter*, 4 *Gratt.*, 408; *Briscoe* v. *Ashby*, 24 *Gratt.*, 454; *Borst* v. *Nalle*, 28 *Gratt.*, 423; *Shipe, Cloud & Co.* v. *Repass*, 28 *Gratt.*, 715.

From the Circuit Court of Loudoun county.

The facts and points decided are sufficiently stated in the head-notes for a proper understanding of the case.

Henry Heaton for the appellants.

P. Harrison for the appellees.

CHRISTIAN J. delivered the opinion of the court, in which MONCURE P., STAPLES and BURKS JJs. concurred. ANDERSON J. dissented.

So much of the decree of the Circuit Court as enforces the lien of the judgment against Lots Nos. 1, 2 *and* 3 *affirmed, and that portion which enforces it against Lots Nos.* 4 *and* 5 *reversed.*

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SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

MOSS AND ALS. *v.* DAVIS AND ALS.

In 1869, P. A. Davis and William A. Moss formed a co-partnership for the purpose of merchandizing at Buckingham Courthouse, Va. On the 21st January, 1870, Davis came to Richmond and executed a deed of trust on the stock of merchandize in the store at Buckingham Courthouse, to Albert Ordway, trustee, to secure to sundry parties, not named in the deed, a negotiable note executed by Davis for the sum of $2,750, bearing even date with the deed. This deed was not admitted to record in Buckingham until January 3, 1871. Moss did not join in the note or the deed, and neither he, nor any other party, so far as the record discloses, except Davis and Ordway, knew of the existence of the deed until it was recorded in Buckingham. The firm continued to carry on the business after the execution of the deed as formerly. No inventory of the stock conveyed was annexed to the deed. No account was kept of the sales or money collected, nor does it appear that any was ever demanded by Ordway and those he claimed to represent. Between the date of the deed and its recordation, Davis purchased goods in Richmond to the amount of at least $3,000, and shortly thereafter to the amount of three or four thousand dollars. A large portion of these goods were put in the store at Buckingham Courthouse, and mingled with those contained in the deed of trust to Ordway. Ordway swears that he did not know Moss was a member of the firm. On a bill filed by Moss to set aside this deed, and for a proper administration and distribution of the social assets of the said firm, the Circuit Court of Buckingham held that the deed to Ordway was valid, and that the holders of the note thereby secured were entitled to priority out of the funds derived from the sale of the stock in the store of said Moss & Davis.

On an appeal to the Supreme Court of Appeals. HELD:

The deed from Davis to Ordway is fraudulent and void, and the creditors secured thereby must share *pro rata* with the other creditors of the firm of Davis & Moss in the distribution of the fund derived from the sale of the assets of said concern.

Quœre. Can one partner, without the consent of his co-partner, assign the entire assets of the firm to a trustee for the benefit of creditors?

The facts and points decided sufficiently appear in the head-notes.

Camm Patteson, G. J. Hundley for the appellants.

Guy & Gilliam for the appellees.

STAPLES J. delivered the opinion of the court, in which the other judges concurred.

DECREE REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

JONES *v.* THE COMMONWEALTH.

Junius E. Jones and Royall Haxall were jointly indicted for a conspiracy for "unlawfully devising and intending one Sally Cousins to charge and convict of the larceny of a certain lot of railroad iron," and for which offence said Cousins was duly tried and acquitted. The accused pleaded not guilty, and Jones moved the court to be tried separately, which motion the court overruled. The jury convicted both, and assessed Jones' fine at ten dollars, and Haxall's at five dollars. Jones moved the court to set aside the verdict and grant him a new trial, which motion the court overruled. Haxall announced that he had nothing further to say, and thereupon judgment was entered against both for the fine and costs. It seems that Jones was a watchman at the Danville Railroad shops, and that he said the company had been losing old iron, &c., and he was anxious to catch the parties who had stolen it, and wanted some one to aid him. He went to a witness, named Cooper, and asked him if he knew of any negro who would "betray his color." Cooper told him of Haxall, who, he said, was a great scoundrel, but that he might answer his purposes. Jones thereupon found Haxall; that having taken a drink, they were seen talking, and that night were seen together at the Danville shops in Manchester. Haxall asked for some old samples of iron, and was given two old fish-plates by Mr. Phaup, having charge of such property; that about 8½ o'clock that night Haxall went to the house of Sally Cousins, in said city, with a bag under his arm, met her in the yard, and asked her if she had any iron, old rags, &c., for sale? She told him to go away; that she did not deal in such things. Pieces like the two fish-plates were found in Cousin's yard, but it was proven that she did not put them there, and no knowledge of how they came to be there was brought home to her by the testimony. About 11 o'clock the same night, Jones and Haxall appeared before the Mayor, and swore out a warrant for the arrest of Cousins for stealing iron from the Danville Railroad Company, and Jones and Haxall were the only witnesses summoned against her; that on her examination, Haxall so contradicted himself and broke down, as to cause a general laugh. Cousins was discharged on account of the insufficiency of the evidence against her, and a warrant was then issued against Haxall for *larceny*, on complaint of the Chief of Police of said city. Haxall was arrested and sent on to the Hustings Court for larceny, and bailed in the sum of $100, with Jones and another as his sureties. Two days thereafter, while Haxall was on bail, he stated to the Chief of Police, in the absence of Jones, that he did not steal the iron, but that Jones gave it to him to put where it was found, and gave him drinks and promised to pay him for it, and that he did put it there as he had promised Jones to do; that he was seen with a half-dollar, which was unusual for him. After this statement by Haxall, Jones and and Haxall were arrested and sent on to the Hustings Court for the conspiracy. It was further proved by Phaup that Haxall refused to tell Jones who he suspected when he asked for the samples of old iron, and

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that Jones wanted Phaup to remain with him, but he declined to do so, stating as his reason that it would cost the railroad company more for him to be detained in court, than it would profit by detecting the thief. Jones objected to the admission of the declarations of Haxall made in his absence, but the court admitted them on the joint trial, and, on the motion of Jones instructed the jury as follows:

"The court instructs the jury, that in passing upon the guilt or innocence of the prisoner, J. E. Jones, they must discard entirely from their consideration the declarations of Haxall, they having been made by him after the conspiracy charged was completed and ended; and also that they cannot find either party guilty of the conspiracy charged in the indictment, unless they believe, from the evidence, that there was an agreement of mind between the two to do and perform the matters and things as charged in said indictment."

Jones obtained a writ of error, and assigned the following as the grounds of error in the judgment of the Court below:

1st. To the court's refusal to allow him a separate trial.

2d. In admitting the statement made by Haxall to Lipscomb, in the absence of Jones.

3d. In overruling his motion for a new trial on the ground that the verdict was contrary to the law and evidence. HELD:

1. Where two persons are jointly indicted for a misdemeanor, they cannot claim the right to be tried separately, citing *Com'th* v. *Lewis & Deveney*, 25 Gratt., 938.
2. On a joint trial of an indictment against several for the same offence, any legal evidence which tends to prove the guilt of either of the defendants of the crime charged, is admissible evidence on said trial, though it may not tend to prove the guilt of any of the other defendants. In such cases, the court should instruct the jury which of the defendants the evidence does, and which it does not, affect.
3. On the trial of an indictment against several for a conspiracy, declarations made by one defendant out of the presence of the rest, in regard to the subject matter of the indictment, are admissible evidence of the charge against all of the defendants; provided there was, in fact, a conspiracy as charged in the indictment, and that the declarations were made in the course of the conspiracy, or the execution of the purposes of the same. But such declarations so made are inadmissible against any except the one making them, either if there was no conspiracy at all, or if said declarations were made after the conspiracy charged was completed.
4. While it is a general rule, that on a conviction of several defendants on a joint indictment for a conspiracy, the reversal of the judgment and award of a new trial as to one of the defendants, must operate alike as to all, there may be exceptions to the rule, and this case is one within the exception.
5. A case where, on a joint indictment against two for a conspiracy, the judgment is set aside and a new trial granted as to one of the defendants, without affecting the judgment against the other. The facts are not sufficient to warrant the verdict of the jury, and for that reason the judgment must be set aside, and a new trial awarded to the plaintiff in error.
6. The facts are not sufficient to warrant the verdict of the jury, and for that reason the judgment and a new trial awarded to the plaintiff in error.

From the Hustings Court of the city of Manchester.

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The facts and points decided are sufficiently stated in the head-notes.

H. H. Marshall, S. M. Page for the plaintiff in error.

The Attorney-General for the Commonwealth.

The other judges concurred in the opinion of MONCURE P., except CHRISTIAN J., who dissented. He was of the opinion that the reversal of the judgment against one on a joint indictment, for a conspiracy against two, necessarily operated as a reversal against both.

JUDGMENT REVERSED, *but not to affect the judgment against Haxall.*

SPECIAL COURT OF APPEALS OF VIRGINIA.

STOVALL, TRUSTEE, &C., *v.* HARDY AND OTHERS.

I. A vendor sells a tract of land, puts the vendee in possession, but retains the title to the whole tract to secure a part of the purchase money. This vendee then sells a portion of said tract to another on credit, puts him in possession, takes his bond for the purchase money, but having no title, attempts to make none. The *first* vendee then dies, and his vendor and another, qualify as his executors; the bond of the *second* vendee for the land purchased by him is assigned, with his knowledge, to one of the distributees of the estate of the *first* vendee (his vendor) by the executors, who, having paid the whole purchase money to the *first* vendor for the whole tract, then (November 11th, 1863), unite in a deed *directly* to the *second* vendee, for that portion of the land purchased by him, with knowledge of the out standing unpaid bond. A judgment was obtained on this bond April 11th, 1866, and duly docketed April 20th, 1866, and in January, 1868, a bill was filed to subject the land, for which this judgment was, a portion of the purchase money, to its payment, asserting a *vendor's lien* thereon. On the 12th June, 1866, the said *second* vendee conveyed his whole property to a trustee for the benefit of creditors named in the deed. At June Rules, 1869, another bill was filed against the said *second* vendee, his trustee and others, by another judgment creditor of the *second* vendee to enforce his judgment lien. On the 15th September, 1869, a decree was rendered in the two suits which had been consolidated for an account of the liens and their priorities; and three days thereafter, another decree was rendered for the sale of the said *second* vendee's real estate (no objection was made to the decree for sale before the report of liens and priorities was made). There were a large number of judgments of the same class with that of the 11th April, 1866, for which a vendor's lien was claimed, amounting to more than the value of the whole real estate to be sold. The Circuit Court held that the holder of the said judgment of the 11th April, 1866, had no claim in equity to a *vendor's* lien for the amount of his jndgment and dismissed his bill as to this claim. HELD:

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This was *erroneous.* The conveyance by the *first* vendor, and as executor of the *first* vendee, to the *second* vendee of the land purchased by him, and the acceptance of the same by said *second* vendee, without the knowledge or assent of the holder of the bond given for part of the purchase money, and with the knowledge that this land was held as security for said bond, was a *fraud* on the rights of the holder of the judgment rendered on that bond, and neither the said *second* vendee nor his judgment creditors, who occupy no better position with reference to the same, than he, can claim any benefit from said conveyance; and the funds derived from the sale of the land for the price of which said judgment was obtained, must be *first applied* to the payment of that judgment, and this is not in conflict with the provisions of § 1, ch. 119, Code of 1860, with reference to vendor's liens.

II. The commissioner of sale, in the consolidated suits, reported that he had paid, out of the proceeds in his hands, attorney's fees, to two counsel who *defended* the *first* suit, and another attorney's fee to the counsel who *brought* the *second* suit, amounting in all to about $400. This was excepted to by the plaintiff in the *first* suit, but allowed by the Circuit Court. HELD:

This was also erroneous. "It is a general practice where a creditor suing for himself and others who may come in and contribute to the expenses of the suit, institutes proceedings for their common benefit, that those who derive a benefit shall bear their proportion of the expense and not throw the whole burden on one. This is equitable and just. But it only applies to those creditors who derive a benefit from the services of counsel in a cause, in which they are not specially represented by counsel. If a creditor has his own counsel in a cause, he cannot be required to contribute to the compensation of another. And this contribution must come from the *creditors.* The *debtor* cannot be charged with it. The law taxes him with certain costs for attorney and counsel fees, and the court cannot, directly or indirectly, impose upon him fees to the plaintiff's counsel, beyond what is provided by law."

The facts are sufficiently set forth in the opinion of the court.

Jones & Bouldin, Marshall & Jones for the appellant.

Goode, Page & Maury for the appellees.

From the Circuit Court of Mecklenburg County.

BARTON J. Cephas Hardy, of the county of Mecklenburg, sold to Wm. C. Hardy a tract of land in the said county, placing him in possession, receiving a portion of the purchase money, and retaining the title as a security for the remainder.

Subsequently, on the 29th March, 1859, Wm. C. Hardy sold 237½ acres, a part of this tract, to James T. Walker on credit, putting him in possession. As Wm. C. Hardy had received no deed, he made none to Walker, from whom no security was taken for the purchase money, the title, which was in Cephas Hardy, being reserved as a sufficient security.

Wm. C. Hardy died in November, 1859, leaving a will, of

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which one Wm. Smith and the said Cephas Hardy were appointed executors and duly qualified.

In their account settled in January, 1861, they credit the estate of their testator, Wm. C. Hardy, as of the 6th December, 1859, with the amount due by Walker, balance on land, $2,137.50. They charge the estate as of the 23d December, 1859, with the sum of $2,646.35 paid to Cephas Hardy per receipt, and, as of the 18th August, 1860, with cash paid to Cephas Hardy (land bond),' the sum of $2,569.75. Walker had not, in fact, paid the sum of $2,137.50 which they credited to the estate of Wm. C. Hardy, but only a part thereof, for which they took from him on the 1st January, 1863, his bond for $1,250.90, with interest from 1st January, 1861, for balance on land, payable to themselves as executors of Wm. C. Hardy.

This bond was passed by the executors early in 1863, in their final settlement of Wm. C. Hardy's estate, to John M. Hayes, who was entitled, under the provisions of Wm. C. Hardy's will, to a share of his estate. Walker was fully informed of this transfer, as he paid to Hayes on the 15th June, 1863, $72 $\frac{95}{100}$ on account of this bond, which was duly credited thereon. Cephas Hardy and wife, by deed dated the 11th November, 1863, conveyed the legal title to the 237½ acres to Walker. A judgment was obtained on this bond on the 11th April, 1866, which was docketed on the 20th, in the name of Cephas Hardy, surviving executor of Wm. C. Hardy, suing for the benefit of Stovall, trustee, &c., to whom it had passed by successive transfers from Hayes.

By the report of the commissioner, it appears that the class of judgment liens, in which this was included, amounted, with costs and interest to the 20th May, 1870, to $4,070.95, of which this judgment amounted to the sum of $1,890.22.

Walker by deed, dated the 12th June, 1866, conveyed all his real estate in Mecklenburg county, including this 237½ acres, to Richard E. Walker in trust, to secure certain debts in the deed set forth.

In January, 1868, Stovall filed his bill against James T. Walker and others to subject the 237½ acres of land to the payment of the bond given for the unpaid purchase money. After proceedings were had in the case, which it is unnecessary to refer to specifically, as they do not concern the questions now in controversy, the cause came on to be heard on the 18th September, 1859, when the court, being of the opinion that the plaintiff, Stovall, had no just claim in equity to a vendor's lien on the 237½ acres, dismissed so much of his

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bill as sought to enforce such lien, and retained the cause as to the other matters in controversy between the parties.

At June Rules, 1869, a bill had been filed by Joseph H. Jones, administrator of Wm. Jones, suing for the benefit of D. S. Marrow against James T. Walker, his assignee in bankruptcy and others, to enforce the lien of a judgment for $122, with interest from 16th November, 1860. On the 15th September, 1869, a decree was entered on the bill taken for confessed as to all the defendants, for an account of the subsisting judgment liens, and of the real estate with its annual rents and profits. And on the 18th September another decree was entered, directing a sale of all the real estate of which the said Walker had been seized, which was subject to the judgment liens. No objection appears to have been made to the decree for sale before the liens and their priorities were ascertained.

The commissioner returned his report of liens, in which he seems to have classified the judgments according to the dates at which they were docketed, instead of the dates at which they were rendered, as he should, all having been docketed in due time, and before the recordation of the deed of trust.

At May term, 1870, the commissioner of sale reported that he had sold the real estate on the 15th December, 1869, upon the terms prescribed in the decree of sale, viz., one-third in cash, and the remainder at six and twelve months, for the gross sum of $3,540.25. He returned with his report of sale an account of the cash received by him and of disbursements made, in which were included the payment of $180 as the attorney's fee, and commissions to the counsel for the plaintiff Jones, administrator, &c.; and the payment to two counsel who had defended the suit brought by Stovall, trustee, &c., for their services in that suit, one hundred and fifty dollars to each, amounting in all to four hundred and eighty dollars of counsel fees, paid by him. To these payments Stovall excepted.

These two cases having been consolidated, the court, on the 3d June, 1870, overruled the exception, confirmed both reports, and ordered a distribution of the fund in hand, and that the commissioner of sale should proceed to collect the bonds for the deferred payments as they fell due, and make report to the court.

From the decree entered on the 18th September, 1869, in the case of *Stovall, trustee*, v. *Hardy and others*, dismissing so much of the plaintiff's bill as sought to enforce a vendor's

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lien, and that entered on the 3d June, 1870, in the two cases consolidated, overruling the exception to the payment of counsel fees by the commissioner of sale, an appeal has been allowed, which presents the questions we have to consider.

The question as to the existence of the vendor's lien in this case, is free from any complication by reason of the deed made on the 12th June, 1866. The gross proceeds of the sale made under the decree of September 18th, 1869, which was confirmed without objection, were less than the amount of the judgment liens having priority over that deed; and the trustee and beneficiaries under it, even if they were purchasers *without notice*, took a mere naked legal title, without any real or valuable interest. The subject will, therefore, be considered without reference to that deed, as if it had not been made.

Nor do I think it was affected by the 1st sec. chapter 119, Code of 1860, p. 567, which provides: "If any person hereafter convey any real estate, and the purchase money, or any part thereof, remains unpaid at the time of the conveyance, he shall not thereby have a lien for the unpaid purchase money, unless such lien is expressly reserved on the face of the conveyance."

Cephas Hardy made no conveyance to his vendee, Wm. C. Hardy, but he retained the title as security for the purchase money. When that purchase money was paid to him out of the estate of Wm. C. Hardy, he held the title as trustee for those entitled to the estate of Wm. C. Hardy, under the will of which he was the executor. The credit in the executorial account of Wm. C. Hardy's estate, of the balance of the purchase money due by Walker, was only formal and made for the purpose of settlement between the executors and devisees of Wm. C. Hardy. Cephas Hardy, the executor and vendor having the legal title, and Walker the purchaser and debtor, knew that the purchase money had not been paid, that the title was retained as security for its payment, and that the debt had been assigned to one of the devisees on account of his share in the estate.

By conveying that legal title to Walker, Cephas Hardy committed a breach of trust, in which Walker fully participated, for he knew that Cephas Hardy held the bare, naked legal title, and as trustee for the security of another party, that his own bond for the unpaid purchase money had been transferred with all the legal incidents and securities to one of the *cestuis que trust.* The conveyance of the legal title by Cephas

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Hardy, and its acceptance by Walker, without the assent of the party for whose benefit and security it was held, was a breach of trust and a fraud upon his rights, whether actual fraud was intended or not, which neither Walker nor judgment creditors of his, who occupy no better position than himself, can claim any benefit from.

I think that as to the vendor's lien that deed should be utterly disregarded in this case, and that the net proceeds of the sale of the 237½ acres should be applied first to the discharge of the unpaid purchase money, and that the decree dismissing so much of the plaintiff's bill as sought to enforce his lien for that unpaid purchase money was erroneous.

It is a general practice to require, when one creditor, suing for himself and others, who may come in and contribute to the expenses of suit, institutes proceedings for their common benefit, that those who derive a benefit shall bear their proportion of the expense and not throw the whole burden on one. This is equitable and just. But it only applies to those creditors who derive a benefit from the services of counsel in a cause in which they are not specially represented by counsel. If a creditor has his own counsel in a cause, he cannot be required to contribute to the compensation of another. And this contribution must come from the creditors. The debtor cannot be charged with it. The law taxes him with certain costs for attorney and counsel fees; and the courts cannot, directly or indirectly, impose upon him fees to the plaintiff's counsel beyond what is thus provided by law—the payment to the counsel for the plaintiff Jones, adm'r, &c., out of the fund, cannot be supported by any law or practice with which I am acquainted.

And I am at a loss to conceive upon what ground the payment to the counsel for the defendants in the case of *Stovall* v. *Hardy* can be supported. The plaintiff in that case is required to pay his proportion of the counsel fees, amounting to $300, for resisting his claim. There are cases of such character, as when a husband sues for a divorce, that the plaintiff is required, upon principles of public policy, to pay reasonable counsel fees for the defence.

This is no such case. It is merely the ordinary case of a conflict of claims, and one party is taxed out of his recovery to pay the counsel for the opposite party. I see nothing to justify it. The exception to those payments of the commissioner of sale should have been sustained.

Both decrees should be reversed so far as they conflict with

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the views herein expressed, and the cause remanded for further proceedings in conformity therewith.

WINGFIELD P. AND MCLAUGHLIN J. concurred in the opinion of BARTON J.

DECREES REVERSED.

SUPREME COURT OF APPEALS OF WEST VA.

SPECIAL TERM, 1878.

MERCHANTS' BANK OF CHARLESTON *v.* PATTON, TRUSTEE, &C.

1. A married woman is regarded by a Court of Equity as the owner of her separate estate; and, as a general rule, the *jus disponendi* is an incident to such estate; that is, it is an incident thereto, unless and except so far as it is denied or restrained by the instrument creating the estate.
2. But it is subject to such limitations and restrictions as may be contained in such instrument, which may give it *sub modo* only, or withhold it altogether.
3. In regard to separate personal estate, and the rents and profits of separate real estate, this power of disposition, if it be unrestrained, may be exercised in the same way, by deed, will or otherwise, as if the woman were a *feme sole*. But in regard to the *corpus* of real estate, it can be disposed of only in such mode, if any, as may be prescribed by the instrument creating the estate; or unless prohibited by such instrument, in the mode prescribed by law.
4. As incident to the *jus disponendi* of her separate personal estate, and the rents and profits of her separate real estate, if not restrained by the instrument creating the separate estate, a *feme covert* may charge her separate estate with the payment of her debts. She may charge it as principal or surety for her own benefit or that of another. She may appropriate it to the payment of her husband's debts. She may even give it to him if she pleases, no improper influence being used or exerted over her.

O. A. Patton, trustee, &c., for his wife, R. Ellen Patton, filed his bill in the Circuit Court of Kanawha county, against the Merchants' Bank of Charleston, R. Patton, Wm. H. Webb and others, charging, that as trustee of his wife, R. Ellen Patton, under a decree of said court, investing him with certain powers to sell certain separate property of his *cestui que trust*, he sold a part of the same to said Webb, who executed five notes for the same, for $500.35 each, payable respectively at six, twelve, eighteen, twenty-four and thirty months; that these notes were payable to and endorsed by said O. A. Patton, trustee for R. Ellen Patton; that the sale was negotiated by R. Patton, and that said notes were deposited in said Merchants' Bank by said R. Patton, for purposes of

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his own, and without the knowledge or consent of the complainant; that the endorsement by him was made in blank before the notes were executed by Webb; that two of the notes had been collected and appropriated by the Bank, and that it held two others in fraud of the complainant's rights; that said Bank got possession of them with full knowledge of their trust, character, &c., and that any appropriation of the same is in fraud, &c., of the rights of the plaintiffs. R. Patton answered the bill, admitting the negotiation of the sale by him, but saying that he was acting under a power of attorney from the plaintiffs, with full powers to act for them, and that in pursuance of this power, he negotiated the sale, and then deposited said notes in said Bank as collateral security for the benefit of the plaintiffs, with their full knowledge and consent, and not for any purposes of his own; and that the money obtained from the Bank was used for their exclusive use under their orders. He denies all fraud, and calls for strict proof. The Bank answered that it received the notes in good faith from R. Patton, as attorney in fact for the plaintiffs, for their benefit, and not for any purposes of his own, and that they were transferred to it for their full value, with the full knowledge, and by the express orders of the plaintiffs; that the transfer has been, time and again, recognized and approved of by them; that it took said notes in the regular course of business, and that the money obtained on them was regularly applied by said R. Patton for the uses and purposes of the plaintiffs, under their express directions, and denied any fraud whatsoever on its part in the transaction. The property sold to Webb was held by the plaintiff, O. A. Patton, as trustee for his wife, R. Ellen Patton, upon the following trusts, as created by a decree of said court reforming a prior trust deed, in which it appears that certain other trusts were created by mistake, viz.: "for the sole and separate use of the said R. Ellen Patton, free from the control and liabilities of her husband, or any parties claiming by, through, or under him, and upon no other trusts whatever." The deposition of R. Patton was the only one taken, and the cause coming on to be heard on the bill, answers with replications thereto, and exhibits, and said deposition. The Circuit Court rendered a decree in favor of the complainant, *as trustee*, against the Bank for the amount of the two notes collected, amounting to $1,186.57, and for a surrender of the two notes not due, and for the costs. It then rendered a decree over in favor of the Bank against R. Patton for the whole amount and interest, paid by the Bank to him for said notes,

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amounting to $2,667.40, and the costs, and then went on to say, "it appearing that said R. Patton obtained the money on said notes for the said O. A. Patton, trustee, and applied the same to his own use, with his assent and approval, who ought to refund the same to the said R. Patton, it is therefore adjudged, ordered and decreed that the said O. A. Patton pay to the said R. Patton, the said sum of $2,667.40 with interest thereon from date, and the costs herein before decreed against said R. Patton. From this decree the Merchants' Bank obtained an appeal.

J. H. & J. F. Brown, for the appellants..

Miller & Swann, for the appellees.

HAYMOND J. delivered the opinion of the court, and after stating the foregoing facts more at length, said:

The appellant, among other assignments of error, claims in its petition that the Circuit Court erred in not dismissing the plaintiffs' bill. The plaintiffs, in their bill, recognize the validity of the sale of land in the bill mentioned, to Wm. H. Webb, at the price and on the terms therein stated, and the execution of the four notes in the bill mentioned, by the said Webb, and that the sale was negotiated by the defendant, Robert Patton, and the purchase money notes were made payable to the plaintiff, Oliver A. Patton, as trustee for R. Ellen Patton. The complaints set up in the bill, and the grievance complained of, is that the said notes were deposited in the Merchants' Bank of Charleston by said R. Patton (who is the father of Oliver A. Patton), for reasons and purposes of his own, without the knowledge or consent of plaintiffs; and they charge that the second and third notes were collected by the Bank, and appropriated to its own uses and purposes, and that two of the notes are still in the hands of the Bank unconverted. The bill in effect admits that said notes were endorsed by the plaintiff, O. A. Patton, as trustee for R. Ellen Patton, but it alleges that the endorsement was made in blank before the execution of the notes by said Webb, in order that they could be collected by plaintiff, O. A. Patton, at the place where they were made payable. The bill denies the validity of the endorsement, and charges that the Bank got possession of the said notes with full notice of their trust character, and in fraud of the same and of the rights of said O. A. Patton, as trustee, and of said R. Ellen Patton, the

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beneficiary. The bill also avers that said notes were never transferred to said Bank with their consent, and charges that said R. Patton never intended to transfer the notes to the Bank, but put them in the same for his own purposes, &c. (See the bill.) The answers deny all the material statements and allegations in the bill upon which the plaintiffs therein seek or claim a recovery. Robert Patton, in his deposition, substantially proves that "acting as attorney-in-fact for O. A. Patton, trustee for his wife," he made sales of the real estate of theirs to Webb for which they executed their deed to Webb, in which he (witness) accepted the Webb notes and deposited the same as collateral security to raise money to run the mill, and for other purposes connected with the trust property; upon the notes being left in the hands of James M. Laidley, cashier of the Merchants' Bank of Charleston, upon which he (witness) received of the notes, certificates of deposit on time which he (witness) appropriated to the payment of the trust debts. He further proves that the plaintiffs knew what disposition he (witness) made of the notes, and they approved the course he had taken. He also proves that he applied the whole of the proceeds of said notes for the trust interest; he also proves that the notes were intended to be deposited as collateral security in the said Merchants' Bank to said Laidley, that the said notes were in the hand writing of said O. A. Patton, and that the endorsement is in the same hand writing; that he (witness) does not recollect the particular time the notes were written or the endorsements were made, whether it was at the time or before the transfer, but that he does recollect that it was done with a clear understanding between the parties that he had the authority to negotiate them in that way, that he (witness) might leave them as collateral security for their purposes. He also proves that said endorsement was not placed on said notes for the purposes alleged in the bill. It fully appears in the case as it seems to me, that said notes were placed in the Bank and the proceeds thereof drawn out of the Bank being the full value of the notes and applied to the use of R. Ellen Patton and of the trust property with the consent and according to the directions and approval of both of the plaintiffs. The said decree rendered by the Circuit Court of the county of Kanawha, on the 8th day of July, 1871, in the case of said *R. Ellen Patton* v. *Oliver A. Patton, trustee, &c.*, Amanda L. Patton and Nella T. Patton, certainly did change the estate or interest of said R. Ellen Patton in the lands and trust property in the deed of trust therein mentioned very greatly.

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In fact, the Circuit Court in refusing said deed of trust by reason of alleged mistake changed the character of the trust and enlarged the estate and interest therein of said R. Ellen Patton, so that the trustee, Oliver A. Patton, of said R. E. Patton was decreed to hold, and does hold the property conveyed by said deed of trust under said decree, simply in trust for the sole and separate use of the said R. Ellen Patton, free from the control and liabilities of her husband or any parties claiming by, through, or under him and upon no other trust whatever. The simple effect of the said last named decree was to change the whole character of the trust deed, and to convert the deed of trust in effect, into a deed conveying by the said R. Ellen Patton, then R. Ellen Tompkins, the property to a trustee for her sole and separate use, and all other trusts, uses or limitations created by the deed, were cancelled and annulled. This decree does not appear to have been reversed, set aside, or annulled in any proceeding. See opinion of Green, Judge, in case of *Linn* v. *Patton, trustee, et al.*, 10 W. Va., 191 and 192. This decree still being in force, we cannot disregard it in this collateral proceeding, but in this case must give it force and effect as it was rendered by a court having jurisdiction of the subject. *Fisher* v. *Bassett*, 9 Leigh, 119; *Cox et al.* v. *Thomas et al.*, 9 Gratt., 324; *Hutchinson* v. *Priddy*, 12 Gratt., 85; *Baylor* v. *Degarnett*, 13 Gratt., 152; *Voorhees* v. *Bank of the United States*, 10 Pet., 449; *Hall* v. *Hall*, and cases cited in opinion of the court on this subject, 12 W. Va., 1. The property under said decree being held in trust by said Oliver A. Patton for the sole and separate use of the said R. Ellen Patton, free from the control and liabilities of her husband, or any parties claiming, by, through, or under him, and upon no other trusts whatever, the question arises as to what are the rights and powers of R. Ellen Patton, the *cestui que trust*, in the property held in trust as aforesaid, or its proceeds when sold, &c. A married woman is regarded by a Court of Equity as the owner of her separate estate; and, as a general rule, the *jus disponendi* is an incident to such estate; that is, it is an incident thereto, unless, and except so far as it is denied or restrained by the instrument creating the estate. But it is subject to such limitations and restrictions as may be contained in such instrument; which may give it *sub modo* only, or withhold it altogether.

In regard to separate personal estate and the rents and profits of separate real estate, this power of disposition, if it be unrestrained, may be exercised in the same way, by deed,

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will or otherwise, as if the owner were a *feme sole.* But in regard to the *corpus* of separate real estate, it can be disposed of only in such mode, if any, as may be prescribed by the instrument creating the estate; or unless prohibited by such instrument, in the mode prescribed by law for alienation of real estate by married women. *Mc Chesney et al.* v. *Brown's heirs*, 25 Gratt., 393. In the case of *Burnett et ux.* v. *Hawpe's ex'or*, 25 Gratt., 481, it was held, "that a married woman, as to property settled to her separate use, is to be regarded as a *feme sole*, and has a right to dispose of all of her personal estate, and the rents and profits of her separate real estate in the same manner as if she were a *feme sole*; unless her power of alienation be restrained by the instrument creating the estate. 2d. As incident to the *jus disponendi* a *feme covert* may charge the separate estate with the payment of her debts. She may charge it as principal or surety, for her own benefit or that of another. She may appropriate it to the payment of her husband's debts. She may give it to him if she pleases, no improper influence being exerted over her. 3d. Although the separate estate is conveyed to a trustee, his assent is not necessary to a valid alienation or charge of the wife, unless it is required expressly, or by strong implication, in the instrument under which the property is devised." *West* v. *West's ex'or*, 3 Rand., 373; *Vizonneau* v. *Pegram et al.*, 2 Leigh, 183; *Woodson's trustee* v. *Perkins*, 5 Gratt., 346; *Penn* v. *Whitehead*, 17 Gratt., 503; *Miller* v. *Bailey*, 21 Gratt., 521; Hill on Trusts, 424; Schouler's Domes. Rel., 219, 225; 1 Bish. on the Law of Married Women, sections 849, 850, 851, 852, 853; *Taylor* v. *Meade*, 34 Law J. N. S., chap. 203, 207. If the sale and transaction involved in this cause had occurred since the last named decree was made, reforming said deed of trust, then there can be no question under the authorities cited, but that the said notes would rightfully have been the property of R. Ellen Patton, and she would have had the right to have disposed of them as she saw fit, or to have directed them and their proceeds to have been disposed of as they were by R. Patton under the direction of the trustee and *cestui que trust*, which disposition of said notes, and the proceeds thereof were directed and approved by the plaintiff, the trustee and the *cestui que trust.* But this whole transaction as to the sale of the land to Webb, the endorsement of the notes and negotiation and disposition thereof to the Bank, and the receipt of the proceeds of said notes from the Bank, and the application thereof to the use of the trust property according to the directions, and with the approval of the

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plaintiffs, seems to have occurred prior to the date of the said decree reforming said trust deed, and according to the terms of the trust deed before its reformation, the proceeds of the said purchase-money notes could not rightfully have been applied or disposed of as they were. But notwithstanding this fact, assuming as we must that the Circuit Court rightfully reformed said deed of trust for the reasons in the said decree stated, then it is evident that the said R. Ellen Patton, from the date of said deed of trust until it was reformed by the court as aforesaid, had the equitable right to have said deed of trust reformed as the Circuit Court did reform it. This being so, it follows as a natural sequence that the said R. Ellen Patton, at the time of the sale of the land to Webb, had an equitable right to so dispose of it, and an equitable right to the money-notes and the proceeds thereof, and to direct the disposition of the notes and their proceeds, as it is proven in this case she did, and also her trustee. Suppose that said notes had never been disposed of, but were still in the possession of the said Oliver A. Patton, the trustee, there can be no doubt that under and by virtue of said decree reforming said deed of trust, the said notes would be her property, being the proceeds of the sale of her sole and separate estate, and that she would have the right to dispose of them as she pleased and to whom she pleased, and so of the proceeds thereof. And R. Ellen Patton having the equitable right (assuming said decree reforming said deed of trust to have been rightfully made for the causes therein stated) to said notes as her sole and separate estate, and to direct the disposition thereof and of the proceeds thereof, and it appearing by the evidence in the cause that she exercised that equitable right, and did direct and approve the disposition thereof, and of the proceeds thereof, and that said notes were disposed of as she directed, and the proceeds thereof also disposed of as she and her trustee each directed and approved, and for the use and benefit of the trust property, no fraud or undue influence by the husband appearing, she and her said trustee, nor either of them, can or ought to be entertained in a Court of Equity for the purposes of said bill in whole or part.

The decree of the said Circuit Court must therefore be reversed, set aside, and annulled with costs to the Merchants' Bank of Charleston against Oliver A. Patton, and the bill be dismissed. But as said deed of trust was reformed after the commencement of this suit, no costs will be given against the plaintiffs in the Circuit Court. The dismissal of plaintiffs' bill is without prejudice to any right, legal or equitable, of the

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defendants, the Merchants' Bank of Charleston, or Wm. H. Webb, involved in this cause directly or indirectly, or their right respectively, to enforce the same against the plaintiffs, or either of them, or any other person, or the estate of plaintiff, R. Ellen Patton, by any proceedings they, or any of them, may hereafter be advised to institute.

The other Judges concurred.

DECREE REVERSED.

SUPREME COURT OF PENNSYLVANIA.

HOLMES, LAFFERTY & CO. *v.* THE GERMAN SECURITY BANK.

A draft, with a bill of lading attached to it to secure its payment, was discounted by a bank and remitted to a correspondent for collection. The commission firm to whom the property was consigned for sale, refused payment of the draft, and afterwards received and sold the property and applied the proceeds of sale to the payment of an old debt due it from the shipper. HELD, that the commission firm having notice of the appropriation of the proceeds of sale to the payment of the draft, could not apply them to its own debt.

Error to the Court of Common Pleas No. 2, of Allegheny county.

This was an action of assumpsit, based on the following circumstances:

J. M. Harper, of Louisville, Ky., had for several years been shipping car loads of live stock to Holmes, Lafferty & Co., of the city of Pittsburgh, to be sold on commission, and making drafts on them as soon as the shipments were made, based on the bills of lading which accompanied the drafts. These drafts were usually discounted by the German Security Bank, of Louisville Ky., and had always been promptly paid. On August 9th, 1877, Harper shipped several car loads of hogs to the defendants, and on the same day drew his draft on them for $1,300, which was discounted by the German Security Bank, on the faith of the bill of lading, which was handed over to the bank. The draft, with the bill of lading attached, was sent to the German National Bank of Pittsburgh, for collection, and presented to defendants on August 11th, and payment refused. The hogs arrived on August 13th, and were received and sold by the defendants. At that time, Harper was indebted to defendants on over drafts

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on previous shipments to a larger amount than the proceeds of the last lot, which, after deducting freight, commission, etc., amounted to $1,299.47. For this amount, with interest from August 11th, 1877, the plaintiff brought action, claiming to recover on the ground that the transfer of the bill of lading, on the faith of which they discounted Harper's draft, gave it a right to the cargo, or its proceeds; that the handing over of the bill of lading was a transfer of the hogs as security for the drafts. The defendant claimed to retain it on account of Harper's indebtedness, and contended that no title to the hogs or the proceeds could pass without an actual delivery of the property to the plaintiff. Verdict and judgment for the plaintiff.

Thomas C. Lazear, Esq., for plaintiff in error.

Slagle & Wylie, Esqs., for defendant in error.

PER CURIAM. Filed November 18, 1878.

The bill of lading was attached to the draft in this case, as a security for its payment. It was therefore evidence of an appropriation of the proceeds of sale of the property contained in the bill of lading, whether the bill was endorsed or not. The consignment to the defendants was for sale only, and, therefore, when they had notice of the drafts and bill of lading before sale, they were informed of the appropriation of the proceeds of sale, and could not apply them to an old debt of their own.

JUDGMENT AFFIRMED.

—*Pittsburgh Legal Journal.*

MISCELLANY.

THE COUNTRY LAWYER.—In his eulogy on the late HON. B. B. DOUGLAS in the House of Representatives, the *Hon. John Randolph Tucker*, of Virginia, thus describes, with great power and accuracy, the "Country Lawyer." Taking Mr. Douglas as a type of that character, Mr. Tucker said:

"He was a planter as well as a lawyer, and thus his professional life was developed according to a type so peculiar in Virginia and other parts of the South—that of a country lawyer.

"This is a character which is now fast passing away, whom I would fain rescue from oblivion. Such a lawyer lived upon his farm, which he cultivated. and attended the courts, without any strict devotion to business in his office. His library was not measured by the number, but the weight of his books. He read and mastered Bracton, Coke, Hale and Blackstone.

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His reports were few—my Lord Coke's, Salkeld, Saunders, Atkins', Equity Cases and the like. He read history much, and studied the human heart profoundly. Amid the mountains, hills, valleys, forests and fields about his country home, he meditated much upon natural law. The principles of right and justice implanted in the instincts of our nature, and deducible from observation and experience, he evolved from his own native intuitions and reason. He wrought out by original thought what law ought to be, without learning much from the decisions of the judges, and thus, in ninety-nine cases in a hundred, he found what was the law in any special controversy. He was less technical than the city lawyer, skilled by ample practice and full libraries in the infinitely varied phases of social contacts and contracts. He was less scientific, but more philosophic; his views were less astute probably, but more broad and fundamental; and his generalizations less accurate, because deduced from a less number of particulars.

"The law he learned was that whose "seat is the bosom of God, and whose voice is the harmony of the world:' *Nec enim alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et omnes gentes, et omni tempore, una lex et sempiterna et immutabile continebit.*

"It was by this self-discipline, by this evolution of law as a system of real right, of absolute justice, in the political, social and domestic relations of men, from the profound study of human nature and of the records of human history, that Patrick Henry was enabled, the country lawyer of Hanover, to write upon the fly-leaf of his Coke upon Littleton those resolutions of 1764, proposed in the Virginia House of Burgesses, which challenged George III to remember Cæsar's fate and the bloody scaffold of Charles Stuart; to strike the key-note of religious emancipation when he pleaded for the people against the parsons, and to forget the thunderbolt of revolution in the proclamation of his sublime dilemma of 'Liberty or Death,' to the colonies struggling in the military grasp of British despotism.

"I do not doubt that John Marshall, the most illustrious of the Chief-Justices of the United States, under the classic shades of his country-seat at Oak Hill, framed the inexorable logic of his argument in the case of Jonathan Robbins, and constructed those canons of interpretation in that series of marvelous judgments, which laid the foundation of his fame as the greatest expounder of our Federal Constitution.

"Time fails me to tell of the judges who were trained in this school of natural law for the science of jurisprudence. Pendleton and Wythe, Jefferson and Madison, John Taylor and Roane, and a host of others, are a galaxy of great men who were thoughtful jurists, though not case lawyers, taught by a profound knowledge of human nature, and a large and varied experience in human affairs, to rear the temple of a sound jurisprudence, upon the deep foundations of natural justice and upon the law of God.

"In my own life, I have known scores of such men whose broad and comprehensive views of right and wrong, and whose acute and powerful minds thus trained, made them the equals, and frequently the superiors, of other lawyers, learned in cases, and trained by the reading of law books and reports without end."

Answers to Bills in Chancery.—The following bill has been offered by Mr. Bocock in the Legislature of Virginia. It embodies substantially suggestions made by us, and to be found in the 1st Volume of the *Journal*, p. 702.—Ed.:

"*A Bill to define the force and effect of answers to Bills in Chancery:*

"Be it enacted by the General Assembly of Virginia, that if the complainant in his bill shall waive an answer, under oath, or shall only require an answer under oath with regard to certain specific interrogatories the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his

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own favor, unless the cause be set down for hearing on the bill and answers only: but may nevertheless be used as an affidavit with the same effect as heretofore, on a motion to grant or dissolve an injunction or any other incidental motion in the cause, but this shall not prevent a defendant from becoming a witness in his own behalf, if otherwise competent under the laws of this State."

THE RETIREMENT OF LORD JUSTICE CHRISTIAN.

"My term of judicial life is now drawing to its close," said Lord Justice Christian, from the bench, on April 24, 1873. But time passed on, and still the Court of Appeal in Chancery retained the judicial services of the greatest lawyer who ever sat upon its judgment seat. At last, after a legal experience of over forty years, and a judicial experience of over twenty years, Mr. Christian, swayed by the consciousness of an unfortunate physical infirmity, has retired; but, by the bench, which he so long adorned—by the bar, who regarded him with such pride—by the general public, whose interests as suitors he ever sought to serve—his name will be cherished in proud and honored remembrance.

Jonathan Christian, the son of a respectable solicitor of Carrick-on-Suir, was called to the bar in Hilary Term, 1834, and joined the Leinster circuit. In 1846, he took silk, and five years later was advanced to the dignity of the coif. He was admitted a bencher of the King's Inns in 1852, and in 1856, was appointed Solicitor-General under Lord Palmerston's first administration. In 1857, on the death of Mr. Justice Burton, he was appointed a puisne judge of the Court of Common Pleas; and in 1867, under the administration of Lord Derby, he was elevated to the office of Lord Justice of Appeal, and in the same year he became a member of the Privy Council. At the bar he had attached himself exclusively to the Courts of Equity at a time when they boasted such advocates as Edward Pennefather, Francis Blackburne, Richard B. Warren, William Brooke, and a little later, Richard W. Greene, Richard Moore, Abraham Brewster, and, though last, emphatically not least, Francis Fitzgerald; at a time when the doctrines of that equity law which, as he himself has observed, "is common law developed, ameliorated, enlarged, civilized," were expounded by such judges as Sugden, Blackburne, Plunket, Sir Michael O'Loghlen, and T. B. C. Smith. He had had experience of its practice both before and after the reforms of 1850 and 1867, and he has witnessed the working of that of 1877. Nor was the Lord Justice a merely passive spectator of the great legal changes of his day. He was himself an advocate of law reform. He has himself, in one of his extra-judicial addresses, recalled the fact that he had been, from the first, a declared enemy of the cause petition system; nor did he shrink from expressing his opinion of it from his place at the bar of the Court of Chancery, believing, as he did, that the true remedy for the evils of that system could alone be found in some such measure as that which became law in 1867; and to his zealous surveillance that great measure unquestionably owes, to a considerable extent, its due and effectual administration. The progress of the Judicature Bill in Parliament had, also, in him a watchful and active critic; and by published letters, by pamphlets, and even by addresses from the bench, he impressively expounded his convictions as to

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what was mainly needful in such a measure. Nor has he ever shrunk from owning an adverse estimate of the merits of actual legislation. Indeed, the vehemence of his expressions in this respect exposed him, on more than one occasion, to censure in Parliament. His denunciation of the Land Act, 1870, in the case of the *Marquis of Waterford's Estate*, 5 Ir. L. T. Rep., 125, nearly led to an address to the Crown for his removal from the bench; and one of his published letters, in reference to the revival of a second Landed Estates Court judgeship, was also brought under the notice of Government in March, 1876, and was severely commented on by the Premier. His opinions, certainly, on many questions of a political or public nature were extremely strong, and, unfortunately, he never hesitated to declare them in language too undisciplined and on occasions which, to say the least of it, were unsuitable. His prolonged feuds with Lord O'Hagan, Vice-Chancellor Chatterton, and with the official law reporters, led to extra judicial harangues of an unusual and unseemly character; and his remarks on one of those occasions, in the case of *King* v. *Anderson*, last year, caused the proposal of a vote of censure by a considerable section of the bar. And yet, while himself so aggressive, the Lord Justice was peculiarly sensitive to the remarks of others. An observation made by the late Chief Justice Whitside, at a public banquet, led to a sarcastic retort, fulminated by the Lord Justice even from the judgment seat; and but recently he appeared to hold (like Lord Kenyon on one occasion) that it was almost a personal affront for a learned colleague to express dissent from an opinion advanced by the Lord Justice; while even the House of Lords did not escape his lash, when, in *O'Rorke* v. *Bolingbroke*, his judgment had been somewhat severely treated.

But, be this as it may, the recorded judgments delivered by Lord Justice Christian will ever command the highest respect of the profession—a respect likely to increase yet more in future years. Whether conversant with the principles of equity or common law, they were ever distinguished by exhaustive research, profound erudition, and perspicuous instruction; they were pronounced with logical precision, incisiveness, and force; they were guided by inflexible impartiality and independence. Nor can we fail to join in the sentiment of regret expressed by the Lord Chancellor on Monday last, that, while those 'judgments remain for the instruction of the profession, the Court of Appeal has been deprived of the assistance which the great learning and ability of this most distinguished judge has so long contributed to the administration of justice in this country.' He had witnessed the foundation of the Court of Appeal in Chancery; he had seen its dissolution; and now, when our newly constituted appellate tribunal so greatly needs all the judicial strength it could possibly command, the great lawyer who might have proved its best mainstay has retired. He has retired; but not from any wish to shrink from duties which, on the contrary, his desire to serve the public renders him still willing to perform; it is because of the increased difficulty, from imperfection of hearing, which he has for some time experienced in following the arguments of counsel. He has retired; but that master mind may yet be devoted to the public service. The retirement of a Kent gave us his famous Commentaries. That of Lord Justice Christian may yet give our country cause for further pride. Yes—we repeat,

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as we said, when he hinted, in 1873, that he was about to withdraw from judicial life—into that retirement we are fain to follow him, with the hope that the sense of duty, by which he has been sustained upon the difficult path which it has been his lot professionally to tread, will prompt him to the discharge of those responsibilities of which one so gifted cannot permanently divest himself—whether presented in the garb of law reform, or of the solution of those moral or economic problems which agitate the mind of this restless age; and we trust it will be impossible for one who so scorned 'laborious ease' in the meridian of his days, to become in the evening of life a mere spectator of the progress of his professional brethren, or of his country to which, and not to himself, the gifts of men like the Lord Justice primarily belong.—*Irish Law Times.*

CORRECTION.—In our report of the case of *Richmond and Danville R. R. Co.* v. *Morris* in the January, 1879, No., p. 51, we were led into a slight error in stating one of the facts, and fearing that it may lead to some misapprehension of the important principles involved, we wish now to correct it. We said in the ninth and tenth lines of our report, "The train was then put in motion, and while the train was backing, the conductor woke him up again, and told him to *jump* off." This direction to Morris to "jump off" might clearly imply negligence on the part of the conductor, for which the railroad company might be held liable. The true state of facts on this point were as follows: "The train stopped about a minute, and the plaintiff could have gotten off while it was not in motion. The conductor then went to the other end of the car, and looking back, saw that the plaintiff did not get off. He returned, shook him, and told him to get up—he was at Boston. The plaintiff says he told him to get off. Immediately after the waking of the plaintiff the last time, the conductor went out at the end of the *caboose* with his lantern in his hand and took his stand on the stationary platform, about two and a-half feet from the platform of the car; the train commenced backing, and the plaintiff got up and walked out to the end of the car and jumped off, not knowing, as he says, which way the car was going, and the *caboose* car and several others passed over him, inflicting the injuries before mentioned."

BOOK NOTICES.

THE LAW OF EXTRADITION, INTERNATIONAL AND INTERSTATE, with an appendix containing the extradition treaties and laws of the United States, several sections of the English extradition act of 1870, and extradition regulations and forms. By SAMUEL T. SPEAR, D. D. (Weed, Parsons & Co., Printers, Albany, 1879.)

This work contains much information on the subjects treated of, which will not be found elsewhere. But we cannot agree with some of the positions, as stated by the author in the text, and we do not think that they are warranted by the weight of authority—*e. g.*, on page 336, *et seq.*, the author justifies the action of Governor Rice, of Massachusetts, in refusing to de-

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liver up the fugitive, Kimpton, on the requisition of Governor Hampton, of South Carolina. We think that the article in the 2d *Virginia Law Journal*, p. 579, entitled "The Kimpton Case," and that in the January, 1879, No. of the *American Law Review*, entitled "Extradition between States," and the authorities cited by these writers, demonstrate the impropriety of Governor Rice's conduct, and we would commend these articles to the consideration of the author. The work is very creditably gotten up, and will be found to be interesting.

HUBBELL'S LEGAL DIRECTORY FOR LAWYERS AND BUSINESS MEN, containing the names of one or more of the leading and most reliable attorneys in nearly three thousand cities and towns in the United States and Canada. A synopsis of the Collection Laws of each State and Canada, with instructions for taking depositions, the execution and acknowledgment of deeds, wills, &c., and times for holding courts throughout the United States and territories for the year commencing December 1st, 1878, to which is added a list of prominent banks and bankers throughout the United States. J. H. HUBBELL, Editor and Compiler. New York: J. H. Hubbell & Co. (Through J. W. Randolph & English, Richmond, Va.)

We have received the edition of this work for the ninth year since it began, which, as the title page indicates, contains much valuable information to lawyers and business men. In addition to what is stated on the title page, it also contains a synopsis of the law of different States relative to insolvency and assignments, which, in view of the repeal of the Bankrupt Act, will be found to be of interest and importance. It also contains the rules of practice in the U. S. Courts.

A TREATISE UPON THE LAW OF PRINCIPAL AND AGENT IN CONTRACT AND TORT. By WILLIAM EVANS, B. A. Oxon., and of the Inner Temple, Esq., Barrister-at-Law. Being an Exact Reprint from the English Edition, by the Chicago Legal News Company.

We make the following extracts from the American publisher's notice of this work:

"The Treatise of Mr. Evans, of the Inner Temple, having appeared in the autumn of 1878, is the latest, as it is the most satisfactory and useful of any that has appeared in England upon the subject of the LAW OF AGENCY. Its freedom from local matter, its treatment of the subject upon general principles—which are as applicable to America as to England—its citations and comments upon a large number of recent and important cases, seemed to justify its reprint in America. * * * * *

"Mr. Evans' Treatise is the latest work published in either England or America upon the LAW OF AGENCY, and as such, must be unusually valuable to the profession in both countries."

We have not had an opportunity of examining the work carefully, but from what we have seen of it, we commend it. The work of the very enterprising publishers is well done in every way.

THE LAW MAGAZINE AND REVIEW.—STEVENS & HAYNES, Bell Yard, Temple Bar, London.

The February, 1879, No. of this most interesting Law Journal has just been laid on our table.

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THE

VIRGINIA LAW JOURNAL.

MARCH, 1879.

CAN STATES BE COMPELLED TO PAY THEIR DEBTS?

The affirmative of this proposition is maintained in an article in the July number of the *American Law Review*, 1878; and as to States of the American Union, two remedies are pointed out—first, that of treaty or war, with the consent of Congress; second, the State whose citizens hold the bonds, or other obligations of the debtor State, may sue the latter State in the Supreme Court of the United States.

It is proposed in this article to examine the validity of the claim for the second of these remedies, and to show that there is no warrant for such a position.

The States, as to their debts, stand upon the same footing as other sovereign States; the same remedies exist to compel them to pay their debts that may be used to compel France or England, and no others.

Can States be sued by their own citizens, or citizens of other States, in their own courts, or the courts of other States?

It is a proposition that seems too well established to admit of discussion, that in any municipal court the plea that the debt claimed is due by a sovereign or a State, is a bar to the action. There is no remedy in such cases in the municipal courts. 1 *Smith* v. *Weguelin*, L. R., 8 Eq., 198, decided in 1867; *The Siren*, 7 Wal.

This is admitted by the author, who takes the position that the proper remedy in such cases is, that the Government of the country where the creditor resides, should, by treaty, if necessary by war, compel the debtor State to do justice to their citizens and discharge its obligations. 2 Phill. Inter. Law, 8.

This being the admitted state of the law as to enforcing payment of a public debt at the time the Constitution of the

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United States was adopted, the only remedy being that of treaty or war, when the States entered into the compact of the more perfect Union, they delegated to the Federal Government this power of enforcing payment of States debts.

The delegation of power is found in the grant of judicial power, which the author claims extends to questions political as well as judicial, and is in these words. Const. U. S., Art. III, § 2:

"The judicial power shall extend to all cases in Law and Equity arising under this 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 of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

This remedy by suit was exercised shortly after the adoption of the Constitution, the States were sued in the Supreme Court of the United States by citizens of other States for debts. Then came the 11th amendment of the Constitution, which took away the right of the citizen to sue a State. Now, says the author of the article, the citizen having no remedy by suit, his State must protect him; his State must take up the controversy, and make it a subject of a suit against the debtor State in the Supreme Court of the United States. And this court, having original jurisdiction in controversies between States (Const., Art. III, § 3), can mould its process to suit the exigencies of the case.

This is the rationale of the article; is it correct?

History of Eleventh Amendment.—When the provisions of the Constitution were under discussion by the several States, one of the objections urged by those who opposed its adoption was, that the grant of judicial power would permit a citizen of any State to arraign any of the States at the bar of the Supreme Court. Patrick Henry claimed that the expression controversies "*between a State and citizens of another State,*" applied in terms to all controversies whether the State were plaintiff or defendant. On the other hand, such statesmen as Madison, Marshall and Hamilton claimed that a State could not be sued without its consent, and the proper construction to give to the clause was, that it permitted the States

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to sue the citizens of other States in the Federal Courts; that it only applied to the States as plaintiffs.

The Supreme Court was organized February, 1791, and two years after, 1793, the construction of the clause of the Constitution, relating to controversies "between a State and citizens of another State," came before the court in the case of *Chisolm's ex'or* v. *Georgia* (2 Dallas, 419); the court sustained the view taken by Patrick Henry. They announced the opinion, that the States, by the adoption of the Constitution, yielded up the privilege universally acknowledged as inherent in a State, of exemption from suit in the municipal courts; in the words of Justice Wilson, "as to the purposes of the Union, therefore Georgia is not a sovereign State." By the Constitution, she is shorn of this attribute of a sovereign State.

How was this decision received by the people of the United States? Did they acquiesce in this construction of the powers of the Federal Court? Not at all; at the next session of Congress in 1794, the 11th amendment was proposed to the States, and adopted at once. It is in these words:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizen of another State, or by citizens or subjects of any foreign State."

It is impossible to conceive of a more emphatic declaration by a people of their disapprobation of a decision, and of the principle announced in it. The decision says, that the grant of judicial power makes the States liable to be called to the bar of the courts of this new government of delegated powers. The people say that the States *shall not* be called to answer at the bar of the courts at the suit of citizens of other States, or of foreign States, and if there is anything in the Constitution capable of such a construction, then we, the source of all power, by an amendment of the Constitution, blot it out forever.

The decision announces the principle, that a State is not sovereign as to the debts she may contract. The people declare the converse of the proposition to be true, that the States are sovereign as to the debts they contract.

In *Florida* v. *Georgia* (17 How., 520), Justice Campbell, speaking of the 11th amendment, says: "Various attempts were made in both branches of Congress to limit the operation of the amendment, but without effect. It was accepted without the alteration of a letter, by a vote of 23 to 2 in the Senate, and 81 to 9 in the House of Representatives, and re-

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ceived the assent of the State Legislatures. Georgia ratified the amendment as "an explanatory article," her Legislature "concurring therewith, deeming the same to be the only just and true construction of the judicial power by which the rights and dignity of the several States can be effectively secured." Thus, the supreme constitutional jurisdiction of the United States, the concurrent action of Congress, and the State Legislatures, expressing a consent nearly unanimous, *corrected the opinion of the Supreme Court*, and intercepted its final judgments in these cases, by declaring that the Constitution should not be so construed as to allow them.

Is it not a fair deduction from the history of this amendment, the circumstances surrounding the discussion of the article containing the grant of judicial power, the decision of the Supreme Court adverse to the views of Madison, Hamilton and Marshall, and the almost instantaneous repudiation of that decision by the people acting through the appropriate channels, that the intention of the 11th amendment was to put the States, as to their debts contracted, just where they stood before the adoption of the Constitution, in the position of sovereign States, not liable to be called to answer at the bar of any court except by their own consent?

The author admits, of course, that since the adoption of the 11th amendment, a citizen of one State cannot sue another State in the Federal Courts. But he claims that as the judicial power extends "to controversies between States," the State whose citizens hold the bonds of another State, may make the non-payment of the bonds a subject of *controversy*, and thus arraign the defaulting State before the Supreme Court The argument is, that when the States, by the adoption of the Constitution, yielded up the right to make treaties, or to make war with each other, it is reasonable to suppose that some mode was devised, by which rights, which are the subject of treaty or war, could be settled. And it is claimed, the device fixed upon to settle these rights political, was to allow the States to implead each other in the Supreme Court.

Is this reasoning correct? From this data, is it proper to conclude that the powers of the Constitution in the grant of judicial powers "to controversies between States," intended to include, not only such matters as are usually the subject of examination in a judicial tribunal, but to go beyond anything yet known in the history of nations, and include, in this grant of judicial power, controversies of a political nature—controversies heretofore settled by negotiation or by the sword, and not by the decision of a court?

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I think not; it is clearly contrary to the spirit of the 11th amendment! Before the adoption of the Constitution, by virtue of a general principle, well settled in all countries where the system of the Common Law prevailed, a State could not be sued without its consent. Those who made contracts with a State relied upon its good faith.

Shortly after the adoption of the Constitution, a construction is given to the compact that violates this principle, and allows a State to be sued in its contracts by a citizen of another State. At once an amendment is made to the Constitution, which declares that the grant of judicial power shall not extend to such cases. A State shall not be sued upon its contracts by citizens of other States, or foreign States. Does not the amendment say, in substance, that those who contract with a State since the adoption of the Constitution, must now, as they did before its adoption, rely upon the good faith of the State, and not upon the courts of the Federal Government to enforce the contract? The principle involved is one of public policy essential to the well being of every State; not a mere sentiment that it was unbecoming the dignity of a State to be sued.

How the contracts of a State shall be performed, when and how its revenues shall be applied in discharge of its contract, is a matter of State policy to be determined by the legislative department of the State, not by the courts of the State. This is the principle involved in the 11th amendment. Justice Field) in *The Siren* (7 Wal., 1,534), uses this language: "It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his own consent. The doctrine rests upon reasons of public policy: the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subject to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception."

Now, if a State may make the non-payment of the bonds of a sister State held by its citizens, the subject of controversy in the Supreme Court of the United States, the evil intended to be remedied by the 11th amendment still exists; the courts of the United States, and not the Legislatures of the States, are to determine how the revenues of the State shall be applied in discharge of its contracts. The revenues

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of the States are not to be managed by the people through their representatives, but they are to be controlled by the Supreme Court of the United States.

In this discussion, I have assumed that the Supreme Court can not only hear and determine, but enforce its judgment by applying the revenues of the State to the discharge of the judgment rendered. This is the position of the author.

POLITICAL NOT A JUDICIAL QUESTION.

The Constitution of the United States distributes the powers of the Federal Government into the three departments, usual in all Republican Governments—Legislative, Executive and Judicial. The third article defines the judicial power, and it would be reasonable to suppose, unless there were some express words used to convey a different idea, that the judicial power granted, was such as is usually exercised by courts in the Colonies, or in England.

In *Smith* v. *Weguelin* (L. R. Eq., 198), where the court was asked to have guano in England, the property of the Peruvian Government, applied to the payment of a bondholder, in accordance with a contract of that Government, that the proceeds of the sales of the guano should be so applied, Lord Romilly, in refusing to exercise the power, said, if such a proceeding were allowed, "it might alter the relations between the two counties, and enable a bondholder, by the aid of the Court of Chancery, practically to declare war against a foreign country." In other words, the court, in taking jurisdiction of a State as to its contracts, would be exercising powers not judicial but political.

If a State fails to fulfil its contracts with the citizens of another State, that is a proper subject of negotiation between the States through their representatives, it is a matter of State policy confined to the legislative and executive departments of the Government, but never entrusted to the judicial department of it.

It is claimed, however, that the terms of the grant of judicial power in the third article are sufficiently broad to include matters of this kind; the terms are "controversies between two or more States." Here it is said that the word "controversies" is used in contra-distinction to the word "cases" in a previous part of the same article, and that the word controversies includes cases which are the subject of judicial decision, and also those which are of a political nature, and which the courts could not take cognizance of but for the use of this broad term.

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How does this view of the meaning of the word controversies apply to other parts of the same article? Immediately before the expression "controversies between two or more States," we find "controversies to which the United States shall be party," and immediately after we find controversies "between a State and citizens of another State"—"between citizens of different States." If we give the word controversies the broad scope claimed for it, the courts of the United States, where the United States is a party, has jurisdiction, not merely to determine questions of a judicial character when the United States is a party, but may determine political questions also. I am aware that it will be replied, the courts of the United States, with the exception of the Supreme Court, connot take jurisdiction except as provided by Act of Congress, or, in other words, that the Constitution, as to the inferior courts, does not execute itself. And when Congress has acted, it has limited the cases in which the United States may be sued, and the limit does not include cases of a political character. This would be conclusive if the question was, What jurisdiction have the courts of the United States? But the question is, What is the grant of judicial power in the Constitution? not how far has it been exercised; and looked at in this aspect, according to the claim set up, the courts *could have jurisdiction of political questions when the United States is a party.* Would it not exercise the ingenuity of even a Philadelphia lawyer to conjure up a case of a political character, in which the United States could be arraigned at the bar of its own courts?

Let us apply this extended meaning of the word "controversies" to the case enumerated after that, to ten or more States, and we shall have the courts taking jurisdiction of controversies of a political character "between a State and the citizens of another State; what controversies of a political character can exist between a State and citizens of another? And when we apply the test to the next class of cases, "controversies between citizens of different States," and ask what controversies of political nature can be submitted to a court for decision, it becomes simply ridiculous to attempt to answer such a question.

We suppose the reply to this line of argument is, that the word controversies has not a fixed, unbending meaning; it is of an elastic nature; it expands or contracts, according to its surroundings. When applied to the United States as a party to a suit, it means cases of a judicial character; when applied to States, it expands to include not those of a judicial only,

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but also those of a political character; and when applied to citizens of different States, it again contracts to cases of a judicial character.

A tribunal to decide controversies between States or Nations, was a thing unknown to English speaking people, and we may rest assured had the framers of the Constitution intended to create such a tribunal, clothed with powers to decide political controversies between States, such an important and novel matter would not have been expressed in doubtful language; it would not have been placed as an ellipsis in the middle of a long sentence, where the powers granted in most of the cases refer to cases the subject of the usual judicial power.

POLITICAL QUESTIONS EXPRESSLY PROVIDED FOR.

It is admitted that the non-payment of the debts of a State, due the citizens of another State, as to the latter State, is a wrong of a political character, the proper subject of negotiation and treaty, and even a *casus belli*.

Prior to the adoption of the Constitution, it is said the remedy was treaty or war, but it is claimed that § 10 of Article I. deprives the States of this power, and, therefore, says the author, we have provided, under the present form of government, the submission of "*controversies between States*" *to the Supreme Court of the United States.*

The force of this argument rests upon the assumption that the States are deprived of the powers of treaty and war by the Constitution of the United States. Is it true that they are deprived of this power? Section 10 of Article I. does not deprive the States of this power absolutely; the power is merely limited, and the limitation imposed is, that the States shall not enter into compacts or agreements one with another, or with a foreign power *without the consent of Congress.* Nor are they allowed to engage in war without such consent, unless actually invaded, or in such imminent danger as will not admit of delay.

The States are not deprived of the powers of treaty and war, but as the exercise of these powers might affect very seriously the interests of other States, members of the Union formed by the adoption of the Constitution, they are only to be exercised with the consent of Congress, who will see to it that the welfare of other members of the Union does not suffer.

The States as to the powers of treaty and war, stand in

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precisely the same relation to their sister States that they do to foreign States. Suppose citizens of New York invest in the public debt of Mexico; the obligations are not met, the Republic fails or refuses to pay; prior to the adoption of the Constitution, it was the proper subject of treaty or war. What is the remedy since the adoption of the Constitution? Is it not the same *with the consent of Congress?*

And it is proper that the remedy should be thus limited. It is always a question of policy whether the non-payment of such debts should be the cause of war, or even the subject of treaty; it may be more expedient for the citizens to lose their debts than to engage in war, or even make them the subject of negotiation. Now that the interests of the different States are so intertwined one with another in this Federal Government, it is eminently proper that the matter of a treaty with a foreign power, or the declaration of war by one of the States, should first receive the approbation of Congress, composed of representatives from all the States, who will take care that such a step is not taken without due regard to the interests of all the States. When a sister State fails to meet its obligations in the hand of citizens, the same remedy may be used that was used before the adoption of the Constitution (when the States certainly were sovereign even as to their debts), but the propriety of using the remedy must first be submitted to Congress for approval. The author admits that one of the remedies to compel States to pay their debts, is treaty or war, *with the consent of Congress*, an admission which not only takes away the force of his argument, but destroys it. The question is, What provision is made in the new government for the exercise of the powers of treaty or war, which the States could have exercised formerly, to compel the payment of debts due by the States? The answer is, that this remedy can only be exercised *with the consent of Congress;* but in lieu thereof, it is provided, that the Supreme Court of the United States may take cognizance of "*controversies between States.*"

The power is one of a political character, exercised by the legislative and executive branches of a government. In the fundamental law of this new government, this confederation of States, where would it be natural to find the grant of such power in that part which defines the judicial or the legislative powers? The answer which springs to the lips is, in that which defines the legislative powers. So thought the framers of the Constitution, and they directed that the powers of treaty or war should be exercised by the States, not when the

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Federal Judiciary shall think proper, but *when Congress shall consent;* that branch of the Government that controls the sword and the purse of the Federal Government, is to decide when the States shall make treaties, or engage in war, with their sister States or foreign States. This political remedy, which, prior to the Constitution, each State could use at its discretion, is under the Constitution, to be used in the discretion of Congress; and Congress is to determine whether the failure to pay by a foreign State or a sister State, debts due to citizens of one of the States, is to be followed by treaty or war.

It being admitted, that independent of the Constitution, the only remedy for the non-payment of debts due by a State to citizens of another State, is treaty or war. When we find that the Constitution vests in Congress the power to determine when the States shall exercise these powers, that the remedy is to be used or withheld as they shall determine, what is the propriety of arguments long drawn out, and fine-spun theories, to show that the remedy for such an evil is to be found in the grant of judicial power? Why search in the grant of judicial power, to dig out, by strained implication, a remedy which, in express terms in the grant of legislative powers, is to be used or withheld in the discretion of the legislative branch of this new government?

This remedy which these sovereign States prior to the adoption of the Constitution could use to enforce the payment of debts, is not destroyed or taken away under the Constitution, but its exercise is limited so that it may not be used to the detriment of the other States of the Union. With this fact standing in bold relief, that this remedy of a political character for a wrong done to a State, is expressly recognized in the Constitution, and that its exercise is to be supervised by the legislative branch of the Government, when we come to consider the construction of a grant of judicial power, and to determine the meaning of the expression, "controversies between States," an expression of doubtful import, if we can violate the rule of association, and claim that the controversies intended are not of a strictly judicial character, such as most of the other cases enumerated, but include those of a political character, what reply can we make, to the assertion that cannot be denied, that a remedy for controversies of the political character under discussion is expressly provided for in another part of the Constitution, and confided to another branch of the Government for its supervision?

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RULINGS OF SUPREME COURT.

The Supreme Court of the United States have uniformly refused to take cognizance of questions of a political character, when other departments of the Government have acted in the matter. And this, too, when the controversy was between individuals and the jurisdiction undoubted over the parties, but the rights of the parties depended on political questions. (7 How., 1.)

In the celebrated case of *Luther* v. *Borden*, an action of trespass, the defendant justified that martial law had been declared, by the Legislature of the State, and that he being a military officer under orders of a superior officer, had done the acts complained of.

The plaintiff was supporting the Constitutional Government, and the defendant the Charter Government of the State of Rhode Island. The plea raised the question which of these was the duly constituted Government of the State.

This was a question, so far as the United States was concerned, which it was the duty of the political branch of the Government to determine, and not the judicial branch. And accordingly the court decided that it could not determine this question, because the decision of such questions had been vested in another branch of the Government in Congress.

Taney, C. J. said, "Under this article of the Constitution (4th article, sec 4), it rests with Congress to decide what Government is the established one in a State. For as the United States guarantees to each State a Republican Government, Congress must necessarily determine what Government is established in the State before it can determine whether it is Republican or not." And its decision is binding on every department of the Government, and cannot be questioned in a judicial tribunal—the right to decide it is placed there and not in the courts (7 How., p. 42); and in another part of the same opinion, he uses this language:

"No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and they may alter and change their form of Government at their own pleasure. But whether they have changed it or not, by abolishing an old Government and establishing a new one in its place, *is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision and to follow it.*" 7 How., 47.

In this case, Congress had not acted in the matter, and the

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case was decided upon the ground, that the question was political, and the power to determine was vested not in the judicial but in the legislative branch of the Government.

If the Supreme Court, when a political question comes before it, incidentally in determining the rights of parties who are properly before it, is to be controlled by other departments of the Government, and refuses to consider such questions, shall we expect the court, when questions purely of a political character come before it, to take cognizance of such questions, when we know that the usual remedy for such matters between nations is treaty or war, and this remedy is, by express provision, made subject to the supervision of Congress? Or shall we expect them, as in *Luther* v. *Borden*, to decline the consideration of political questions which have been left for the decision of Congress by the Constitution.

The case of *The Cherokee Nation* v. *State of Georgia* (5 Peters, 1) is very instructive upon this question. The bill claimed that the Cherokees were a nation, a foreign State, and prayed that the State of Georgia be restrained from the execution of certain laws of that State, which it was alleged would annihilate the Cherokees as a political society, and seize for the use of Georgia the lands of the nation, which had been assured to them by the United States in solemn treaties, still in force. The court decided that the Cherokees were not a "foreign State," and that they did not have jurisdiction of the parties, but the opinions of the judges discuss the question under consideration. Marshall, C. J. says, "A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people asserting their independence; their right to which the State denies." (5 Peters,20.) And again speaking of the right to the land occupied by the Indians, he says, "The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the execution of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department." *Ibid*, p. 20.

Justice Johnson said, that had he been sitting alone, he would have put his rejection of the notice upon the nature of the claim set up. "I cannot," says he, "entertain a doubt

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that it is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal. There is no possible view of the subject, that I can perceive, in which a court of justice can take jurisdiction of the questions made in the bill." *Ibid*, 28. He compares it to the case of the *Nabob of Arcot* (2 Vesey, Jr., 371), "a case of a political character, where the courts of Great Britain refused to take jurisdiction, because it had its origin in treaties entered into between sovereign States; a case in which the appeal is to the sword, and to Almighty justice, and not to courts of law or equity. In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty is war and subjugation." 5 Peters, 30.

THE CASES OF BOUNDARY.

I am aware that it may be said that the cases of *Rhode Island* v. *Massachusetts*, 12 Peters, 657; *Virginia* v. *West Virginia*, 11 Wal., 54; and others, in which the Supreme Court has exercised jurisdiction and determined questions of boundary between States, were cases not purely of a judicial character; that the questions involved were of a political character, such as between States or nations, are usually settled by treaty.

It is true that in this class of cases the court did take jurisdiction of cases of a political character, holding that the grant of judicial power to decide "controversies between States" included them. But it may be admitted that the grant of judicial power extends to this class of cases without effecting the argument.

Prior to the Declaration of Independence, controversies as to boundaries were settled by the King in council, or if there was an agreement on the subject, that agreement was enforced by the Court of Chancery. Under the articles of Confederation, a court was created for this specific purpose. Under the supervision of Congress, judges were appointed by consent of the States, or if they could not agree, Congress selected three persons from each State, and this number was reduced to thirteen, by each State alternately striking one from the number selected, until it was reduced.

In extending their jurisdiction to cases of this description, there was something in the history of the country to guide the court. A tribunal had always existed for deciding such controversies; at the time of adoption of the Constitution, many such controversies were still in existence, and the court

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might say, it is not to be presumed that it was the intention of the framers of the Constitution to leave the States without any tribunal for deciding such questions, except that of treaty or war with the consent of Congress.

How does this course of reasoning apply to enforcing the non-payment of debts by a State? When, in the history of the colonies, or of the people from whom their inhabitants are descended, was it known that a sovereign State could be sued by an individual for a debt, or that one State could sue another State, because the latter had failed to meet its obligations to citizens of the former?

No such tribunal was ever heard of among English speaking people, and it would be a forced construction to extend the judicial power to include such cases, unless there were express words to convey such an idea.

HOW IS THE DECISION OF THE COURT TO BE ENFORCED?

In the case of *Rhode Island* v. *Massachusetts*, 12 Peters, 751, Mr. Justice Baldwin, who delivered the opinion of the court, seemed to think it would be enforced in the same way in which a decree is enforced against the King, in cases where he was plaintiff, or he, by his Attorney General, became a party to a suit, and submitted to the jurisdiction of the court. In such cases, he is presumed never to do a wrong or refuse a right to a subject; on the same principle, it is argued, that it cannot be presumed that a State would either do wrong, or deny right to a sister State or its citizens, or refuse to submit to the decree of the court.

Mr. Madison held a similar view as to the judicial power in reference "to controversies between States and a foreign State." "I do not conceive," he says, "that any controversy can ever be decided in these courts between an American and foreign State, without the consent of parties. If they consent, provision is here made. The disputes ought to be tried by the National tribunal. This is consonant with the law of nations." (*Virginia Debates*, 391.) There is no difference whatever between the grant of judicial power as between States, and as between a State and a foreign State.

The view, then, of the Supreme Court, even in the case of boundaries, is like that of Mr. Madison, that if the parties consent, if the sovereign States submit to the decree of the court, in the grant of judicial power, there is a tribunal created which will decide these controversies between States. The Supreme Court, in this view, is a commission or board

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of arbitration, which will decide controversies between States, domestic, or domestic and foreign, whenever the parties submit their differences to them, and leave the enforcement of its decisions to their own sense of right.

But the author is not satisfied with such milk and water doctrine as this, that may do to feed such babes as Baldwin and Madison, men who lived in the early days of this great country. Now that she has passed her centennial, the men of the country must have strong drink like this:

"It would, indeed, be a hollow mockery if the power were exhausted on entering the decree. The judgment must be enforced. The wisdom of that august tribunal will, doubtless, when necessary, prescribe the process and mould the proceedings by which it shall be executed."

"If Congress can authorize the levy and collection of a tax, so can the court; if Congress can direct the appropriation of the revenue of a State in the hands of its officers, so can the court; and if Congress can require State officers to pay revenue collected by them into the hands of the court, so also can the court." 12 Amer. Law Review, 653–4.

This is the power claimed for the Supreme Court under the new light by which the Constitution is to be read!

Suppose it is admitted that the power of the Supreme Court is as great as Congress on the subject, pray tell us what authority Congress has on the subject? Can Congress direct the appropriation of the revenues of a State in the hands of its officers? Can Congress require State officers to pay revenue collected into the hands of a court?

I understand the author to assert these propositions boldly and broadly.

Will the author be so kind as to inform us when the power was delegated to Congress to interfere with the revenues of a State in the hands of its officers? In what part of the Constitution shall we find the provision that Congress has the power to require the State officers to pay over revenues collected for State purposes?

If there is one proposition in reference to the Constitution that all jurists are agreed upon, it is that contained in the tenth amendment. That the powers of the Federal Government are all delegated, and that it has no powers except those delegated, in which are necessary and proper to carry into execution those delegated. Over and over again has this doctrine been uttered by the Supreme Court. Mr. Justice Swayne, in *Pacific Ins. Co.* v. *Soule*, 7 Wall., 444, says, of the National Government, "It has no faculties but such as

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the Constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is *ultra viris* and void."

Certain it is that no express power has been delegated to Congress in the Constitution to interfere in any manner with the revenues of a State in the hands of its officers, and it will be difficult to ascertain what power is delegated, which it would be either necessary or proper to enforce by a law, appropriating the revenues of a State in the hands of its officers.

Perhaps this monstrous doctrine is deduced from the case of *Osborne* v. *The Bank*, 8 Wheat, 842, for the author says of that case: "The court enforced its decree on Osborne, the Treasurer of the State of Ohio, and compelled him to pay over moneys which he had collected under a statute of that State by virtue of and in discharge of the duties of his office." 12 Amer. Law Review, 654.

Never was a graver mistake made; the court did not undertake to interfere with State officials in the execution of State laws; such was not the principle involved in that case, nor in the numerous class of cases where State laws have been declared null and void, and the individuals claiming to act under them have been restrained by the courts of the United States. The principle involved is, that the State laws in question are in conflict with the Constitution of the United States, or the laws made in pursuance thereof, which are the supreme laws of the land, and by reason of such conflict are void.

Osborne was not regarded as a State officer performing his duties under a valid law of Ohio, but as a citizen of the United States, acting without authority to the injury of another, for the void law of the State could, in the nature of things, give no authority, and his attempt to collect the tax imposed on the United States Bank, was an unlawful act of Osborne, the individual, not the lawful act of Osborne, Treasurer of the State of Ohio. It is just here that we see the difference between the articles of Confederation and the Constitution; the former acted on the States, the latter on the individuals.

The cases in which State officials have been restrained from acting under State laws in conflict with the Constitution of the United States, are of constant occurrence, but there is yet to arise a case in which the courts claim, in disposing of such cases, the authority to interfere with the State officials acting under valid State laws. They declare the law

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void, that it gives no authority to the individual to do the acts complained of, and then they declare to the individual thus acting that he must refrain from the acts complained of. *Bradley, J. in Bd. of Liquidation* v. *McComb*, 92 U. S., 541.

Florida v. *Georgia*, 17 How., 478. An extract is paraded from the opinion in this case to shew that the court can enforce its decree. The question under discussion was, whether the United States could intervene, and how, in a suit between two States? Congress could have acted in the matter, and prescribed the mode in which States or the United States could be arraigned before the court, but it did not, and therefore the court having original jurisdiction, devised the means itself, and the means devised was to serve process on the Governor and the Attorney General. And because the court can adopt the process by which the case is to be brought before it to be heard and determined, the author infers that it may devise effectual means for enforcing its decree. "It might," says he, "by an ancillary proceeding, direct the treasurer of a State to pay over to the marshal funds as fast as received by him, until the judgment was satisfied, or it might extend this process to many or all of the tax collectors of a State; it might direct it officers to assess, levy and collect a *pro rata* share of the judgment from the property of the citizens of the State, or Congress might pass a law providing the process and mode of proceeding." 12 Amer. Law Review, p. 654–5.

The logic of the author is most agile, it makes a wondrous leap in arriving at its conclusions. Given the premises that the Supreme Court in controversies between States may prescribe the modes and forms of proceeding to bring the parties before it, he leaps to the conclusion, that the revenues of the State in the hands of its treasurer or its tax collector is the subject of garnishment, and that the Supreme Court can levy, assess and collect a tax from the citizens of a State to liquidate a decree made by it.

The first part of the conclusion has been definitely settled the other way exactly. Public funds are not the subject of garnishment, whether they be the funds of the United States, a State, or a municipal corporation. *Buchanan* v. *Alexander*, 4 How., 20; *United States* v. *Baltimore and Ohio Railroad*, 17 Wal., 322; *Darlington* v. *Mayor, &c.*, 31 N. Y., 164.

The second branch of the conclusion is answered by the Supreme Court in *Rees* v. *Waterton*, 19 Wal., 117, in these words: "This power to impose burdens and raise money, is the highest attribute of sovereignty, and it is exercised first,

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to raise money for public purposes only; and second, by the power of the legislative authority only. It is a power that has not been committed to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority, at once so delicate and so important."

Very true, says the author, the Supreme Court did so decide, but that was in a suit on appeal from a Circuit Court, where an individual was a party, and it does not follow that the court would not exercise it in furtherance of its original jurisdiction.

And why not, pray? The answer of the author is, "the Federal Government has all power necessary for the execution of the powers granted." Certainly it has, but the very question at issue is, whether *this power is granted at all;* and particularly whether it is granted to the judiciary.

The Supreme Court declares that this power to tax is a function of the legislative department of the Government; that it has not been committed to them. The power to tax has not been committed to them—has not been committed in any form. They do not declare merely that they will not exercise the power at the suit of an individual, on appeal from the Circuit Court; but they declare the power does not exist; it is not within the grant of judicial power. It is beyond their power to assume the place of a State, and exercise the delicate and important function of levying taxes on the people. The reasons given by the court for their decision, cuts up the whole matter by the roots. If the power is not judicial, and has not been committed to them, and cannot, from its very nature, be committed to them, they can no more exercise the power when they have original than when they have appellate jurisdiction.

Kentucky v. *Dennison*, 24 How., 97. This case settles the question of compelling States to pay their debts, or compelling them to do anything by process from the Supreme Court directed to or acting upon the officers of a State. A crime is committed in Kentucky, the criminal flies to Ohio, he is demanded in due form by the Governor of Kentucky, and the Governor of Ohio refuses to deliver the fugitive from justice. Kentucky having a controversy with Ohio, applies to the Supreme Court for a mandamus to compel the Governor to deliver the fugitive. What was the decision of the court? They decided that they had jurisdiction of the controversy; that *mandamus* was the proper remedy; and that it was the duty of the Governor of Ohio to deliver the fugitive—no

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merely a moral duty, but a duty prescribed by the Constitution of the United States itself, and enforced by appropriate legislation by Congress. And yet they did not compel the delivery of the fugitive. Why not? Because *no means had been provided to enforce obedience.* "Indeed," remarks Chief Justice Taney, "such a power would place every State under the control of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever and compel him to perform it."

Apply these principles to the debt question—the State of Rhode Island sues the State of New York for its failure to pay bonds issued by the latter and held by citizens of the former; the court takes jurisdiction, hears and determines the amount of the debt, and decrees that New York shall pay the amount to Rhode Island. Can the court compel the Legislature of New York to levy a tax, and the State officers to collect and pay over the tax in discharge of the debt? No, says the court, in *Kentucky* v. *Dennison*, we cannot control State officers.

But now comes the author with a new idea. This is the way to do things. The Constitution acts upon individuals not upon States; *therefore*, Oh! happy thought, the court will appoint its own officers to levy and collect a tax, which tax will be collected of individuals. The State officers will not be interferred with in the performance of their duties; the principles of *Kentucky* v. *Dennison* will not be violated; the court will merely appoint its own officers to perform the duties of the State officers. Is it not a pity that some one had not suggested this idea to the Supreme Court when they were considering *Kentucky* v. *Dennison.*

There was no use of an attempt to compel the Governor of Ohio, a State officer, to render obedience to the *mandamus;* all the court had to do was to vest one of its own officers with the power of surrendering the fugitive in Ohio, and all would have gone as "merry as a marriage bell."

The idea is as ridiculous as it is novel; the court cannot interfere with State officers—they are sacred. But it can vest in its own officers the same powers that the State officers possess, and thus all the functions of the State officers can be absorbed, so far as the revenue of the State is concerned. The court cannot exercise such powers where the township of Waterton (19 Wal., 47) is in question; it has refused so to do; but if the State of New York is a defendant, with

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Rhode Island as plaintiff, then the court will exercise powers which belong solely to the legislature of a State. The little town of Waterton only comes before it by way of appeal, but the State of New York comes before it in its original and exclusive jurisdiction. Then, when it has before it the great State of New York, its energies are aroused, and the slumbering powers of the "august tribunal," which inhere in its original jurisdiction are awakened, and like Minerva, from the brain of Jove, the court steps forth a full-fledged State, exercising all the powers of the legislative, executive and judicial departments; it renders a decree, makes laws in levying and assessing taxes, and appoints officers to execute these laws.

The result of this discussion brings me to the conclusion so felicitously expressed by Mr. Hamilton. 2 Federalist, No. 81. "The contracts between a nation and an individual are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will." Mr. Webster, in a letter to Baring Brothers, in 1839, expressed the same opinion, that the good faith of a State is the only security for the payment of its debts.

In the maintenance of this good faith, every citizen of the State is interested. The honor of the State and its material prosperity are alike dependent upon the fidelity with which its engagements are kept with its creditors. To these principles, I yield my assent, but not to the doctrine, that under the Constitution, any mode is provided to compel a State to pay its debts.

Norfolk, Va. W. H. Burroughs.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

THE UNION NATIONAL BANK OF SAINT LOUIS &c. *v.* A. MATTHEWS.

A loan by a National Bank upon the faith of real estate as security, is valid under the National Banking Act.

In error to the Supreme Court of the State of Missouri.

Mr. Justice Swayne delivered the opinion of the court.

This case involves a question arising under the National Banking Law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance. There is no controversy about the facts, and so far as it is necessary to advert to them, they may be briefly stated.

On the first of March, 1871, Hugh B. Logan and the defendant in error, Elizabeth Beard, executed and delivered to Sterling Price & Co., their joint and several promissory note for the sum of $15,000, payable to the order of that firm two years from date, with interest at the rate of ten per cent. per annum. The payment of the note was secured by a deed of trust, executed by the defendant in error, on certain real estate therein described.

On the thirteenth of the same month, the note and deed of trust were assigned to the bank. The answer of the bank avers that the bank "accepted the said note and deed of trust as security for the sum of $15,000, then and there advanced and loaned to said Sterling Price & Co., * * * on the security of said note and deed of trust." Price & Co. failed to pay the loan at maturity. The bank directed the trustee in the deed of trust to sell. The defendant in error thereupon filed this bill in the proper State Court to enjoin the sale. A perpetual injunction was decreed upon the ground that the loan by the bank to Price & Co. was made upon real estate security; that it was forbidden by law, and that the deed of trust was, therefore, void. The decree was made upon the pleadings. No testimony was introduced upon either side. The plaintiffs in error removed the case to th Supreme Court of the State. There the decree of the lower

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court was affirmed. Hence this writ of error to this court from the State Court.

Our attention has been called to but a single point which requires consideration, and that is whether the deed of trust can be enforced for the benefit of the bank.

The statutory provisions which bear upon the subject are as follows:

"SEC. 5, 136." Every National Banking Association is authorized "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, *by loaning money on personal security*, and by obtaining, issuing, and circulating notes according to the provisions of this title.

"SEC. 5, 137. A National Banking Association may purchase, hold, and convey real estate for the following purposes, and for no others: First, such as may be necessary for its immediate accommodation in the transaction of its business. Second, such as may be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate purchased to secure any debts due to it for a longer period than five years."—Rev. Stat. U. S., 1,999; 13 U. S. Stat. at Large, 99.

Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust, but that has not yet occurred, and never may.

Section 5, 137 has, therefore, no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view.

Section 5, 136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*—that the maker who executed the deed would not have been deemed

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abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter.

The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations, and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in *mortmain.* The intent, not the letter, of the statute constitutes the law. A Court of Equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances the defence of *ultra vires*, if it can be made, does not address itself favorably to the mind of the chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error.

In the *First National Bank* v. *Haire and others*, 36 Iowa, 443, the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should endorse it, that the bank should discount it, and that the maker should indemnify the endorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and endorser failed and became bankrupts. The bank filed a bill to foreclose. The same defence was set up as here. In disposing of this point, the Supreme Court of the State said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors, and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this.—*Silver Lake Bank* v. *North*, 4 J. C. R., 370."

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust

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is the same thing in effect as a direct mortgage—with respect to a party entitled to the benefit of the security—and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not *declare* such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so, and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

In *Harris* v. *Runnels*, 12 How., 79, this court said that "the statute must be examined as a whole to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case, a note given for the purchase-money of slaves, taken into Mississippi, contrary to a statute of the State, was held to be valid.

Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford* v. *Worcester*, 7 Mass., 48; *Barton* v. *Hervey*, 1 Gray, 119; *King* v. *Birmingham*, 8 Barn. & Cr., 29.

Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void.—*Bank of the State of Mississippi* v. *Sharp*, 4 Smedes & Mar., 75; *Grand Gulf Bank* v. *Archer*, 8 Id., 151; *Rock River Bank* v. *Sherwood*, 10 Wisconsin, 230.

The charter of a savings institution required that its funds should be "invested in, or loaned on, *public stocks or private mortgages*," &c. A loan was made and a note taken secured by a pledge of worthless bank stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counter claim adjudged that he should pay the amount of the loan with interest.—*Mott* v. *U. S. Trust Co.*, 19 Barb., 568.

Where a corporation is incompetent by its charter to take

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a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure* v. *Hillegas*, 7 Serg. & R., 320; *Gounde* v. *The North Water Company*, 7 Barr, 233; *Runyon* v. *Coster*, 14 Pet., 122; *The Banks* v. *Poitiaux*, 3 Randolph, 136; *McLindo* v. *The City of St. Louis*, 10 Mo., 577.

The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 604.

In the *Silver Lake Bank* v. *North*, 4 John. C. R., 370, the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defence "that by the act of incorporation, the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent, after the bond and mortgage were executed." The analogy of this defence to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor Kent said: "Perhaps it would be sufficient for this case, that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of *Pennsylvania* to exact a forfeiture of their charter than for this court in this collateral way to decide a question of misuser, by setting aside a just and *bona fide* contract." * * * "If the loan and mortgage were concurrent acts, and intended so to be, it was not a case within the reason and *spirit* of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced *bona fide* as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition."

It is not denied that the loan here in question was within this category. This authority, if recognized as sound, is conclusive. See also *Baird* v. *The Bank of Washington*, 11 Serg. & R., 411.

Sedgwick (Stat. and Const. Constr., 73) says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the

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agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and, perhaps, depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defence whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress.

That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government.

The decree of the Supreme Court of Missouri is reversed, and the cause will be remanded, with directions to dismiss the bill.

Mr. Justice MILLER dissenting.

I am of opinion that the National Banking Act makes void every mortgage or other conveyance of land as a security for money loaned at the time of the transaction by the bank, to whomsoever the conveyance may be made; that the bank is forbid to accept such security, and it is void in its hands.

The contract to repay the money, and the collateral conveyance for security, are separable contracts, and so far independent that one may stand and the other fall.

In the present case, the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of money, is valid against Mrs. Matthews personally. With this latter contract, the State Court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more.

Its judgment in that matter ought, in my opinion, to be affirmed.

NOTE.—The Supreme Court of Appeals of Virginia, at the January Term, 1879, in the case of *Wroten, assn.*, v. *Armat, &c.*, decided this question the same way, before the decision in the foregoing case by the Supreme Court of the U. S. was known of. The opinion in *Wroten, assn.*, v. *Armat, &c.*, is a very able one, delivered by MONCURE P., and as it discusses other very important principles, we hope to be able to publish it in our next No.—ED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

SLAUGHTERS *v.* FARLAND'S EX'X.

1. S. brings debt against W., the maker, and H. and F., endorsers of a negotiable note. There is an office judgment at rules against all the defendants. At the next rules, office judgment confirmed as to W. and H., death of F. suggested. At the next term of the court, there is judgment against W. and H. Afterwards *scire facias* issued and served on F's executrix to revive the action, and she appears and pleads *nil debet* and obtains a continuance, and this is repeated. There are three trials and a verdict in her favor. HELD:

That F's executrix, not having made any question in the court below as to the revival of the suit against her by *scire facias*, she must be held to have waived the question, and she cannot make it in the appellate court.

2. The certificate of the notary that he gave notice of protest of the note for non payment, sent by mail to the place of residence of endorser, whilst there was a mail communication between the place of starting and the residence, though not by the direct route, held to be sufficient evidence of notice.

The case is fully stated by Judge MONCURE in his opinion.

J. M. Matthews for the plaintiff in error.

No counsel appeared for the defendant in error.

MONCURE P. This is a writ of error to a judgment of the Circuit Court of Essex county, rendered on May 11th, 1872, in an action of debt then pending in said court in the name of the plaintiffs in error, Fanny Slaughter and Matilda Slaughter, against the defendant in error, Ellen D. Farland, executrix of the last will and testament of Zebulon S., alias Z. S. Farland, deceased, who, in his lifetime, was sued with George T., alias Geo. T. Wright, and Robert S., alias R. S. Hipkins.

The original action was brought in the said court on the 19th day of August, 1868. The writ was returnable to September Rules next thereafter, and was returned duly executed on all the defendants. At the same Rules, a declaration was filed in the case, which is in the due form of a declaration in an action of debt on a protested negotiable note, payable at the Bank of Commerce, Fredericksburg, against the maker and endorsers thereof. At the same Rules, a common order was entered against all three of the defendants, the maker, and the two endorsers of the note. At the next Rules, to wit., on

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the 5th day of October, 1868, the common order or conditional judgment entered against two of the defendants, to wit, the maker, Wright, and first endorser, Hipkins, at the last Rules, was confirmed, and it was suggested that the other defendant, Zebulon S., alias Z. S. Farland, was dead. At the next succeeding term of the said court, to wit, on the 18th day of November, 1868, being the last day of the said term, an order was made in the case stating that the plaintiffs on that day came by their attorneys, and the defendants, Wright and Hipkins, being then again solemnly called, and failing to appear, and the judgment obtained against them at Rules not having been set aside, and the plaintiffs being then entitled to a final judgment, it was, therefore, considered by the court that the plaintiffs recover against the said defendants the sum of $687.54, with interest thereon at *six per centum per annum* from the 1st day of April, 1862, till paid, and also $2.85, the charges of protest of the said note, and also the plaintiffs' costs of suit, $7.32.

On the 15th day of September, 1869, the plaintiffs sued out of the clerk's office of said court a *scire facias* to revive the said action against Ellen D. Farland, executrix of the last will and testament of the said Zebulon S., alias Z. S. Farland, deceased.

Afterwards, to wit, at Rules held at the clerk's office of said court on the 4th day of October, 1869, the *scire facias* aforesaid having been returned executed, it was ordered that the cause stand and be revived against the said Ellen D. Farland as executrix aforesaid, and be in all things in the same plight and condition it was in at the time of the death of said Zebulon S., alias Z. S. Farland, deceased, and on the motion of the plaintiffs, it was further ordered that the conditional judgment against the said defendant, Zebulon S., alias Z. S. Farland, be confirmed.

And at a Circuit Court, continued and held for said county on the 17th day of November, 1869, came the said parties to the said revived action by their attorneys, and on the motion of the defendant, the judgment obtained against her in the clerk's office in the cause was set aside, and the said defendant plead "*nil debet*," and "offsets," to which said pleas the plaintiffs replied generally, and issues were thereupon joined by the parties, and leave was given to the defendant to file special pleas in writing, within ninety days, and the cause was continued till the next term.

At the next term, to wit, on the 28th day of April, 1870,

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on the motion of the defendant, it was ordered that the cause be continued for her and at her costs for that term.

At the next term, to wit, on the 15th day of November, 1870, on the motion of the defendant, she was permitted to file the special pleas in writing, which leave was given her to file at November term, 1869, and the plaintiffs filed a general demurrer to said special pleas, in which demurrer the defendant joined, and which, upon being argued, the court sustained. Whereupon the issues joined in the cause were tried by a jury, which found a verdict for the plaintiffs for the sum of $491.10. On the motion of the plaintiffs, the verdict was set aside and a new trial was granted them; and, therefore, the cause was continued till the next term.

At the next term, to wit, on the 13th day of May, 1871, the case was tried by a jury upon the issues joined therein, but the jury being unable to agree, was discharged, and the cause was continued till the next term for a new trial to be had therein.

At the next term, to wit, on the 14th day of November, 1871, on the motion of the defendant, it was ordered that the cause be continued for her and at her costs at that term.

At the next term, to wit, on the 13th day of May, 1872, came the parties aforesaid by their attorneys, and neither party, plaintiffs nor defendant, demanding a jury, the whole matter of law and fact was submitted to the court. Whereupon it was considered by the court that the plaintiffs take nothing by their bill, but for their false clamor be in mercy, &c., and that the defendant recover against the plaintiffs her costs by her about her defence in that behalf expended, and that the defendant go thereof without day.

The plaintiffs excepted to the said judgment of the court, and tendered their bill of exceptions, which was made a part of the record, and is in the words and figures following, to wit:

Be it remembered, that on the calling of this cause, the parties, by their attorneys, announced themselves as ready for the trial of the cause, and none of the parties demanding that the cause be tried by a jury, the whole matter of law and fact was heard by the court. The plaintiffs, to prove and maintain the issue on their part, showed in evidence to the court the note in writing on which this suit was instituted, with all the endorsements thereon, in the words and figures following, to wit:

TAPPAHANNOCK, 29th November, 1861.

Four months after date I promise to pay to the order of

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Robert S. Hipkins six hundred and eighty-seven dollars and fifty-four cents, value received, payable at Bank of Commerce, Fredericksburg. GEORGE T. WRIGHT.
$687.54; 4270.

$687.54 due Nov. 29th.

GEO. T. WRIGHT,
R. S. HIPKINS,
Z. S. FARLAND.

and also the protest in writing of the said note, in the words and figures following, to wit:

[Then follows a copy of the note, after which is the notarial certificate in these words:]

State of Virginia—District of Fredericksburg, to wit:

Be it known that on the 1st day of April, in the year of our Lord, one thousand eight hundred and sixty-two, at the request of the cashier of the Bank of Commerce, at Fredericksburg, I, Samuel S. Howison, notary public for the district aforesaid, by lawful authority duly commissioned and qualified, presented at the Bank of Commerce, where the same was made payable, the original note (whereof the above is a true copy), and demanded payment of the same, which was refused; therefore the said notary have protested, and do, by these presents, solemnly protest against the drawer and endorsers of the said note, and all others to whom it doth or may concern, to avail for principal sum, together with all interest, exchange, costs and damages suffered and to be suffered for non-payment thereof. Whereupon I gave notice of the said protest to the parties concerned as follows, viz.: Notice for drawer and two first endorsers at Tappahannock, Va., and to last endorsers in person at Fredericksburg, informing them, respectively, that they were liable for the payment of said note. In testimony whereof, I have hereunto set my hand and affixed the seal of my office on the 1st day of April, 1862.

S. S. HOWISON, Notary Public.
Fredericksburg, Virginia—Notary Public, D. S. U.

Tax on seal	$1 50
Cost of protest	1 00
Extra notices	20
Paid postage	15
	$2 85

Protest-book A. A., page 44.

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And the plaintiffs, further to prove and maintain the issue on their part, shewed in evidence to the jury, by one witness, R. A. Cauthorn, that he was postmaster at the town of Tappahannock, in the State of Virginia, from some time early in the year 1861, to some time in the month of May, 1862; that on the 31st day of March, 1862, he mailed a letter at the postoffice in Tappahannock to Fredericksburg, in said State, and sent it by the Fredericksburg mail; that shortly thereafter (the precise day not recollected, he received a letter from Fredericksburg dated 5th April, 1862, in reply to his letter; that he does not know whether the reply letter came by the direct mail from Fredericksburg to Tappahannock, or *via* Richmond city; that he knows of no irregularity or obstruction of mail communication about the 1st of April, 1862, between Fredericksburg and Tappahannock; that his practice about that time was to send the mail for Fredericksburg *via* Richmond city; that during the entire month of April, 1862, Tappahannock was the postoffice of the defendant, Z. S. Farland, and that for the same time and up to the summer of that year, there was regular mail communication between Tappahannock and Richmond, and that mail matter frequently came from Fredericksburg to Tappahannock *via* Richmond. And the defendants, to prove and maintain the said issue on their part, shewed in evidence to the court, by one witness, Jas. H. Muse, that he, the said Muse, was commissary for the Fifty-fifth Va. regiment; that the mail-carrier from Fredericksburg to Tappahannock boarded with him; that he did not come to Tappahannock from the 1st to the 3d April, 1862, when the witness left with the regiment, and that if the mail had been brought from Fredericksburg to Tappahannock between the 3d and the 6th, over the regular route, he should have known it; that the said regiment was ordered to Fredericksburg, and on the 3d of April, 1862, left Tappahannock, and went as far as Lloyd's, in Essex county, on the next day to Loretta, in said county, on the next day (the 5th) to Port Royal, and on the next day (the 6th) to Massaponax swamp, near Fredericksburg; that he accompanied the regiment, and during this time, from the 3d to the 6th of April, 1862, inclusive, he was satisfied that no mail conveyance passed on the direct route (over which the regiment traveled) between Fredericksburg and Tappahannock; that for several days the regiment was detained at the said swamp, which was so much swollen that it was impossible to cross it; that said Z. S. Farland, on the 3d of April, 1862, went out in the country to place his family with P. A. Sandy, and said Far-

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land went with the said regiment and remained for some time; that at and about that time the cars were running between Fredericksburg and Richmond; and the defendants, further to prove and maintain the issues on their part, shewed evidence to the jury, by one witness, John T. Boughan, that the aforesaid regiment left Tappahannock for Fredericksburg on the 5th day of April, 1862, and on reaching Port Royal, remained there two days and nights, because of high water at the Massaponax swamp, and then proceeded to Fredericksburg.

And the defendants, further to prove and maintain the issue on their part, shewed in evidence to the jury the deposition of one witness, S. S. Howison, in the words and figures: "The deponent being first duly sworn, deposeth and saith: 1st. Question by defendant's counsel—Were you a notary public of the corporation in district of Fredericksburg, State of Virginia, in the year 1862; and if yea, when and by whom were you appointed?

Answer—I was commissioned a notary public by Governor John Letcher in the early part of 1861, as far as my memory serves me; I cannot state positively the date of my commission. Under the same commission, I protested the note above mentioned; I never gave any notice to any of the parties of the removal of any of the effects of the Bank of Commerce; nor do I know that any formal notice was given by any of its officers. The specie of the bank was removed, according to my recollection, in April, 1862; the books and all its papers were stored away in a vault, under a store in Fredericksburg, for some months. I do not believe the bank did any regular business after 1862; it was engaged simply in closing up the specie of the bank. I think it was moved on the 3d of April—the event being necessitated by the presence of General Augur's U. S. army brigade on the Stafford side of the Rappahannock river, opposite the town of Fredericksburg. The books and papers of the bank were moved from the banking rooms and stored away in the vault under the store in Fredericksburg, as before stated, about the same date, viz., on the night of the 3d April, or the morning of the 4th of April. And further this deponent saith not. S. S. Howison."

And this being all the evidence offered in the said cause, and the court, having considered the same and the arguments of counsel, adjudged that the plaintiffs take nothing by their bill, but for their false clamor be in mercy, &c., and that the defendants recover against the plaintiffs their costs by them

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about their defence in this behalf expended. To which said judgment of the court, the plaintiffs, by their counsel, except, and tender this their bill of exceptions, and pray that the same may be signed, sealed and enrolled, and made part of the record in the said cause, which is accordingly done.

J. M. JEFFRIES. [Seal.]

To the said judgment of the Circuit Court, the plaintiffs applied to a judge of this court for a writ of error, which was accordingly awarded.

There are but two questions arising in this case—one of form, and the other of substance. 1st. Whether the proceeding by *scire facias* against the personal representative of one of the joint defendants who died pending the action was valid and legal; and 2d, Whether due notice of the dishonor of the note on which the action was brought was given to the endorsers, so as to make them liable.

The former question was not raised by any of the parties, either in the court below or in this court; and if it might have been successfully any party in the court below, it was waived by the acts and proceedings of the parties in the case in that court, and they are concluded from now making it in this court. The action was brought, as we have seen from the preceding statement of the case, by the holders against the maker and two endorsers of a protested negotiable note, payable at a bank. Though the contract of the maker and endorsers was, in its nature, the several contract of the parties, yet the statute authorized a joint action to be brought by the holders against the maker and endorsers, thus treating it as a joint contract of the parties. The holders had a right of election to bring a joint action against the maker and endorsers, or a several action against each. But by bringing a joint action against all, the contract must be considered as against one *quo ad* the action, which is subject to the same rules which govern any other action against several upon a joint contract.

The last endorser in this case, Z. S. Farland, died pending the action, after the common order had been entered against all the defendants at rules, but before it had been confirmed against any of them at the succeeding rules. At the latter rules, the death of the said Z. S. Farland was suggested, and the common order was confirmed against the other defendants. At the next succeeding term of the Circuit Court, no defence having been made by the said other defendants, the office judgment against them became a judgment of the

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last day of that term. No notice was then taken of the other defendant, Z. S. Farland, nor was any abatement or discontinuance of the case ever entered as to him; nor was any further notice taken of him after the suggestion of his death on the 5th day of October, 1868, until the 15th day of September, 1869, when a *scire facias* was sued out by the plaintiffs to revive the action against Ellen D. Farland, executrix of the last will and testament of the said Z. S. Farland. The said *scire facias* was returned duly executed on her, and she did not move to quash it nor demur to it, upon the ground that there could be no proceeding against her except by a new action, nor upon any other ground. What would have been the effect of such an objection to the *scire facias*, is a question which need not now be decided. It is enough to say, that whatever right she may have had, if any, to make such an objection, was waived by not making it, and by her subsequent conduct in the case. On the 17th day of November, 1869, on the motion of the said defendant, she plead "*nil debet*" and "offsets," on which issues were joined between the parties, she obtained leave to file special pleas in writing within ninety days, and the cause was continued until the next term. The cause was twice afterwards continued on her motion and at her costs. And there were various other proceedings in the case which are fully set out in the statement of the case, and need not be here repeated, but which are conclusive against any right on her part at this time if any such right was existing, to object to the proceeding against her by *scire facias*.

We therefore now proceed to consider the only remaining question in the case, and the only question raised and relied on in it by the defendant, Ellen D. Farland, executrix of Z. S. Farland, deceased. That is, whether it appears from the evidence in the record that due notice of the dishonor of the note was given to the said endorser, Z. S. Farland.

The note was payable at the "Bank of Commerce, Fredericksburg," and was due and payable on the 1st day of April, 1862. The evidence of its presentation for payment, its dishonor, the protest for non-payment, and the notices which were given to the maker and endorsers of such dishonor, and that *they* were looked to for payment, is contained in the notarial certificate which is made a part of the record, and is certified with the other evidence, in the bill of exceptions taken to the judgment of the court in the case. That the note was duly presented for payment at the Bank of Commerce, Fredericksburg, on the day on which it was payable,

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and payment was then and there duly demanded but was not made, and that the note was then and there duly protested for non-payment, are facts which are set out in the notarial certificate of protest, and are not and cannot successfully be denied. Was due notice given to the endorsers to bind them? What is said in the said certificate on this subject?

The statute declares what contracts shall be deemed negotiable, and may, upon being dishonored for non-acceptance or non-payment, be protested; and that the protest in such cases "shall be *prima facie* evidence of what is stated therein, or at the foot or on the back thereof, in relation to presentment, dishonor and notice thereof." Code, p. 987, chap. 141, sections 7 and 8.

Now, "what is stated therein, or at the foot thereof, or on the back thereof, in relation to presentment, dishonor and notice" as aforesaid? As to presentment and dishonor, there can be no difficulty nor any question. But as to notice?

It is stated in the certificate of protest aforesaid as to notice, as follows: "Whereupon," that is upon the protest of the note for non-payment, "I gave notice of the said protest, to the parties concerned as follows, viz.: Notice for drawers and two first endorsers at Tappahannock, Va., and to last endorsers in person at Fredericksburg, informing them respectively that they were liable for the payment of said note." And at the foot of the protest is a statement of the items of the costs of protest, amounting together to $2.85, one of which items is this: Paid postage 15" (cents), and this seems, by a memo. at the foot of the said statement, to have been entered in "Protest book AA, p. 44."

It thus appears from the said certificate, and what is stated therein and at the foot of it, that after the said protest was made and on the same day, notice of the said protest was given to the two first endorsers (one of whom, the second, was the said Z. S. Farland), informing them respectively that they were liable for the payment of said note. Now, here is positive evidence of the fact of notice of the protest, and given by the notary to the endorser, Farland, on the day of the protest. Such notice might legally have been given to said Farland, either in person or by letter sent through the postoffice. It appears that such notice was in fact given in the latter way. Tappahannock is about sixty miles from Fredericksburg, and notice could not well have been given by the notary to the endorsers residing there in person, without employing, at heavy expense, a special agent for that purpose, and no charge was made by the notary for any such expense. It is stated

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in the certificate that notice was given to the "last endorsers *in person* at Fredericksburg," no doubt because they resided there, where the notary resided and the protest was made; which implies that the notice stated in the certificate to have been given to the "drawer and two first endorsers at Tappahannock, Va., was not given to them *in person*, but otherwise, that is, through the mail. And in confirmation of this, is the charge for postage as aforesaid. What postage could that be but for notices sent by mail to the said parties at Tappahannock?

That Tappahannock was at that time the postoffice of the said Z. S. Farland, who then resided there, is certified as a fact proved in the cause; and also that there was, at that time, regular mail communication between Fredericksburg and Tappahannock. Such communication may have been *via* Richmond. But that fact, if it was a fact, can make no difference. Letters going by mail between the two places no doubt went as expeditiously, or nearly so, *via* Richmond, as by the direct route; though the distance was somewhat increased by the former mode. Probably communication by letter between the two places might be more frequent *via* Richmond than directly, even supposing that there was no obstruction of the direct route. But if the direct route was temporarily obstructed, as it may have been by troubles arising out of the war, then the regular mail route during the period of such obstruction was *via* Richmond; and notice of protest sent in a letter by that route was reasonable and sufficient.

The authorities cited by the learned counsel for the plaintiffs in error clearly show, that the notice proved to have been given to the said Z. S. Farland as aforesaid was sufficient. All or most of the cases which have any material bearing upon the subject are referred to, and their substance stated in 2 Robinson's Pract., new edition, pp. 191–211; and 1 American Leading Cases, 249–259; *The Bank of Columbia* v. *Lawrence*, and the notes to that case. See also 26 Gratt., pp. 806 and 807.

The Court is therefore of opinion that the judgment of the Circuit Court against the plaintiffs in this case is erroneous, and ought to be reversed and annulled with costs, and a judgment rendered against the defendant, to be levied *de bonis testatoris* for the amount of the said negotiable note, with legal interest from the day on which it became payable until payment, and costs of protest and costs of suit in the said Circuit Court.

JUDGMENT REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

ROBINSON *v.* THE COMMONWEALTH.

January 30.

1. An indictment charging the prisoner with stealing certain papers of the value of $110, not otherwise describing the papers charged to have been stolen, is fallibly defective.
2. On a trial for stealing certain bank notes, the "numbers and denominations of which are unknown to the jurors," the evidence of the Commonwealth shews that the number and denomination of the notes were known to the jurors, and for this variance between the indictment and the evidence, the court, on the motion of the prisoner, excludes the evidence; and then, against the objection of the prisoner, discharges the jury. On a second indictment for the same offence. HELD:
   I. That if the jury had in the first trial rendered a verdict in favor of the prisoner, it would not, under the statute, Code of 1860, ch. 199, § 16, have been a bar to another indictment and trial for the same offence; and, therefore, the discharge of the jury was no injury to the prisoner.

This was a writ of error from the judgment of the Hustings Court of Manchester, by which Charlotte Robinson was sentenced to three years' imprisonment in the penitentiary for larceny. The case is stated by Judge CHRISTIAN in his opinion.

S. M. Page, for the prisoner.

The Attorney-General, for the Commonwealth.

CHRISTIAN J. delivered the opinion of the court.

The plaintiff in error, Charlotte Robinson, was indicted for larceny in the Hustings Court of the city of Manchester. The indictment contained two counts. The first count charged "that the said Charlotte Robinson, on the 21st day of April, in the year 1878, at the said city, and within the jurisdiction of the said Hustings Court of the city of Manchester, divers notes, national currency of the United States, the *numbers and denominations of which said notes are to the jurors unknown*, of the value of one hundred and ten dollars, the notes and property of Geo. W. Alsop being then and

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there due and unsatisfied to the said Geo. W. Alsop, feloniously did steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia."

The second count charged "that the said Charlotte Robinson, on the 21st day of April, 1878, in the city and jurisdiction aforesaid, *certain papers* of the value of one hundred and ten dollars, of the goods and chattels of one Geo. W. Alsop, being then and there found, feloniously did steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia."

Upon this indictment the prisoner was arraigned, and pleaded "not guilty." Upon this trial, there was no motion to quash the indictment or either count thereof, and the only plea tendered by the prisoner was the plea of "not guilty."

The record of the trial shews, that after the Commonwealth's evidence was all produced, the prisoner, by her counsel, moved the court to exclude all the evidence of the Commonwealth. And upon this motion, the record discloses, "it appearing to the court, from the evidence adduced in the case, that the notes designated in the indictment and described as unknown, were, in fact, known to the grand jurors, the court, for this reason, sustains the motion aforesaid; and G. B. Williams, one of the jurors, was withdrawn, and the rest of the jury from rendering their verdict were discharged."

The record further shews that the prisoner, by counsel, "objected to the discharge of the jury, and moved the court to permit this jury to render a verdict, which motion the court overruled, and the prisoner, by counsel, excepted thereto."

After this proceeding, another indictment was found by the grand jury against the prisoner, both counts being in the same form, *except it failed to charge that the denomination of said notes were unknown to the grand jury*, and described the denomination of same. In all other respects, both counts were the same as in the first indictment. Upon this second indictment, the prisoner was arraigned, and she then tendered the following plea:

"And the said Charlotte Robinson comes and says that no further proceedings in the premises should be had or taken against her on the said indictment, because she says that on the 15th day of July, 1878, in the Hustings or Corporation Court of the city of Manchester, she, the said defendant, was put upon her trial upon an indictment for the identical charge contained in this, a second indictment, for the same offence, and a jury between the Commonwealth and the said

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defendant, upon the said indictment, on the 15th day of July, 1878, was in due form of law drawn, selected and empannelled, charged and sworn to well and truly try the said issue. And the said jury, without the consent of the said Charlotte Robinson, have been discharged and separated without having rendered any verdict therein, and without disagreeing or other special cause, there being no material necessity for the discharge of the said jury, and the said Charlotte Robinson says that she has been once in jeopardy upon and for the said charge and offence for which she now stands charged, and indicted in the present indictment to which she is now called on to plead, and cannot, by the law of the land, be again tried therefor, and this she is ready to verify."

To this plea the Commonwealth's attorney tendered a demurrer, which was overruled by the court, and thereupon there was a replication filed by the attorney for this Commonwealth, and issue joined therein by the prisoner. Upon this issue thus made up, a jury was sworn, and arguments of counsel being heard, returned a verdict in these words: "We, the jury, on the issue joined, find for the Commonwealth."

The prisoner then pleaded "not guilty," and upon this issue another jury was sworn, who, after hearing the evidence and arguments of counsel, returned a verdict, finding the prisoner guilty, and ascertaining the term of her imprisonment at three years in the penitentiary.

Motions were made by the prisoner to set aside both the verdict of the jury on the special plea, and the verdict of the jury on the plea of not guilty, both of which motions the court overruled. To these judgments refusing to set aside said verdicts, a writ of error was awarded by one of the judges of this court.

The court is of opinion there is no error in the judgment of the Hustings Court refusing to set aside these two verdicts of the jury. As to the verdict upon the plea of not guilty, it is sufficient to remark, that neither the evidence nor the facts proved are certified; nor does it appear in the record that the court below was asked by the prisoner's counsel to certify either the evidence or the facts proved. In the absence of both, this court cannot, of course, determine the question whether the verdict of the jury, on the issue made by the plea of not guilty, was contrary to the evidence.

The only question we have to pass upon, as the record is presented here, is, whether the prisoner ought to have been discharged at her second trial upon her special plea of "once in jeopardy," as above set forth.

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In determining this question, we must treat the first indictment as containing really but one count, the first. The second count was manifestly defective, and must be rejected as bad.

It charged the prisoner with the larceny *of certain paper* of the value of one hundred and ten dollars. There ought to have been *some description* of the paper, so as to inform the defendant of the nature of the charge she was called upon to answer. The charge of stealing *certain paper* was altogether too vague and indefinite. It might have been wall paper, or writing paper, or wrapping paper, paper written or printed upon; paper whose value was determined by what was written or printed thereon, or paper the value of which was intrinsic in itself. It is true, bank notes, promissory notes and bonds, and other writings of value, are, in a certain sense, all *paper*, but their value is estimated not *as paper*, but according to the value of the obligation thereon written or printed. It is not sufficient, therefore, in an indictment, to charge the larceny of *certain paper*. There must always be some description, at least to the extent, to notify the defendant of the specific charge he is called upon to answer.

In this case, therefore, we must reject the second count as defective, and treat the case as under an indictment containing a single count, charging the plaintiff in error with the larceny of "divers notes, national currency of the United States, the number and denomination of which said notes are to the jurors unknown, of the value of one hundred and ten dollars, the notes and property of Geo. W. Alsop."

Now, on the trial of the prisoner on this indictment upon the plea of not guilty, the evidence for the Commonwealth disclosed that the denomination of the notes *were in fact known* to the grand jurors, while the indictment charged that they were "to the jurors *unknown*." It would certainly, at this stage of the proceedings, have been competent for the attorney for the Commonwealth to have entered a *nolle prosequi* under this indictment, and preferred another indictment by the same or another grand jury against the prisoner, leaving out the words "the denomination of which said notes are to the jurors unknown;" and certainly to the second indictment, it could not be pleaded in bar that the prisoner had once before been tried for the same offence, or, in other words, was put twice in jeopardy.

In this case, however, the *prisoner*, by her counsel, moved to exclude all the evidence on account of the variance be-

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tween the proof and the charge in the indictment, as above indicated. The court granted her motion, and excluded the Commonwealth's evidence, and discharged the jury.

Now the great complaint of the prisoner's counsel is, and that is the burthen of the elaborate argument on the authorities cited here, that the court had no right to discharge the jury without the consent of the prisoner; that the prisoner had a right to the verdict of the jury; that she objected to a discharge of the jury, and insisted that the court should permit the jury to render a verdict in her case.

Without special reference to, or comment upon, the numerous cases cited by the counsel for the prisoner, it is sufficient to say that it is undoubtedly true, as a general rule, that in a criminal trial the court has no right, without the consent of the prisoner, to discharge the jury, except in a case of manifest necessity, such, for instance, as the illness or death of a juror, or where it is plain that the jury cannot agree in a verdict.

But in the case before us, it is plain that the discharge of the jury by the court, if error, was not an error to the prejudice of the prisoner.

The evidence offered by the Commonwealth being excluded by the court, the verdict would, of course, have been a verdict of not guilty. That verdict would only have discharged the prisoner from further prosecution under *that indictment*. The action of the court in excluding the evidence and discharging the jury, accomplished precisely the same thing. If the jury had not been discharged and rendered a verdict of not guilty, that verdict could not have been pleaded to the second indictment, because the acquittal was effected in consequence of a variance between the allegations and the proof. Whatever may have been the rule at common law, or the principles settled by the cases relied on, our statute puts that question at rest forever. For it provides that "a person acquitted of an offence on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the force or substance thereof may be arraigned again on a new indictment, or other proper accusation, and tried and convicted for the same offence, notwithstanding such former acquittal." Code 1860, ch. 199, § 16, p. 814.

It is plain, therefore, that by the express terms of this statute, if the jury had not been discharged, and had rendered a verdict of not guilty, that verdict could not be pleaded in

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bar of the second prosecution. We are, therefore, of opinion that there is no error in the judgment of the Hustings Court of the city of Manchester, and that the same be affirmed.

JUDGMENT AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

HARRIS *v.* HARRIS.

NOVEMBER TERM, 1878.

D. M. Harris and S. C. Harris, his wife, were married in the Spring of 1861. At the time of the marriage, the husband was an old bachelor, "ripe in years," worth about $15,000, mostly in slaves, and with no particular personal attractions; kind-hearted, somewhat close and penurious; the wife was a young lady, "moderately handsome," cultivated, and moving in good society, but poor. They lived at the house of a mutual friend a short while, and then removed to the husband's farm to live. Not long after this, a disturbance occurred in the family, owing to alleged disobedience and insubordination of the husband's servants; and at the request of the wife, she and her three sisters, who were living with her, were removed to a house some three miles distant, where they remained nearly two years, supported by the husband, and he visiting them occasionally. In the meantime, the domestic peace was further disturbed by notices posted in the neighborhood by the husband, forbidding the public to credit his wife, for purchases, on his account. This induced the wife to threaten a suit for alimony, which secured her, by a compromise, the sum of $350 from the husband. After this, through the intervention of friends, a reconciliation was effected, when she and her sisters returned to the husband's home to reside. Shortly after this, the disturbances with the servants were renewed, when she left her husband's home again, in the county of Nelson, went to the city of Norfolk to reside, and was never again in the county of Nelson, until the institution of this suit for divorce by the husband, on the ground of desertion, her absence extending through a period of more than fourteen years. The only ground alleged in the answer of the wife for deserting the home of her husband, was because he failed to protect her from alleged insults and injury at the hands of his servants, but there was no proof of such insults and threatened injuries from the servants, further than that the husband was indulgent to his servants. The last separation took place in 1863, and the servants were liberated by the results of the war in April, 1865. The husband filed the bill for the divorce from the bonds of matrimony, on the ground of the desertion, for more than five years The Circuit Court granted the divorce, according to the prayer of the bill, and made an allowance to the wife of an annuity during her life, the payment of which was secured by a charge on the real estate of the husband, his whole estate being at this time worth about $3,500. The reason assigned in the decree of the Circuit Court for the allowance is, that "although the desertion and abandonment as charged in the plaintiff's bill is proven by the evidence, the same was not without the fault of the plaintiff."

By section 12 of chapter 105 of the Code of 1873, it is provided as follows: "Upon decreeing the dissolution of a marriage, and also upon decree-

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ing a divorce, whether from the bond of matrimony, or from bed and board, the court *may* make such further order, *as it shall deem expedient, concerning the estate and maintenance of the parties or either of them,*" &c., * * * *, and it was under this provision that the allowance to the wife was made. The husband appealed from so much of the decree as makes the allowance. HELD BY THE COURT OF APPEALS:

1. The power to grant the allowance under the provision just quoted is one of *discretion* in the court granting the divorce.
   "*Discretion*," when applied to courts of justice, means a *sound discretion guided by law*. It must be governed by rule; it must not be arbitrary, vague and fanciful, but legal and regular.
2. Alimony had its origin in the legal obligation of the husband, incident to the marriage state, to maintain his wife, in a manner suited to his means and social position, and although it is her right, she may, by her misconduct, forfeit it, and where she is the offender, she cannot have alimony on a divorce decreed in favor of the husband. So long as he has committed no breach of marital duty, he is under no obligation to provide her a separate maintenance, for she cannot claim it on the ground of her own misconduct.
3. *Quære.* Would the fault of the husband alone in any case be a sufficient reason for making the allowance to the wife if on the evidence *he* was entitled to the divorce?
4. Desertion, considered without reference to matter which may exist in justification, is the actual breaking off of the matrimonial cohabitation, with an intent to desert in the mind of the offender. A mere separation by mutual consent, is not desertion in either party, nor as matter of proof can desertion be inferred against either, from the mere unaided fact that they do not live together, but the intent to desert may be proved by a variety of circumstances.
5. An offer to return, *made in good faith*, during the five years, the statutory period, will put an end to the desertion and bar the suit, but if the desertion has continued the number of years required by the statute, the deserted party may then refuse to renew the cohabitation, and this refusal will not bar the already existing right to the divorce.
6. The Circuit Court having properly granted, on behalf of the husband, a divorce from the bond of matrimony for the wilful desertion of him by his wife, there was nothing in the circumstances of this case which make it proper to require the husband, out of his estate, to contribute to her maintenance after the divorce.
7. *Quære.* How far the *inchoate* right of the wife to dower in the real estate of the husband is effected by the granting of a divorce *a vinculo matrimonii* (see *Porter* v. *Porter*, 27th Grattan), and how far the court granting the divorce can control this right, under the provision of our statute giving it such a wide discretion "concerning the estate and maintenance of the parties or either of them."?
8. The answer of a defendant (excluding admissions) is entitled to the same weight in a divorce suit as in any other chancery suit.

From the Circuit Court of Nelson county.

The facts and points decided are sufficiently stated in the head-notes.

W. J. Robertson & Whitehead, for the appellant.

Fitzpatrick, for the appellee.

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BURKS J. delivered the opinion of the court, in which *Christian* and *Staples JJs.* concurred.

Moncure P. and *Anderson J.* dissented.

So much of the decree of the Circuit Court as granted the divorce was affirmed, and that which made the allowance to the wife reversed, without awarding costs to either party.

SUPREME COURT OF APPEALS OF VIRGINIA.

MILLER AND OTHERS *v.* THE RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY.

JANUARY TERM, 1879.

On the 8th of September, 1873, the Council of the city of Richmond passed an ordinance prohibiting the R. F. & P. R. R. Company from using steam engines on that part of Broad street in said city east of Belvidere street after the 1st of January, 1874, under a penalty of not less than $100 nor more than $500 for each violation of the ordinance. Notwithstanding the ordinance, the railroad company continued to use the steam engines on that part of the street prohibited by said ordinance after the said 1st of January, 1874, and on the 2d of January, 1874, it was summoned before the Police Justice of the city to answer the city of Richmond for the violation of said ordinance. The Company admitted the violation of the ordinance, but denied its validity, on grounds not necessary to be here stated. The Police Justice held that the ordinance was valid, and imposed a fine of $500 on the Company for the violation, and from this decision the Company appealed to the Circuit Circuit of the city of Richmond, which, on the 29th of June, 1874, affirmed the judgment of the Police Justice, but suspended the execution of its judgment for ninety days, to allow the Company to apply to the Supreme Court of Appeals for a writ of error to said last named judgment. During the pendency of the appeal from the Police Justice, in the case of the *City of Richmond* v. *The Railroad Company* in the Circuit Court, and before any decision was rendered in that court, Henry Miller and others, citizens of Richmond, property owners, &c., on said Broad street, filed their bill in the Chancery Court of said city, praying for an injunction to enjoin and restrain said Railroad Company from the use of said steam engines, alleging that it was a *nuisance*, dangerous and detrimental to them, and all others on said street, alleging also the passage of the ordinance, its violation, and the right of the City Council to exercise the power attempted by the ordinance. The Railroad Company demurred to the bill, on the ground that it did not shew a proper case for relief in equity, and answered denying the existence of the nuisance, and also denying the validity of the ordinance of the City Council. On the 1st of June, 1874, the Judge of the Chancery Court refused to grant the injunction, but continued the motion for the same until the legal right should be decided in the case at law then pending in the Circuit Court. As before stated, the judgment of the Circuit

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Court, affirming the judgment of the Police Justice, was rendered on the 29th of June, 1874, but suspended for ninety days for the Company to apply for a writ of error. On the 6th of July, 1874, the plaintiffs in the injunction suit renewed the motion for the injunction, but the Chancellor again refused it on the ground he should not interfere while the judgment of the Circuit Court, establishing the legal right, was suspended by the order of that court. The Railroad Company obtained a writ of *supersedeas* to the judgment of the Circuit Court, but upon a hearing, that judgment was affirmed by the Supreme Court of Appeals of Virginia, and afterwards by the Supreme Court of the United States. On the 27th October, 1874, during the pendency of the writ of error in the case from the Circuit Court in the Court of Appeals, the plaintiffs in the injunction suit again applied to the Chancellor for the injunction, but he again refused to grant it, and from this order of refusal the said plaintiffs appealed. On a motion by the Company to dismiss the appeal as improvidently awarded. HELD:

1. The appeal was *not* improvidently awarded.
2. The bill shewing upon its face sufficient ground for equitable relief, it was not demurrable.
3. The Chancellor ought to have granted the injunction, notwithstanding the pendency of the writ of error from the judgment of the Circuit Court; the plaintiffs in the injunction suit were not bound to submit to the invasions of their rights, and to incur hazards to life and property during the pendency of the writ of error in this court.

From the Chancery Court of the city of Richmond.

The points decided are sufficiently stated in the head-notes.

James Lyons and W. P. Burwell, for the appellants.

P. V. Daniel, John O. Steger, Ould & Carrington, and Conway Robinson, for the appellees.

ANDERSON J. delivered the opinion of the court, in which the other judges concurred, except *Moncure P.* who did not set in the case.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

FRANCIS *v.* FRANCIS, BY, &C.

Robert Francis and Emma Jane Francis were free persons of color prior to the late war. In 1852, they began cohabiting as man and wife, and continued to occupy this relation down to November, 1868. Most of the time they were living in the house of Robert, and visited by his mother and sister; and during that period Emma Jane had ten children

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by Robert. All of these were treated and recognized by him as his children until he concluded to abandon her and marry another woman in November, 1868, and then, for the first time, he denied that a child, then eleven years old, was his. He often spoke of Emma as his wife, and this was the relation in which she was regarded in the neighborhood where they resided. They were never married by the rites of matrimony, and there was no *express* agreement (except so far as the evidence of Emma states such) that they ever were to occupy the relation of man and wife. In November, 1868, Robert abandoned Emma and married another woman. In August, 1875, Emma, suing by her mother and next friend, filed her bill in the Corporation Court of the city of Norfolk, alleging, the relations existing between her and Robert from 1852 to 1868, that they had agreed to be man and wife; that they were cohabiting as such at the time of the passage of the Act of Assembly of Virginia, passed February 27, 1866, "to legalize the marriage of colored persons," which provides that, "where colored persons, before the passage of this act, shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been solemnized between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and be subject to the duties and obligations of that relation, in like manner as if they had been duly married by law, and all the children shall be deemed legitimate, whether born before or after the passage of this act," and claiming that by this act their relations as husband and wife were legalized and established. She alleged the abandonment by Robert and marriage with another woman; that he was a man of means, and that she was unable to support herself and the one child then living with her (eight of the children having died, and the other one not being then living with her), and praying for a separate maintenance to be decreed to herself and child out his estate. Robert answered the bill, acknowledging that he had kept Emma as a *mistress* but denying that he ever agreed to make her his wife, or acknowledged her as such, and denying that the Act of Assembly above quoted, applied to persons who were *free prior to the war*, who could have been married under then existing laws as white persons, but that it only applied to *slaves*, who were freed by the war, and who were incapable of contracting prior to being made free.

The Corporation Court held that these parties did come within the purview of the act of February 27, 1866, and that by it their relations of marriage were established, and decreed to the plaintiff and her child a separate maintenance out of the estate of the defendant of $25 *per* month, or $300 *per* year, that being the amount reported by the commissioner as requisite and proper for that purpose.

From this decree Robert Francis obtained an appeal to the Supreme Court of Appeals, in which it was HELD:

1. There was no error in the decree of the Corporation Court.
2. The language of the act of February 27, 1866, is "colored persons," and this includes all such, no matter when or how their freedom was acquired. Where the Legislature has used words of a plain and positive import, the courts cannot put upon them a construction which would hold that it did not mean what it has actually expressed.
3. It was not the intention of the Legislature by this act, to force upon persons the relation of husband and wife against the consent of either. It must appear that they have agreed to occupy that relation, but it is not necessary that this agreement should have been an *express* one. It may be *implied*, as in other cases, from the conduct and declarations of the parties; and while in this case there is no proof of an *express* agreement, the conduct and declarations of the parties are amply sufficient to warrant the holding of an *implied* one.

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During the pendency of the appeal, Robert Francis died, leaving a will, by which he gave all of his property to his mother and an infant son, in whose names the appeal was revived and prosecuted. HELD:

That inasmuch as alimony is a proportion of the husband's estate, allowed to the wife for her maintenance and support during the period of their separation, and only continues with their *joint* lives The effect, therefore, of the affirmance of the decree of the court below, is to put the appellee in the same position, as if the appeal had not been taken, which is to give her a decree against the estate of the appellant for the amount allowed by the court below, from the date of the decree in that court, to the death of appellant, when said allowance ceases.

The points decided are sufficiently stated in the headnotes.

From the Corporation Court of the city of Norfolk.

Baker & Walke, for the appellant.

Baker & Borland, for the appellee.

STAPLES J. delivered the opinion of the court, in which the other judges concurred.

DECREE AFFIRMED, *and cause remanded to ascertain the date of the death of Robert Francis, and for decree in accordance with former decree as affected by that fact.*

SUPREME COURT OF APPEALS OF VIRGINIA.

NOVEMBER TERM, 1878.

MCDEARMAN'S EX'ORS *v.* ROBERTSON.

James McDearman qualified as the guardian of John J. Robertson in 1852. He died in 1867, having settled several *ex parte* accounts from year to year, which had been returned to the County Court and ordered to be recorded. Robertson, having arrived at his majority, filed his bill against A. A. North and Samuel D. McDearman, executors of said James McDearman, deceased, and the surety on the guardian's bond, in March, 1869, to surcharge and falsify several items of the *ex parte* accounts, and for a final settlement of the guardianship accounts. After two settlements under decrees of the court, the commissioner reported a balance due from the guardian to the ward as of the 1st of March, 1871, of $5,715.59. To this report the executors filed the following exceptions:

1st. "Because the receipts of each year are brought into the account in the year in which the rents and hires accrued, making the fund bear interest a year too soon, and seriously affecting the result of the scaling during the war.

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2d. "Because the commissioner has not credited the guardian with $4,000. invested in 8 per cent. Confederate bonds by and with the advice and direction of the County Court."

3d. "Because the commissioner has disallowed certain payments made in 1863 and 1864 in currency, as allowed by a former commissioner in the settlements which had been returned to the County Court, approved by it, and ordered to be recorded."

All three of these exceptions were overruled by the Circuit Court, the report of the commissioner was confirmed, a decree rendered for the balance found due by the commissioner, and for a sale of the real estate of the testator to pay the same.

From this decree the executors appealed, relying for errors on the exceptions, as just stated, to the commissioner's report, and the further fact, that the decree for the sale was made by the court below, without giving the heirs and devisees of the decedent a *day* within which to pay the amount decreed as due by the estate. HELD BY THE SUPREME COURT OF APPEALS:

1. There is no error in the decree appealed from as to the *first* exception; the rents and hires were charged by the commissioner, as of the same dates they were entered in the *ex parte* accounts settled by the decedent in his lifetime.
2. As to the *second* exception, there was no evidence that the investment was made of the funds of the ward or for him. The *County* Court had no jurisdiction to authorize any such investment under the act of 1863, and its order was a nullity. And this was not a case in which an order of the *Circuit* Court authorizing such an investment would have protected the guardian. See *Campbells* v. *Campbell's ex'or*, 22*d Gratt.*; *Crickard's ex'or* v. *Crickard*, 25*th Gratt.*
3. As to the *third* exception, the commissioner was right in scaling the amounts paid by the guardian in Confederate money in 1863 and 1864, from their nominal amounts to the actual value of the same in gold, as of the dates when they were severally made.
4. The cases in which the heirs and devisees should have a day to pay the amount decreed against a testator's estate before a decree of sale is made of the real estate, are cases where the property is covered by a lien, such as a mortgage or deed of trust, or other security for a debt, which is not the case here. (*Long, &c.*, v. *Weller*, 29*th Gratt.*, and cases cited.) In this case, there was no lien of any kind, but it was a suit to subject the real estate of the decedent to pay a fiduciary debt, the personal estate being exhausted. In such cases, it was not necessary to give the heirs and devisees a *day* to pay in the decree. See *Judge Anderson's opinion in Crawford* v. *Weller*, 23*d Gratt.*

From the Circuit Court of Appomattox county.

The facts and points decided sufficiently appear in the head-notes.

John Howard, for the appellants.

Kirkpatrick & Blackford, for the appellees.

CHRISTIAN J. delivered the opinion of the court, in which the other judges concurred.

DECREE AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

THORNTON *v.* THORNTON.

December 12, 1878.

1. Upon a bill to enjoin the proceeding in an action at law founded on mutual accounts between the parties, and asking for a settlement of the accounts, if the injunction is granted, *quære* if it should not be without requiring the plaintiff in equity to confess a judgment in the action at law.
2. If it was proper to require a confession of judgment, it should expressly provide that the judgment so confessed was thereafter to be dealt with as the Chancery Court might direct.
3. Although there is no such express provision in the order granting the injunction, the court, if of opinion that the bill should be dismissed for want of jurisdiction, should, in the order of dismissal, direct that the judgment at law be set aside.
4. In an agency where there is a fiduciary relation between the parties, a Court of Equity has jurisdiction to settle and adjust the accounts between them.

In June, 1873, Joseph Thornton presented his bill in equity to the judge of the County Court of Fairfax, in which he stated that W. H. Thornton had instituted a suit in *assumpsit* against him in said court, to recover a balance of $2,410.11 as of January 1st, 1866, which he claims to be due upon a settlement of accounts between them. That sometime in the year 1865, the said W. H. Thornton applied to plaintiff for employment, and plaintiff employed him to take care of his estate in Fairfax county, as his agent and steward. He was employed to fell, saw and get out timber on said estate, plaintiff furnishing him with the means; that in the course of this employment, the said W. H. Thornton had from plaintiff large amounts of money to disburse, and had authority, in some cases, to make sale of the product of the estate derived from cutting, sawing and marketing lumber; that he has never rendered a satisfactory account of his stewardship, nor furnished plaintiff with proper vouchers of disbursement of the money placed in his hands to carry on the business aforesaid; that sometime in the year 1869 or 1870, he rendered to the plaintiff the meagre and unsatisfactory account herewith filed; but that no vouchers for disbursements accompanied the said statement, nor has he at any time exhibited a satisfactory account of his receipts from sales or otherwise; that he did not keep regular accounts of his transactions as agent, as he was required to do, but on the contrary, plaintiff was

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purposely not informed of the condition of the business, and could not tell to what extent he had been involved by the conduct, contracts and transactions of the said W. H. Thornton.

Plaintiff is informed and believes, that said W. H. Thornton, during his employment, which lasted until 1869, clandestinely used and appropriated the property of plaintiff, which was under his control, as his agent, for his own purposes and for his own profit, without giving an account of the same.

Plaintiff is willing, if required by the court, to confess a judgment in the action at law, but submits he ought not to be required to do so, as the defendant ought not to have sued plaintiff in a court of law until his accounts had been submitted, examined and approved, the balance ascertained and admitted to be correct, and this especially as plaintiff denies the justice of the claim *in toto*, and believes that upon a just settlement of the accounts between them, the defendant will be brought largely in debt to him. And making W. A. Thornton a defendant, he prays that he may be enjoined from proceeding any further in his action at law until permitted by the court; that the cause may be referred to a commissioner to settle and adjust the accounts between the parties, and for general relief.

An injunction was awarded according to the prayer of the bill, upon the plaintiff giving bond and security in the penalty of $200.

The cause seems to have been sent to the Circuit Court of Fairfax county, and at the November term, 1873, of that court, an order was made, that unless the plaintiff confessed a judgment in the action at law at that term of the court, the injunction should stand dissolved and the bill dismissed. And this the plaintiff seems to have done.

At the February term of the court, the defendant demurred to the bill, and also answered. It is unnecessary to set out the answer. It is sufficient to say the defendant denies the material allegations of the bill; avers that he kept his accounts in small books as directed by the plaintiff, which he delivered regularly to the plaintiff with the vouchers, and that the plaintiff from these kept the accounts on his books. There were depositions taken by both parties. At the June term, 1874, the court entered the following decree: "On motion to dissolve the injunction, and the court hearing argument in opposition thereto, doth order that the injunction granted the complainant, on the 16th day of June, 1873, be and the same is hereby dissolved, and bill dismissed with costs." And

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thereupon Joseph Thornton applied to this court for an appeal; which was allowed.

Held as stated in the head-notes.

Wattles for the appellant.

Smoot and *Claughton* for the appellee.

BURKS J. delivered the opinion of the court.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

FICKLIN'S EX'OR *v.* CARRINGTON.

December 12, 1878.

1. In the absence of C. in a foreign country, F. sent to Mrs. C. a check for $500, which was collected by her. In the absence of all evidence bearing upon the intention of F. in sending the check, the presumption is, the intention was not a gift to Mrs. C., but a loan on the credit of her husband, C.
2. Where a debtor who resides in the State, removes, after contracting the debt, to another State, the removal is itself an obstruction to the prosecution of a suit by the creditor to recover the debt, and the statute of limitation will not run against the debt whilst the debtor resides out of the State.

This was an action of *assumpsit* in the Circuit Court of the city of Richmond, brought in June, 1874, by Slaughter F. Ficklin, executor of Benjamin F. Ficklin, against Eugene Carrington, to recover the sum of $500 in gold, which the plaintiff claimed had been lent to the defendant on the 1st of April, 1865. The defendant, residing in Maryland, the process was served by an attachment on property owned by him in Richmond.

Carrington appeared, and filed the plea of *non assumpsit*, and also the statute of limitations. The plaintiff took issue on the first plea, and replied specially to the second, that after the loan of the money the defendant removed to the State of Maryland, and had continued to reside out of the State, so that said Benjamin F. Ficklin, in his lifetime, and the plaintiff, since his death, had been obstructed in the prosecu-

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tion of his suit. And to this replication the defendant rejoined that by his removal he did not obstruct it.

When the cause was called for trial, the parties waived a jury and submitted the whole matter of law and fact to the court. And the court, having heard the evidence, rendered a judgment in favor of the defendant. And thereupon the plaintiff applied to this court for a writ of error and *supersedeas*, which was allowed.

Upon the first issue, the only question was, whether a check for $500 in gold, sent by B. F. Ficklin to Mrs. Eugene Carrington, while her husband was in a foreign country, was intended to be a gift or a loan.

HELD as stated in the head-notes.

Kean & Davis for the appellant.

Ould & Carrington for the appellee.

CHRISTIAN J. delivered the opinion of the court.

JUDGMENT REVERSED.

SUPREME COURT OF APPEALS OF WEST VA.

ANDERSON *v.* NAGLE ET AL.

1. A contract in writing was executed for the sale of land, before judgments were obtained against the vendor, and the deed executed in pursuance of said contract was not recorded until after the said judgments were duly docketed, and the contract was never recorded. Such contract and deed are void as to such creditor, and the land so contracted to be sold and so conveyed is subject to the satisfaction of the judgments.
2. An authenticated copy from the recorder's docket of an official abstract of a judgment, docketed under the provisions of the 3d and 4th sections of chapter 139 of the Code, is evidence that such abstract was docketed, and when, and of notice to purchasers of land upon which the alleged judgment is claimed as a lien, when the existence of such judgment is properly proved; but where the existence of the judgment is put in issue by a distinct denial in the answer, an authenticated copy of such abstract, as docketed by the recorder, will not be received as proof of the judgment, and dispense with the necessity of producing an authenticated copy of the judgment.
3. But when the bill exhibits such authenticated copies from the recorder's docket of official abstracts of judgments so docketed, and distinctly alleges the recovery of such judgments in a court of competent jurisdiction within the State, and these facts are not controverted by the answer, they are to be taken as true for the purposes of the suit, and no proof is required to show the same.

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4. Where two judgments are recovered, one in 1868 and the other in 1869; and the one last recovered is docketed in 1870 (less than a year from its date), while the one first obtained is docketed in 1871; but both are docketed, before a contract in writing or deed to the purchaser for valuable consideration without notice is recorded, the judgment *first* recovered though *last* docketed has priority.
5. It is error in a decree, for which it will be reversed, to order the sale of real property without fixing the amount and priorities of the liens charged upon it.
6. It is wholly unnecessary to refer a cause in which it appears there are but two judgment liens to a commissioner to ascertain the amount and priorities of liens, where the pleadings and proof show clearly what they are.
7. And where the court below has failed upon such pleadings and proof to ascertain the amounts and priorities of the liens under such circumstances, while the Appellate Court will reverse the decree, it may enter such a decree as the court below should have entered.
8. Where a suit in chancery is instituted to enforce a judgment lien, and the bill alleges that there is but one other judgment lien on the real estate sought to be held liable to the satisfaction of the judgment, and sets it up also as a lien on the land, the decree should provide for the payment of both judgments, if the land is subject thereto.

George W. Anderson filed his bill against A. L. Peadro, Julia H. Nagle, and the National Bank of Parkersburg, in the Circuit Court of Wood county, to enforce the lien of a judgment recovered by him against said Peadro, on a lot alleged to belong to said Peadro, in the town of Parkersburg. It was alleged by the plaintiff that the only lien existing against said property of Peadro, other than his, is that of said National Bank of Parkersburg for $250, with interest and costs. The plaintiff's judgment was for $853.33, with interest and costs (subject to certain credits), was recovered at the October term, 1868, of the Circuit Court of Wood county, and docketed June 16th, 1871, and that in favor of the Bank was recovered at the fall term, 1869, and docketed June 20th, 1870. Abstracts of said judgments were filed with the bill.

The defendant, Julia H. Nagle, answered the bill, in which she says she knows nothing of the indebtedness of A. L. Peadro, as set out in the bill, or of the liens set up against the lots purchased by her of said Peadro; that said Peadro sold her the lot for $600 on the 15th day of January, 1865, which contract, in writing, then made by said Peadro to her for the sale of said property, she exhibits with her answer; that she had paid all the purchase-money on said lot; that as soon as she bought said lot, she took possession thereof, and built a new house upon it, and has lived upon and claimed the same from that time to the present; that said Peadro made her a deed for said property pursuant to said contract, a copy of which she says is filed with the bill; that she is "advised

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by counsel, and charges, that the judgment of complainant does not constitute a lien on said lot, because said judgment was not obtained, when respondent had purchased said lot, and was in possession of the same under her contract of purchase as aforesaid; and that said judgment was not docketed according to law until the 16th day of June, 1871; respondent's deed was admitted to record on the 20th October, 1870; and said judgment never was docketed within the time required by law." She denies that she ever had any personal knowledge whatever of said judgment, and was wholly ignorant of it until after the institution of this suit.

The defendant further says: "that although the said deed was acknowledged by said Peadro on the 20th October, 1870, before the recorder of Wood county, yet the said deed was left with said recorder to be recorded by said Peadro, and to go on record as soon as the dower was released by Mrs. Peadro, who was sick. It will be seen that the dower was released on the 26th of June, 1871, and the deed recorded by the recorder on the 21st of July, 1871." That she is advised that said Peadro parted with all his interest when he signed and acknowledged the deed on the 20th of October, 1870; and that he had no interest whatever in said lot on the 16th June, 1871, when plaintiff's judgment was recorded; that plaintiff was neither a creditor, nor subsequent purchaser without notice of respondent's right; that the plaintiff's debt and judgment was long subsequent to the deed to respondent; she avers that she has not only an equitable, but a legal title to the said property, and that plaintiff's judgment cannot offset it, and prays that she may be hence dismissed, &c. The bill was taken for confessed as to defendants, Peadro and the bank; and there was a general replication to the answer of defendant, Julia H. Nagle; and no depositions were taken in the cause on either side. On the 23d day of June, 1876, the cause was heard on the bill taken for confessed as to the defendants who had not answered, the answer of the defendant, Julia H. Nagle, with general replications thereto, and exhibits filed, and was argued by counsel; and the court decreed that the judgment of plaintiff, and also the judgment of the bank, were liens on said lot prior to the recordation of the deed to defendant, Julia H. Nagle; and that said two liens were the only liens entitled to hold said property subject to the satisfaction thereof; and that unless the said defendant, Peadro, paid the plaintiff's judgment within twenty days from the time the decree was entered, or unless the said Julia H. Nagle, or some one for her, paid the same, then Dan.

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D. Johnson, who was by said decree appointed a commissioner for the purpose, was directed to sell said property, to pay the same, &c.

From and to said decree an appeal and *supersedeas* were allowed.

W. H. Small and *D. H. Leonard* for the appellant.

John A. Hutchinson for the appellee.

Held by the Court of Appeals as stated in the head-notes.

JOHNSON J. delivered the opinion of the court.

The other Judges concurred.

DECREES REVERSED.

SPECIAL COURT OF APPEALS OF VIRGINIA.

HARTSOOK *v.* STATON.

1. Where there are mutual accounts to be settled between a principal and his agent; or a discovery is necessary, or when necessary to prevent a multiplicity of suits, or where the ends of justice cannot be attained at law, a Court of Equity will take jurisdiction of a suit between them; but the bare relation of principal and agent, will not justify the interference of the court in every case, or entitle the principal to come into that court, if the case can be fairly tried at law.
2. A case in which a principal filed a bill against his agent, to recover an alleged balance due from the sale of a tract of land sold by the agent for the principal before the late war, and in which the bill was dismissed on the demurrer, on the ground that a Court of Equity would not take cognizance of the case.

From the Circuit Court of the city of Richmond.

The facts are sufficiently stated in the opinion of the court.

Steger & Sands for the appellant.

Robert Johnston, *W. J. Mayo* for the appellee.

MCLAUGHLIN J.—This was a bill in chancery in the Circuit Court of Richmond city, filed by the appellee, Benjamin S. Staton, against the appellant, Daniel J. Hartsook, and comes up by appeal from the decree rendered in the cause by the

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said court. It appears from the allegation of the bill that the plaintiff (the appellee here), in the fall of the year, 1857, being then a resident of the State of Virginia, but about to remove to the State of Missouri, appointed the defendant (the appellant here) his attorney-in-fact for him, and in his name, to sell and convey a tract of land in the county of Buckingham. The said Hartsook was authorized to receive the purchase-money and undertake to transmit it to Staton. The land was sold to one Thomas S. Ballard for the sum of $2,400, payable in three equal instalments, at fixed periods, with legal interest thereon from certain days. The mother of Staton and the widow of his father, then living, not having relinquished, had a claim of dower in the land.

The bill further alleges that, "to ensure the said Ballard a good title for the said tract of land, and to induce your orator's said mother to unite in a conveyance thereof, it was agreed between your orator, his said mother, and the said Hartsook, who was a wealthy banker, merchant and farmer, that he should retain in his hands, upon interest, the last instalment of said purchase-money, when paid by said Ballard, and pay over the interest thereon to the said mother of your orator, who lived in the neighborhood of said Hartsook, during the life of your orator's mother, and at her death, to pay the same, with any interest thereon from the last named period, to your orator."

It is further alleged that the first and second instalments were collected by Hartsook, and after deducting commissions, transmitted to Staton, that the last instalment of $800 was collected by Hartsook, and as the plaintiff supposes, the interest was duly paid to Dorathy Staton, the widow, until her death in the spring of 1866; but that Hartsook, "upon various pretences, which are wholly unfounded and false, refuses to pay your orator the said sum of $800 with interest thereon from the death of said Dorathy."

Hartsook appeared and demurred, and the demurrer having been argued, the court overruled the demurrer, and required the defendant to answer in ten days. The defendant then answered, and after various proceedings, a final decree was rendered in favor of the plaintiff against the defendant for the sum of $800, with interest thereon from the 1st day of June, 1866, from which he has appealed.

I will consider the demurrer. It is insisted by the appellee that Hartsook being an agent or trustee may be required to account in a Court of Equity. It is true that when there are mutual accounts between the parties, or a discovery is neces-

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sary, a Court of Equity will take jurisdiction. The bare relation of principal and agent does not justify the interference of the court in every case, or entitle the principal to come into a Court of Equity if it can be fairly tried at law. *Coffman* v. *Langston*, 21 Gratt., 269; 1st Story Eq. Jur. § 462. So also the jurisdiction may be maintained to prevent a multiplicity of suits, or where the ends of justice cannot be attained at law.

But conceding Hartsook to be an agent, the jurisdiction of a Court of Equity cannot be maintained here on any of these grounds. There were no mutual accounts alleged in the bill to be adjusted, no discovery was necessary, there was no danger of a multiplicity of suits, and it does not appear but that the ends of justice might be fully attained at law. The bill alleges that Hartsook collected the last bond, that Mrs. Staton is dead, and that Hartsook is bound to pay the plaintiff this sum with interest from her death. The date of her death is a matter susceptible of proof. There was no difficulty in maintaining a suit at law. The remedy was clear and adequate.

But taking the allegations of the bill for true, as we must on the demurrer, the agency of Hartsook ceased upon the collection of the last bond, and the fiduciary relation then ceased to exist. Hartsook was then to be treated as a borrower of the money. He was to pay Mrs Staton the interest annually in lieu of her dower, and at her death, the principal to Staton. At her death he became the debtor of Staton. Surely where the mere relation of debtor and creditor for a fixed and certain amount exists, equity will not take jurisdiction. I think the plaintiff has mistaken his forum. The decree of the Circuit Court of Richmond city must be reversed, the demurrer sustained, and the bill dismissed with costs, but without prejudice to the appellee to assert his claim in a court of law.

Wingfield P. and *Barton J.* concurred in the opinion of *McLaughlin J.*

DECREE REVERSED.

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CORPORATION COURT OF THE CITY OF NORFOLK.

WININGDER AND ALS. *v.* GLOBE MUTUAL LIFE INS. CO.

1. On an application by a defendant for the removal of a cause from a *State* court to a *Federal* court, it is the duty of the *State* court to consider whether the case is such as entitles the party to such a removal; if it is, then the application should be granted, and the State court can lawfully proceed no further in the cause. But if, in the opinion of the State court, it is not such a case as entitles the party to the removal, it is its duty to retain it, for having acquired jurisdiction, it must proceed until it is *judicially* informed that its power over the case has been suspended.
2. A foreign insurance company, doing business in the State of Virginia, under the provisions of the statute of that State, is *quoad hoc* domiciled here, and not a citizen of another State; and in a suit brought by a citizen of the State, on a policy of insurance, in a State court, against such company, it is not entitled to have the cause removed to a Federal court under the provisions of § 12 of the judiciary act of 1789, or of the act of 1875, amending the same.

The facts are sufficiently stated in the opinion for a proper understanding of the points decided.

White & Garnett for the plaintiff.

Baker & Walke for the defendant.

From the Corporation Court of the city of Norfolk.

SCARBURGH J. The defendant, in its petition, claims to be entitled to have this cause removed to the Circuit Court of the United States for the Eastern district of Virginia. It is a corporation created by the laws of the State of New York, but at the time of its making the policy of insurance on which this suit is founded, and long prior thereto, it was, and from that time has been, and still is, doing the business of insurance in this State under the laws of this State; and the policy was issued by it in this city.

It is insisted by the counsel for the defendant, that this court has no power of judgment in the premises, but must at once order the removal asked for; and that the question, whether such removal is proper? can be decided only by the Federal courts. It is claimed, that this is the ruling of the cases of *Ins. Co.* v. *Dunn*, 19 Wall., 214, and *Ins. Co.* v. *Morse*, 20 Wall., 454.

It is nowhere questioned, so far as I am informed, that this is a subject within the rightful cognizance of the Federal

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Government. If, therefore, I was satisfied that the construction contended for had been adopted by the Supreme Court of the United States, I should feel bound to follow it; for in all such cases, it seems to me to be a sound principle, that the decisions of that court become a part of the statute in question, and are as obligatory upon the State courts as the statute itself. The Federal courts act upon this principle in reference to the construction put by the State tribunals upon State statutes. In cases depending on the laws of a particular State, the courts of the United States adopt the construction which the courts of the State have given to those laws. "This course," says Marshall C. J., in *Elmendorf* v. *Taylor*, 10 Wheat., 152, "is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. * * * * On this principle, the construction given by this court to the constitution and laws of the United States, is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States." This principle has been uniformly observed by the Supreme Court of the United States from a very early period of its history to the present day. It had already become the settled doctrine of that court when *Elmendorf* v. *Taylor*, *supra*, was decided.

But the cases of *Ins. Co.* v. *Dunn*, *supra*, and *Ins. Co.* v. *Morse*, *supra*, do not go to the extent contended for. They hold, it is true, that when a proper case for removal is presented, it is the duty of the State court at once to grant the petition, and "to proceed no farther with the cause," and this, unquestionably, is a sound principle. But those cases recognize the doctrine that the State court must, of necessity, decide for itself whether a *proper* case for removal has been presented; for the statute contemplates that the action of the State court shall be invoked only in a *proper* case.

Gordon v. *Longest*, 16 Peters, 97, is the first case in which the Supreme Court of the United States passed upon the construction of the twelfth section of the judiciary act of 1789. It was there held, that under that section it must be made to appear to the satisfaction of the State court, that the defendant is an alien, or a citizen of some other State than that in which suit is brought; and that the matter in controversy, exclusive of costs, exceeds the sum of five hundred

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dollars. It was admitted on the record, that the defendant was a citizen of Pennsylvania, and the plaintiff a citizen of Kentucky, where the suit was brought; and the record showed that the matter in controversy, exclusive of costs, exceeded five hundred dollars. A proper case for removal was, therefore, presented to the State court; the necessary facts *judicially* appeared to that court. Hence, the Supreme Court says: "From the decision of the State judge, he seemed to consider the application for the removal of the cause as a matter to be decided by his discretion. But he must exercise a legal discretion. The defendant was entitled to a right under the law of the United States; and, on the *facts* of the case, the judge had no discretion to withhold that right. No objection can be made to the form of the application, nor to the facts on which it is founded. [That is to say, the case was presented in proper form, and the *facts* fully made out.] This being clear, in the language of the above act, it was the duty of the State court 'to proceed no further in the cause.'"

The act of 1875, under which this petition is filed, is substantially, as to the point now under consideration, the same as the twelfth section of the judiciary act of 1789.

The Supreme Court, in *Insurance Co.* v. *Dunn*, *supra*, goes no further than the same court goes in *Gordon* v. *Longest*, *supra*. On the contrary, the judgment of the court in the former case is based upon its judgment in the latter. And so, in *Ins. Co.* v. *Morse*, *supra*, reference was merely made to what was held in *Ins. Co.* v. *Dunn*, *supra*.

The Chief Justice, in his dissenting opinion, in *Ins. Co.* v. *Morse*, *supra*, but asserts the same doctrine in saying, that "the State court had jurisdiction to try the question of citizenship upon the petition to transfer."—20 Wall., 459. In *Amory* v. *Amory*, 95 U. S. R. (5 Otto), 187, the Supreme Court says: "Holding, as we do, that the State Court is not bound to surrender its jurisdiction upon a petition for removal until, at least, a petition is filed, which, upon its face, shows the right of the petitioner to the transfer, it was not error in the court to retain these causes," And in *Ins. Co.* v. *Pechner*, *Ibid.*, 186, the same court says: "It [the petition] should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed farther with the cause.' Having once acquired jurisdiction, the court may proceed until it is *judicially* informed that its power over the cause has been suspended."

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It seems to me, therefore, that it is the duty of this court to consider whether this is such a case as entitles the defendant to its removal. If it is, then the prayer of the petition must be granted, and this court can lawfully "proceed no farther in the cause." But if, in the opinion of this court, it is not such a case, then it is its duty to retain it; and it would be error for this court to act otherwise, for having acquired jurisdiction, it must proceed until it is *judicially* informed that its power over the cause has been suspended.

The only point in dispute is, whether the defendant is a citizen of the State of New York. In *Continental Ins. Co.* v. *Kasey*, 27 Gratt., 216, it was held, that a foreign insurance company, doing business in this State under the provisions of our statute, is *quoad hoc* domiciled here, and not a citizen of another State. The principle is well settled, that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper, that are not repugnant to the constitution or laws of the United States. *Paul* v. *Virginia*, 8 Wall., 168; *Ducat* v. *Chicago*, 10 *Ibid.*, 490; *Lafayette Ins. Co.* v. *French*, 18 How., 404; *Doyle* v. *Continental Ins. Co.*, 94 U. S. R. (4 Otto), 535. Unless, therefore, the provisions of our statute, requiring a foreign insurance company, as a condition of its doing business in this State, to become a citizen of this State, be repugnant to the constitution or laws of the United States, then the defendant, as to its business here, deriving all its powers and authority from our statute, is an incorporated institution of this State and one of its citizens.

It is supposed that not only is the case of *Ins. Co.* v. *Morse*, *supra*, in conflict with the case of *Continental Ins. Co.* v. *Kasey*, *supra*, but that under the ruling in the former the construction put upon our statute by the latter, renders it to that extent repugnant to the Constitution of the United States, and therefore void. But there is no such conflict, nor does the ruling in *Ins. Co.* v. *Morse*, *supra*, produce the result claimed for it upon the construction put upon our statute by *Continental Ins. Co.* v. *Kasey*, *supra*. The two cases are entirely consistent with each other. In *Ins. Co.* v. *Morse*, *supra*, the question whether, if the statute of Wisconsin had required the company, in order to do business there, to become *pro tanto* a citizen of that State, it would, in that respect, have been repugnant to the Constitution of the United States, was not discussed, or at all noticed, in the opinion of the court. The learned Chief Justice was of the opinion, that such was

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the effect of the statute; and if the majority had concurred with him in that construction, there is nothing in their opinion which indicates that they would not also have concurred with him in sustaining the judgment of the State Court.

It is not contended, nor could it be with any show of reason, that the States have not reserved the power of requiring foreign corporations, as a condition of their doing business within their borders, respectively, to take their authority for that purpose from the State imposing the condition, and thereby becoming, as to that business, a citizen of such State. *B. & O. R. R. Co.* v. *Wightman* (S. C. of Appeals of Va.), 1 Va. L. J., 715; and the cases cited in that case, *Ibid*, 717. If it be true that the States have retained that power, then the Federal Courts will follow the construction put upon our statute by the Court of Appeals in *Continental Ins. Co.* v. *Kasey*, *supra*. The very latest deliverances of the Supreme Court of the United States upon that subject, fully sustain the rule already noticed, requiring them to do so. In *County of Leavenworth* v. *Barnes*, 94 U. S. R. (5 Otto), 70, 71, that court says: "It [a decision of the Supreme Court of Kansas] gives effect and construction to one of its own statutes, and, according to well settled rules, will be followed by this court." In *Peik* v. *Chicago*, *Ibid*, 164, 178, it says: "The Supreme Court of Wisconsin has decided that there is no such repeal as is claimed. * * * This is binding on us." In *Stone* v. *Wisconsin*, *Ibid*, 181, 183, it says: "This construction of the statute and Constitution is binding upon us as a question of State statutory and constitutional law." In *Town of South Ottawa* v. *Perkins*, *Ibid*, 260, 267, it says: "And this court has always held that the laws of the States are to receive their authoritative construction from the State Courts, except where the Federal Constitution and laws are concerned; and the State Constitutions, in like manner, are to be construed as the State Courts construe them. This has been so often laid down as the proper rule, and is, in itself, so obviously correct, that it is unnecessary to refer to the authorities."

My opinion, therefore, is, that the defendant, as to the policy on which this suit is founded, is a citizen of this State, and that its petition must be denied.

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MISCELLANY.

LAW BOOKS IN VIRGINIA.—Law books have multiplied in Virginia since 1866, when the following Act of Assembly was passed:

An Act for Law Bookes.

WHEREAS, for the better conformity of the proceedings of the courts of this country to the lawes of England, it appeares necessary for their better direction therein, all the former statutes at large and those made since the beginning of the raigne of his sacred Majestie that now is and a few other approved bookes of law should be purchased. *It is therefore by this grand assembly and the authority thereof enacted accordingly* that all the aforesaid statute bookes, and Daltons justice of the peace, and office of a sheriffe, and Swinburnes book of Wills and Testaments may be sent for by the auditor for the use of the generall courts and assembly, to be kept at James Citty, and paid for out of the two shillings per hogshead; and that the like bookes be sent for by some of the commissioners of the severall county courts for the use of the respective counties, and paid for out of the county levy.—2 Hening's Statutes at Large, p. 246.

ENGLISH JUDGES.—Notwithstanding the very liberal pension which awaits their retirement, judges in the United Kingdom are apt to continue in harness very often far into their eighties, deeply to the exasperation of those who are eager for their shoes. Sometimes this is done to secure the patronage of the office to the political party with which the judge is in sympathy. Thus he won't resign till his friends come into power, sometimes to spite the government, which won't give him the peerage to which he aspires. Thus Lord Norbury positively refused to budge for anything under an earldom, and it is very well known that a barony would soon bring in the resignation of Chief Baron Kelly, who is eighty two. It is related of the late Chief Baron Pollock, that one who wished him to resign waited on him, and hinted it. entirely with a view to the prolongation of his own valued life, etc. The old man arose, and said, with grim, dry gravity: "Will you dance with me?" The guest stood aghast, as the Lord Chief Baron, who prided himself particularly upon his legs, began to caper about with a certain youthful vivacity. Seeing his visitor staggered, he capered up to him and said: "Well, if you won't dance with me, will you box with me?" And with that he squared up to him, and half in jest, half in earnest, fairly boxed him out of the room. The old Chief Baron had no more visitors anxiously inquiring after his health, and suggesting his retirement.—*Western Jurist.*

VIRGINIA LAW JOURNAL.—We are gratified to know that our work is growing in popularity with the profession in and out of Virginia. We appreciate these evidences very highly, and promise our best endeavors to meet the expectations of our readers. We have some very valuable and interesting material for the next number.

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BOOK NOTICES.

THE AMERICAN DECISIONS, containing all the cases of general value and authority decided in the courts of the several States, from the earliest issue of the State Reports to the year 1869. Compiled and annotated by John Proffatt, L.L. B., author of "A Treatise on Jury Trial," etc. Vol. VII. San Francisco: A. L. Bancroft & Co., Law Booksellers and Stationers. 1879. Through J. W. Randolph & English, Publishers, etc., Richmond, Va.

The present volume of this excellent series, contains cases reported in 12, 13, 14 Mass.; 1, 2 Conn; 12, 13, 14 Johns.; 1, 2 Johns. Ch.: 1 Southard (N. J.); 1, 2 Serg. & R.; 4 Har. & J.; 5 Munford (Va.); 1 N. C. Term R.; 4 Bibb (Ky.)

This work increases in value and importance with each additional volume. The amount of editorial labor bestowed upon the present volume shews that the publishers are fulfilling their promise made at the beginning, to make this the best series of reports extant. We take the greatest pleasure in recommending this work in the highest terms, and it has received the highest commendation from the justices of the Supreme Court of the United States.

With the tenth volume, which will be issued about the 1st of July, 1879, subscribers will receive a table of cases and general index, of the first ten volumes, free of charge.

DRONE ON COPYRIGHTS.—By Eaton S. Drone. Boston, 1879. Little, Brown & Co. Through J. W. Randolph & English, Richmond, Va.

This is a "treatise on the law of property in intellectual productions in Great Britain and the United States, embracing copyright in works of literature and art, and playright in dramatic and musical compositions." It seems to have been prepared with great labor and accuracy, as far as we have been able to examine it, and will do much towards enlightening the profession about a class of subjects of which but little is generally known. There is so much confusion in the English and American statutes and decisions on these subjects, that this work will be hailed with pleasure by lawyers engaged in this class of work. The work of the enterprising publishers is, of course, well done.

AMERICAN REPORTS, Vol. XXV. By ISAAC GRANT THOMPSON, Esq. Albany, 1879. John D. Parsons, Jr., Publisher. (Through J. W. Randolph & English, Richmond, Va.)

This volume contains all cases of general authority in the following reports: 53d and 54th Ala.; 31st Ark.; 1st Baxter (Tenn.); 2d and 3d Colorado; 81st, 82d, 83d and 84th Ill.; 123rd Mass.; 1st and 2d Montana; 5th Nebraska; 69th New York, and 6th Oregon. The cases are well reported, and many of them interesting. The publishers have also done their work well.

OHIO STATE REPORTS, Vol. XXXII. Part 3.

We are indebted to Messrs. Robert Clarke & Co., Publishers, Cincinnati, who are among the most enterprising publishers that we know of, for the advance sheets of these reports.

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THE

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THE VIRGINIA MARRIED WOMAN'S ACT.

The statute law of Virginia on the subject of married women's property is contained in two acts and an amendment to each; the first passed March 31st, 1875, and the second, April 4th, 1877, each being in force from the time of its enactment. We shall not consider the two amendments referred to, as the first of them, as will be seen, is in effect rendered useless by the subsequent Act of 1877, and the last amendment does not affect the questions we here propose to discuss.

The leading policy of the Act of 1875 is to exempt the property of the wife from the husband's ante-nuptial debts, without, however, depriving the latter of any of his common law rights of ownership; but another object of the same act is to exempt all property of the husband, except that acquired from or through the wife, from the wife's ante-nuptial debts. The leading policy of the second of the above named acts, is to leave to married women all property acquired by them before or after marriage as their sole and separate estate. The Act of 1875 is probably open to certain constitutional objections which cannot be urged against the Act of 1877. But the first and second sections of the Act of 1875, which sections seek to exempt the wife's property from the husband's ante-nuptial debts, if not in effect repealed by the Act of 1877, are at least rendered useless thereby, as that act accomplishes as much as the said two sections, and more besides. (See opinion of Moncure J. in *Fox's adm'r* v. *Comm.*, 16 Gratt., p. 1.) But as the reasoning in the opinion just referred to also clearly shows that the third section of the Act of 1875 is not repealed by the subsequent act, we must consider the last named section in connection with the Act of 1877, and from the two together, endeavor to form some idea of their effect.

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The wording of the Act of 1877 unfortunately renders it very obscure, ambiguous and difficult of interpretation, and the writer feels by no means sure of reaching right conclusions in regard to it, his hope being that the present attempt will induce further discussion of the subject from those more competent to deal with it. Some interesting points may arise from a discussion of the statutes under the following heads:

1. Their constitutionality.
2. To what property they apply.
3. The nature and effect of the wife's ownership, rights, powers, and liabilities under them.
4. To what extent the husband's marital rights and liabilities remain unimpaired.

A complete exposition of all the "points" with which the statute fairly bristles cannot be here given of course.

1st. Section 3 of the Act of 1875, provides that, "an action or suit may be maintained against the husband and wife jointly, for any debt of the wife contracted before marriage; but the execution on any judgment or decree in such action or suit, shall issue against, and such judgment or decree shall bind only the estate and property of the wife, which she shall own at the time of the marriage, or acquire subsequently thereto, and not that of the husband."

It will be seen that this section applies as well to marriages existing and already celebrated at the time of its enactment, as to future marriages, but by the common law, upon the marriage of a man and woman, the right is instantly vested in the existing creditors of the woman to sue the husband, and to hold him personally liable during the coverture for his wife's ante-nuptial debts; so far, therefore, as this section applies to marriages subsisting at the time of its enactment, it seeks to impair the vested rights of the wife's ante-nuptial creditors, and would seem on that ground to be void, though there is no Virginia case denying the authority to impair vested rights, unless, indeed, such a right may be looked on as arising under an implied contract, when, of course, it could not be impaired by subsequent legislation. (As cases in point, see 5 Duer, N. Y., p. 183 [*Berley* v. *Rapacher*], and *Westervelt* v. *Gregg*, 12 N. Y., 202.) No objection appears to the application of this section to marriages solemnized after its enactment, so that a man who has been married since March 31st, 1875, is clearly not personally liable for his wife's ante-nuptial debts. The Act of 1877 is prospective in its operation throughout, and as it does not seek to take away any vested right, or to impair the obligation of any contract, it

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probably is not open to objection under this head, whatever may be thought of the policy of the statute and its tendency for good or evil, a question we will not here touch upon.

2d. To ascertain the property to which these statutes apply, resort must be had to the wording of the statutes themselves. Bishop discusses the subject quite fully in his work on Married Women (Vol. II, ch. 7), and reference is thereto made upon the questions of the married woman's separate property in damages for a tort.

The object of this heading is merely to point out three different classes of property secured to married women under the Virginia statute, in order to discuss more clearly the woman's rights and liabilities in reference to each class. The first two classes of property are indicated by the 1st section of the Act of 1877, and are, 1st, all the property, real and personal, owned by the woman at the time of the marriage, with the rents, issues, and profits thereof; and 2nd, any property acquired by a married woman as a separate and sole trader. The third class is indicated by section two of the same act, and consists of all real and personal estate acquired by any married woman, after the passage of the act, in any of the following modes, to wit, by gift, grant, purchase, inheritance, devise or bequest. It may here be remarked that whatever may be the woman's right to property for damages to her person or property before marriage, or to her property after marriage, the particular enumeration in section two of the modes in which she may acquire separate property after marriage, excludes any other mode of acquisition (*expressio unius exclusio est alterius*), and hence the husband, on common law principles, would seem to be entitled to the damages for an injury to the wife's person, at least, during the coverture, provided, during the coverture, he should choose to sue for and reduce them into possession; though it must be admitted that this conclusion seems strange and anomalous.

3d. We now come to consider the nature and extent of the wife's ownership under the statute, together with her rights, powers and disabilities, and under this head let us look at her power of contracting both generally, and with reference to the three classes of separate estate above enumerated; 2d. The modes of enforcing the wife's contracts; and 3d. Her power of disposing by will of the various classes of separate statutory property.

A distinguished author in discoursing of the construction and interpretation of these married woman's statutes, by reference to common law principles, ingeniously compares the

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common law, and the statutes, respectively, to the centripetal and centrifugal forces of astronomy, the one ever propelling the heavenly body forward into unknown space, and the other ever drawing it back to the centre of the system of which it is but an emanation and a part.

The married women's statutes are but an emanation and a part of our vast system of laws, and as that system has ever been governed by well known and settled principles, so must those principles be applied to limit, and direct the course of this new offspring of legislation, lest unchecked, it should clash with other portions of our legal system and mar the uniformity of the whole.

Bearing this rule of construction in mind, it may be observed in reference to the wife's power of contracting, that the mere creation of a legal separate estate in her, does not, by implication, confer that power upon her in all its generality to such an extent that she may sue and be sued upon any contract made by or with her as if sole. (2 Bish. Married Women, sec. 232, and cases cited, 35 N. Y., 507; 22 N. Y., 450.) The statute, however, may confer such a power upon her either partially or fully, expressly or by implication. Let us see to what extent our statute confers the power of contracting on the wife. Plainly, she has not such a general power as that above described. The woman is empowered to contract in relation to, or for the disposal of any of the separate property created in her by the statute, though it cannot be definitely stated what contracts have such a "relation" to her sole and separate estate as that therein referred to. The expression, "in reference to," admits of great latitude of construction, it may be very limited, or it may be very broad and general.

Many cases can, however, be thought of, where no ambiguity can arise, as where a married woman owning a farm, hires hands to work it, or an overseer to manage it, or contracts to rent or sell it, or where she hires out a team owned by her as separate estate, or buys sheep to pasture on her grazing farm; such contracts as these, and many others that could be mentioned, would doubtless have such a "relation" to her sole and separate estate, as to bring them within the statute.

The wife is, moreover, empowered to become a "sole trader" and to acquire property as such, and it would seem, therefore, that she is authorized by implication at least, if not directly, to make any contract necessary, usual or proper, for the conduct and management of her business as such sole

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trader; such as a contract of partnership, or of rent for a house, in which to carry on her trade. (1 Minor's Insts. first ed., p. 206; 39 Barb., 78; 61 Barb., 145; 44 N. Y., 343.) And as it is generally both necessary, usual, and proper for a person engaged in trade to make purchases of property on credit, it follows that a married woman, as a sole trader, can clearly make such purchases and thereby acquire a good title to the property. It has been questioned whether the wife ordinarily can make valid purchases on credit so as to acquire title to the property; but if the word "purchase" is given a common sense meaning, and not a technical one, in that part of the act authorizing her to take by purchase, no good reason appears why she cannot in general, though not a sole trader, validly make such purchases, and be bound for them to the extent of her separate estate. (See 2 Bish. Married Women, sec. 80.)

Does it, however, follow because the statute has conferred no general power of contract upon the wife, that all her contracts not made as a sole trader, nor in reference to, or for the disposal of, her separate estate, are therefore wholly void? At law they are clearly so, but as we shall presently show, they may be made a valid charge in equity in proper cases, as well upon her separate statutory, as upon her separate equitable, estate.

The woman's express power of contracting under the statute, however, except as a sole trader, is only partial, as the statute provides that the husband shall join in any contract in reference to her real and personal estate, other than such as she may acquire as a sole trader. Her powers of contracting as a sole trader, both express and implied, as above explained, are not restricted, by requiring the joinder of the husband.

The South Carolina cases throw light on the question of what business a married woman may engage in, as a sole trader, as by the common law of that State married women have always had the right to exercise a sole and separate trade; and the courts there have held that the business cannot be one wholly unconnected with and unlike the buying and selling of merchandise; the wife must trade or be engaged in commerce. 1 Hill, 428.) Thus a *feme covert* cannot be a common carrier as if sole (*Ewart* v. *Nagel*, 1 McMullen, 50), though she may be a sole trader in the keeping of a boarding house. (*Dace* v. *Neuffer*, 3 Richardson, 78.)

As to the modes of enforcing the married woman's contracts. Having seen no authorities on any act worded as ours is in

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this respect, we shall here have to rely mainly on the usual rules of statutory construction, and on abstract reasoning. Section 1 of the Act of 1877 provides, that the married woman may sue, and be sued, as if she were a *feme sole* * * * * provided her husband be joined with her, in any action by or against her. Now, these words immediately follow those words of the act allowing the woman to contract in relation to, and for the disposal of, her separate estate, being separated from them only by a comma, and it would seem, therefore, should be limited in meaning by them. If it be contended that the woman should be sued on all contracts as a *feme sole;* she must have power to make any and all contracts as if sole, but if she has such power, the previous words granting her certain partial powers of contract only, would be superfluous and useless, which cannot be presumed, because the presumption of law is, that the Legislature always understands the subject it deals with, and means something by the language it uses, whatever the fact really may be. Besides, a married woman always, at common law (in form at least), both in contracts and in torts, sued as a *feme sole*, and in actions of tort was sued as such, only in each case, her husband must be joined with her; that is to say, the forum (whether of law or equity) in which the suit was brought, was not changed or affected by the fact of the woman's coverture. But in regard to being sued on contracts made by a married woman during coverture, the case is very different. Independently of statute, a married woman cannot, in any case, be sued on such contracts in a court of law; liability to be sued as a *feme sole* on a contract, imports a personal liability on the part of the married woman, enforcible in a court of common law or of equity, according to the nature of the case itself, not according to the character or status of the defendant as being married or sole. But as this personal liability of a married woman is a thing unknown to the unwritten law, whether common law or equity, it follows that it can only attach to such contracts as the statute empowers married women to make, viz.: contracts in relation to or for the disposal of their separate estate (in which the husband must join unless the wife contracts as a sole trader), and (by implication) where the wife is a sole trader, contracts, necessary, usual, or proper, for the carrying on of a sole and separate trade. Upon these contracts, and these only, can a married woman be sued at law or in equity, as the case may be, upon joining her husband, and all other contracts of married women, remain null and void at law, but liable, in proper

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cases, to be made a charge in equity as well upon her separate statutory, as her equitable estate. Thus an ordinary note or bond of a married woman may be sued on in equity, and the amount due charged on her separate statutory estate, though no personal judgment or decree can in such cases be rendered against her.

Reason, as well as the authorities, sustains this position, "for she cannot bind her person either at law or in equity by an ordinary contract, and, therefore, she must be capable of binding such estate [viz., her separate statutory estate] in equity, as though it were held by a trustee under the unwritten law, for the same reason applies to the one case as to the other" (2 Bish. Marrried Women, § 204, &c). And in *Johnson* v *Cummins*, 1st C. E. Green (N. J.), p. 97.

Chancellor Green says: "The jurisdiction of a Court of Equity over the subject, does not rest upon the ground that the estate of the wife is an equitable estate merely, but that it is her separate estate, which is equitably subject to contracts and engagements entered into by her which are not legally binding upon her personally, and which cannot be enforced at law." In *Todd* v. *Lee*, 15 Wisconsin, p. 365–380, Dixon C. J. says: "The contracts of a married woman, when necessary or convenient to the proper use or enjoyment of her separate [statutory] estate, are [by the statute] binding at law; all her other engagements stand as before the passage of the statue, good only in equity." (See also *Yale* v. *Dederer*, 18 N. Y., 265; *Barnett* v. *Lichenstein*, 39 Barb., 194; *Balm* v. *Delayle*, 37 N. Y., 35.)

The New York authorities above referred to, hold that the woman can only charge her statutory property when she expressly makes the charge in the contract itself, or when she has procured a credit for the direct benefit of her separate statutory estate. The same doctrine, however, had prevailed under the unwritten law of that State, before the passage of the Married Woman's Statutes (7 Paige, 9, 14; 20 Wendall, 570).

In Virginia, under the unwritten law, the credit need not be for the direct benefit of her separate estate, nor need there be an express charge contained in the contract, in order to make it binding (*Woodson* v. *Perkins*, 5 Gratt., 351; *Penn and als* v. *Whitehead*, 17 Gratt., 503–12–16; *Muller* v. *Bayly*, 21 Gratt., 528, &c.) There seems, therefore, no reason why the doctrine with us in this respect should be changed by the new statutes.

It is finally provided in § 1 of the Act of 1877, "that noth-

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ing herein contained shall deprive her [the wife] of the power to create, without the concurrence of her husband, a charge upon such sole and separate estate, as she would be empowered to charge, without the concurrence of her husband, if this act had not been passed." The power to charge her separate equitable estate without the husband's concurrence, is thus expressly reserved to the wife, and the question arises, whether this express reservation does not imply, that she has not the power to charge her separate statutory estate without his concurrence. If the affirmative be held, then all that has been said of charging such estate is useless; but considering the immense evils that would flow from such a construction of the statutes, by exempting vast proportions of all property in the Commonwealth, from the debts of those who use and enjoy that property; and considering further that there is no express denial of the power of charging, and that the implied power of charging the separate statutory estate, does not at all affect the express power of charging in equity, being, by no means, incompatible with it, it seems that the question above raised should be negatively answered, and the power of charging the separate statutory estate allowed.

3. The wife's power of disposal, by will, over her separate statutory estate.

It is remarkable that the Act of 1877 confers this power upon the married woman only in regard to the third class of separate property created by it as above explained—viz., the real and personal property acquired by the woman after marriage, by gift, grant, purchase, inheritance, devise or bequest. This state of things is probably due to inadvertence of the framer of the act, not to design.

Nevertheless, the woman having clearly no express power to will away any of her statutory separate property, except that acquired under § 2, it becomes necessary to inquire whether any express power of willing is implied from the nature of the woman's ownership, to wit, as her sole and separate estate. Prior to the revisal of 1849, the law was that as to personalty the *jus disponendi* was incident to a separate estate; but as to real property, a married woman could not devise it, unless a power to do so was reserved by articles before marriage, or by the instrument creating the estate (*West* v. *West*, 3 Rand., 373); as the law now stands, however, she may dispose of any of her estate, real or personal, by will, unless, indeed, she be prohibited from doing so by the instrument creating the estate (1 Min. Insts., 1st, 2d, p.

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345.) This law (V. C., 118, § 3), of course, has reference to the equitable estate of married woman only, as a separate statutory estate in married women was unknown in Virginia at the time of its enactment. Does this right of willing away the separate equitable estate extend, by analogy, to the separate equitable estate newly created?

Now, on the one hand, it may be urged that, as these married womens' statutes are in derogation of the common law, they should be strictly construed, and no further power given to the woman over the property than that expressly conferred by the statute, and upon such reasoning, apparently, it has been held in Mississippi, that a married woman's will of her separate statutory property, made without her husband's consent, is void (35 Miss., 119, 145). In that State, indeed, it may be remarked, a very strict and narrow construction seems in all cases to be given the statutes on this subject. (7 Sm. & M., 64.)

It may be said, on the other hand, however, that the words "sole and separate estate" had a definite meaning in the law before the enactment of the late statutes; and that married women had certain well-defined rights over such property owned by them, among which, was the right of willing it away, and therefore, that the same attributes and incidents were intended to attach, and do attach by implication, to the separate statutory property as belonged to the separate property in equity, and among them the unrestricted right of disposal by will. And taking into consideration the general scope and policy of the statute, the latter reasoning should probably prevail, though Bishop, in 2 Married Wom., § 459, says there is no decision expressly sustaining the conclusion reached by it, probably because, in most States, the power of willing is expressly given the wife. And it would seem, at all events, she has the power of willing away her personal estate acquired under the statute in any of the three ways enumerated above.

4. To what extent do the marital rights and liabilities of the husband remain unimpaired by the statute?

1st. As to his rights: He has, at common law, a right to the wife's society, and to take her with him on changing his domicile, so that if she, without justifiable cause, refuses to follow, this is a desertion of him by her (1 Bish. Mar. & Div., 5th ed., § 788, &c.), and he has a right to her time, services and labor, and the wages or proceeds thereof; he has an absolute right to all her chattels personal in possession, with some limitation on his power of disposal by will; he has the

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absolute power of disposal over the wife's chattels real, during coverture, though he cannot dispose of them by will, and they survive to her free of incumbrances, if she survives the husband or is divorced, and the husband, after her death, takes them, absolutely as his own by survivorship; he has the right to reduce the wife's choses in action into possession during the coverture, upon which they become absolutely his, and if he does not so reduce them, they survive to her if she survives the husband or is divorced, and the husband, after her death, takes them only as her administrator, though after payment of her debts, he is entitled to the surplus absolutely.

2d. As to his common law liabilities: He must support his wife in a manner corresponding to the station assumed by him in society, and he is answerable during the coverture for the wife's ante-nuptial contracts and torts, and for her post-nuptial torts. (Minor's Insts. title Husband and Wife, *passim.*) With this brief statement of the husband's common law rights and liabilities, we may proceed more clearly. There appears to be nothing in our statute impairing the husband's right to the wife's society, unless it results from the wife's right to be a sole trader, for in attending to her trade, she might necessarily be absent sometimes from her husband; this right, however, can hardly be construed, as authorizing the wife to create for herself a domicile separate from the husband, as that would be so gross an infringment of the husband's common law rights, and so contrary to public policy, as hardly to be allowed by a mere construction of the statute, so that the husband probably has the right to change the wife's domicile with his, as at common law (2 Bish. Mar. Wom., §157, &c). But inasmuch as the statute empowers the wife to become a sole trader, and to hold as her sole and separate estate all property acquired by her as such, it is manifest that the husband can have no right to her time or the proceeds of her labor, in conducting her separate business, yet it seems equally plain, that the statute did not intend to deprive the husband wholly of his right to the time and services of his wife, so as to make him a debtor to her, for example, for repairing his clothes or cooking his food; yet it seems impossible to say how far the husband's right to the wife's services remain unimpaired by the statute. It may be observed, however, that the right to be a sole trader, refers to some continuous business, to the conducting of which a considerable amount of time, skill and labor is devoted, and not to one or more isolated and unconnected transactions (104

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Mass., 589; 40 Conn., 117; 2 Bish. Mar. Wom., §441). The husband's rights of ownership over the wife's property during her life, are well nigh entirely swept away by the statute, though the right of tenancy by the curtesy is expressly reserved to him. The question has been raised whether, under our statute of distributions, upon the death of the wife intestate, the husband will take the statutory personal property subject to payment of her debts.

It has been held in New York, under the Married Woman's Act of 1848–9, which, so far as this question is concerned, does not differ from ours, that the husband does take such property. After citing the provision of the act referred to, that "any married woman is capable of taking by gift, grant, or from any person, other than her husband, and can hold to her separate use, and convey and demise real and personal property, and any interest and estate therein, in the same manner and with the like effect as if she were unmarried; and the same shall not be subject to the disposal of the husband or liable for his debts," the judge discourses as follows: "The effect of this provision is to put such property, during the lifetime of the wife, entirely at her disposal, and to impart to the wife the power to make effectual disposition of it by any valid testamentary bequest, and thus to place it, if she chooses, wholly beyond the power or reach of the husband. If, however, she fails to make any disposition of the property by way of sale during her lifetime, or by testamentary bequest to take effect upon her death, then the rules which always prevailed before the statutes of 1848–9 were enacted take effect, and the husband has all the rights given to him by the common law and by those provisions of the revised statutes which have never been repealed by these later acts. * * * * * * The property, then, in this case, stands precisely upon the footing of *choses* in action of the wife which have not been reduced into possession during the coverture." (*Ransom* v. *Nichols*, 22 N. Y., p. 110–11–12. This reasoning seems satisfactory and conclusive of the question, nor does the express reservation of the right of curtesy appear to affect the question. Bishop, in his work on married women, says that the better view of the right of curtesy initiate is, "that by the birth of a child, the estate, by the mere marital right, is extended in duration, to become an estate, not for the mere joint lives of husband and wife, but for his own life; and that it is this enlarged estate, not the mere possibility [of holding the land after her death for his own life], which is termed tenancy by the curtesy initiate."

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(Vol. II., § 43.) Now, even if the express reservation of curtesy to the husband had not been given by the statute, it seems that he would, after the wife's death (having had issue by her born alive), have held her lands of inheritance for his life, as tenant by curtesy consummate (2 Bish. Mar. Wom., § 147, &c.), so that the only effect of the reservation is to secure to the husband the curtesy initiate, as well as the curtesy consummate, and as this curtesy initiate is not a right dependent on survivorship, it bears no analogy to the husband's right of administration and ownership in the personal effects of his intestate wife. It was observed, in a New Jersey case, that the design of the act was to protect the wife's estate in lands from the power of the husband and the claims of his creditors. "The language of the statute may have full effect without at all impairing the husband's right to curtesy [manifestly meaning after the wife's death]. *Johnson* v. *Cummins*, *supra*. As the liability of the husband to support the wife according to the station he assumes in society, was not changed under the unwritten law, by the creation of a separate estate in the wife, it would seem, by analogy, that the same liability rests on him under the statute, and no rules of construction can raise a contrary doctrine. (2 Bish Mar. Wom., § 158.) Now, as we have seen, the third section of the Act of 1875 only operates to exempt the husband from liability for the wife's ante-nuptial debts, and that only where the marriage has taken place since the passage of the act. No reference is made anywhere in the statutes under discussion to the husband's liability for the wife's ante-nuptial or post-nuptial torts, and as there is nothing in the statute from which the husband's exemption may be inferred, it follows that his liability for the wife's torts, both before, and after marriage, remains precisely as at common law.

No attempt has here been made to expose any of the dangerous consequences which must ensue indirectly from the married woman's law. Our effort has simply been, to arrive at the meaning of the act in some particulars as it now stands. As before remarked, we are distrustful of many of the views here presented, but hope that some good may, at least, be accomplished by inviting further discussion of a subject of such prime importance to the profession and the community.

W. D. Dabney.

Charlottesville, Va., Jan. 23, 1879.

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IGNORANCE AS A DEFENCE.

It has sometimes been said that there can be no conviction of crime without proof of criminal intent. Undoubtedly this is the case with regard to all crimes of which intention is a necessary incident. There can be no conviction of murder without proof of malice; no conviction of larceny without proof of the *animus furandi;* no conviction of burglary without a burglarious, or, at all events, a felonious intent. To cases of this class, the famous maxim that the *mens rea* is essential is of unquestioned application; and so viewed, the statement is little more than a *petitio principii.* It amounts to saying that to sustain a guilty intention, a guilty intention must be proved.

But that a guilty intention is not necessary in all cases, is shown by the fact that in a large class of cases, every day becoming more important—those of negligence—the nature of the offense excludes intention either good or evil. Malicious offenses spring from a bad motive; negligent offenses are without motive; the first emanate from a moral, the second from an intellectual defect. The wrong in the first class of cases consists in intending evil; the wrong in the second class of cases from not intending at all. That the party meant what he did is an essential element to a conviction of a malicious offense; that he did not mean what he did is an essential element to a conviction of a negligent offense.

We may, therefore, summarily dispose of the maxim, that without proof of malice there can be no criminal conviction. A distinct class of cases, however, comes up in which the unlawful act is done intentionally, but in ignorance that it is unlawful. This ignorance is of two kinds, (1) ignorance of law, and (2) ignorance of fact.

That ignorance of law is not a defense is generally conceded. A conspicuous illustration of this is to be found in the case of Miss Anthony, who was convicted a short time since in New York of illegal voting. She set up as a defense that she believed that she was in law entitled to vote, and that she had been so advised by competent authorities. This was held not to avail her, and under Judge Hunt's express directions she was convicted. *U. S.* v. *Anthony*, 11 Blatchf., 200; *U. S.* v. *Taintor*, id. 374. Similar rulings have been maintained in other jurisdictions. *Hamilton* v. *People*, 57 Barb., 625; *State* v. *Boyett*, 10 Ired., 336; *State* v. *Hart*, 6 Jones (N. C.), 389. It has also been held not to be a defense

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to an indictment for adultery that the defendant erroneously but honestly believed that she had been legally divorced. *State* v. *Goodenow*, 65 Me. 30. Were this not the law, government would come to an end. In the late civil war, the Secessionist honestly believed that secession was legal, and that to support it by force was to exercise a constitutional right; but this honest belief would have been no more tolerated as a defense in the Federal courts than would the Confederate courts have condoned armed resistance to their authority on the ground of an honest belief that the Confederate governments were usurpations. Ignorance of law, also, would be at a premium if men could have plurality of wives on the ground that such plurality is legal; or could stuff ballot-boxes on the ground that they knew no law forbidding such excesses; or could violate police regulations on the ground that they did not know that such police regulations existed. The most obtuse and stolid of criminals would be those whom the law would most favor; and if we could conceive of a person totally ignorant of law, such a person, in this theory, would be totally free from criminal responsibility. Fanatics, also, would be relieved from civil restraint in proportion to the intensity of their fanaticism; and the very element of fierce infatuation which would add to their dangerousness would add to their immunity. The late decision of the Supreme Court of the United States in *Reynold's Case*, however, has finally disposed of this kind of defense. Belief in the unconstitutionality of a law; belief in its violation of higher law; belief in its conflict with conscientious duty, will be no defense to an indictment for disobedience to such law. And even a conscientious belief that an act is right (*e. g.*, labor by a Jew on Sunday in contravention of the Sunday laws) will not prevent such act from being indictable when made so by the State. *Com.* v. *Has*, 122 Mass., 40; *Specht* v. *Com.*, 8 Penn. St., 312.

Ignorance of fact, however, presents questions far more intricate; and as to this defense we may lay down the following propositions:

First. When to an offense knowledge of certain facts is essential, then ignorance of these facts is a defense.

Second. When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact is no defense.

Of the last proposition the following illustrations may be given:

To an indictment for bigamy, it is no defense that the defendant, a woman, honestly believed (within the limit of seven

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years from the time he was last heard from) that her husband was dead. So has it been ruled in Massachusetts. *Com.* v. *Mash*, 7 Metc., 472; see *Com* v. *Elwell*, 2 id. 190. In England, decisions to the contrary were given before the law was thoroughly considered, by single judges (*R.* v. *Turner*, 9 Cox's C. C., 145; *R.* v. *Horton*, 11 id. 670); but these decisions have now been summarily and finally overruled. *R.* v. *Gibbons*, 12 Cox's C. C., 337. And an indictment has been sustained in Massachusetts against a man for marrying a woman who believed herself to be a widow, although eleven years had elapsed since she had last seen or heard from her husband whom she had left (*Com.* v. *Thompson*, 6 Allen, 591; *Comp* v. *Thompson*, 11 id. 23); it being held by the court that the statutory exceptions do not apply to the deserting party. It has been further held that when a guilty party in a divorce suit marries again without leave of court (this being legally essential) during the life of the other party, and afterward obtains such leave, an honest belief that the second marriage is or has become legal has no effect in making it so, and in protecting the parties. *Thompson* v. *Thompson*, 114 Mass., 566.

Numerous illustrations to the same effect may be drawn from prosecutions for invasions of the laws making indictable the sale of liquors under certain conditions. It is no defense, for instance, to an indictment for keeping or selling adulterated or intoxicating liquors that the defendant did not believe them to be intoxicating or adulterated. *R.* v. *Woodrow*, 15 M. & W., 404; *Com.* v. *Farren*, 9 Allen, 489; *Com.* v. *Nichols*, 10 id. 199; *Com.* v. *Smith*, 103 Mass., 444; *State* v. *Smith*, 10 R. I., 258; *People* v. *Zeiger*, 6 Park. Cr., 355. Thus, on an indictment for selling adulterated milk, the defendant is not protected by ignorance of the adulteration, or even by belief that the milk was pure. *Com.* v. *Farren*, 9 Allen, 489; *Com.* v. *Waite*, 11 id. 264; *State* v. *Smith*, 10 R. I., 258. And the same rule applies to indictments for selling intoxicating drinks. *Com.* v. *Boynton*, 2 Allen, 160; see *Barnes* v. *State*, 19 Conn., 398.

In several States selling intoxicating liquors to minors is indictable by statute, and in such cases, also, arises the question whether the defendant knew that the vendee was a minor. Here, again, we have the rule before us applied, it having been repeatedly held that ignorance, in this respect, coupled even with an honest belief that the vendee was of full age, is no defense. *U. S.* v. *Dodge*, 1 Deady, 186; *Com.* v. *Goodman*, 97 Mass., 117; *Com.* v. *Emmons*, 98 id., 6; *Com.* v. *Lattinville*, 120 id., 385; *Com.* v. *Finnegan*, 124 id., 324;

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Barnes v. *State*, 19 Conn., 398; *McCutcheon* v. *People*, 69 Ill., 601; *Farmer* v. *People*, 77 id., 322; *State* v. *Hartfiel*, 24 Wis., 60; *State* v. *Cain*, 9 W. Va., 572; *Ulrich* v. *Com.*, 6 Bush, 400; *State* v. *Hause*, 71 N. C., 518. *Aliter* under Georgia and Indiana statutes. *Stern* v. *State*, 53 Ga., 229; *Brown* v. *State*, 24 Ind., 113; *Farbach* v. *State*, 24 id., 77; *Goetz* v. *State*, 41 id., 162.

It is also no defense to an indictment for selling to persons of intemperate habits that the defendant did not know that the vendee was of intemperate habits (*State* v. *Heck*, 23 Minn., 594; *Farmer* v. *People*, 77 Ill., 322); though it is otherwise when the statute makes the offense to be selling to persons of "*known*" intemperate habits, in which case knowledge is an ingredient of the prosecutor's case. *Smith* v. *State*, 55 Ala., 1; see *Crabtree* v. *State*, 30 Ohio St., 382.

Analogous cases have arisen under statutes making it indictable to abduct, seduce or violate girls under a specific age. Here, also, it is no defense that the defendant mistook the girl's age. *R.* v. *Booth*, 12 Cox's C. C., 231; *R.* v. *Olifier*, 10 id., 402; *R.* v. *Robins*, 1 C. & K., 456; *State* v. *Ruhl*, 8 Iowa, 447. We have recently had a signal illustration of this application where the rule was affirmed by the great majority of the English judges. The defendant was convicted under 24 & 25 Vict. of unlawfully taking an unmarried girl under sixteen years out of her father's possession and against his will. It was proved by the defendant that he *bona fide* believed, and had reasonable grounds for believing, that the girl at the time of the act was over sixteen. Cockburn, C. J., Kelly, C. B., Bramwell, Cleasby and Amphlett, BB.; Blackburn, Mellon, Lush, Grove, Quain, Denman, Archibald, Field and Lindley, JJ., held that the defense was of no avail, and that the conviction was right. The sole dissentient was Brett, J. A similar ruling is to be found in the Iowa reports. Is has been held in that State that knowledge that a child is under ten years is not necessary to convict a defendant of the statutory offense of assaulting a child under ten years. *State* v. *Newton*, 44 Iowa, 45. And it has been held in Missouri, that it is no defense to a suit for marrying minors that the defendant believed them to be of full age. *Beckham* v. *Nacke*, 56 Mo., 546.

In other lines of prosecutions under statutes making acts indictable, irrespective of intent, similar conclusions have been reached. Thus, it is no defense to an indictment for betting at a gaming house that the defendant believed that the house was licensed (*Schuster* v. *State*, 48 Ala., 199); nor

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to an indictment for selling a calf under the statutory age, that the defendant did not know that the calf was below the limit (*Com.* v. *Raymond*, 97 Mass., 567); nor to an indictment for carrying an illegal number of passengers, that the defendant did not know that there was an excess (*State* v. *Balt. Steam Co.*, 13 Md., 181; though see *Duncan* v. *State*, 7 Humph., 148); nor to an indictment for selling naphtha, that the defendant did not know that the oil was naphtha (*Com.* v. *Wentworth*, 118 Mass., 441); nor to an indictment for illegally usurping an office, that the defendant honestly believed that he was honestly elected to the office. See *State* v. *Hallett*, 8 Ala., 159; *McGuire* v. *State*, 7 Humph., 54; *State* v. *Hart*, 6 Jones (N. C.), 389. With these rulings may be classed the well known common law principle, that it is no defense to an indictment for a libel that the defendant was ignorant of the contents of the libel (*Curtis* v. *Mussey*, 6 Gray, 261; *People* v. *Wilson*, 64 Ill., 195); or that his motives were scientific or philanthropic. *R.* v. *Hicklin*, L. R., 3 Q. B., 360.

As diverging from the line of the cases just stated may be mentioned a series of rulings in Ohio and Indiana. In Ohio, the precedent was set in a case rather political than juridical in its type. James G. Birney, conspicuous in the old anti-slavery agitation, was indicted, in 1837, for harboring a fugitive slave. *Birney* v. *State*, 8 Ohio, 230. The statute, under which the prosecution was instituted, did not make either the *scienter* or the intent essential to the offense, though it might well be argued that as this was a statute in derogation of liberty, and, as in a free State, no one has a right to view another man as other than a free man, the case was exceptional, and notice of the enslaved status of the fugitive must be brought home to the defendant in order to charge him with the statutory offense. But the case, aside from this view, could not fail to associate itself with the great issues of liberation then profoundly agitating the country; and it was to such an appeal that the remarkable speech of Mr. (afterward Chief Justice) Chase owed its distinctive power. The case, like that of the trial of the seven Bishops, contained in fact the germs of a great political revolution; nor could the judges avoid viewing it apart from the fundamental issue of freedom or slavery which it involved. But aside from this view, political cases, or cases involving political issues, cannot be judicially authoritative in any courts except those by whom they are pronounced. In fact, there is scarcely a case on record in which judges, when acting in cases on which great political consequences depended, do not vote according

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to their party views. It was so in Queen Caroline's case, in which the Tory peers voted even on the most technical of the litigated questions, on the side of the government, while Erskine, the sole Whig peer, voted on such questions steadily on the other side. In O'Connell's case, we find the Whig peers, Denman, Cottenham and Campbell, voting on one side, and Brougham, then acting with the Tories, voting with Lyndhurst on the other side, on the questions of the regularity of the jury impannelling, and of correctness of a joint judgment on an aggregation of counts, on which the fate of the prosecution depended. In Massachusetts, during the war of 1812, the judges of the Supreme Court, strong lawyers indeed, but also strong federalists, pronounced a series of rulings on the militia question, which no lawyers now undertake to defend, and which historians of all shades agree to have been as much the result of political ties as were the subsequent rulings of Southern judges resting on the assumption that the Union was a mere league of sovereign States. No one would presume to cast the faintest shadow on the integrity of the seven judges of the Supreme Court of the United States, who formed part of the Commission, that by a vote of eight to seven, ruled a long series of technical points which made Mr. Hayes President of the United States; yet, no one doubts that the votes of each of these eminent jurists, on each of these separate issues, many of them very subtle, were in harmony with those of his party associates who were political members of the Commission. In Birney's case, there was this additional element, that the question was itself political, and political in the highest, noblest and most imperative sense of the term. Am I to treat another man as a slave without knowing him to be such? That I should treat him as a slave at all, on a free soil, is repugnant to the instincts of all freemen; but that without notice that he is a slave, without knowledge direct or inferential of the fact, I should treat him as such, and should refuse him the common charities of life, if he should come starving to my door, and then should be compelled to give information of his whereabouts to the police, if not to confine him myself, this is as contrary to a sound jurisprudence, as it is to true political philosophy. So strong and imperative is the presumption, in a free country, in favor of freedom, that if we have to except by any Federal obligation the disfranchisements of other sovereignties, express notice of such disfranchisements should be proved in order to force us to execute them. The man who treads our soil has the *status* of a free man, and if I am to

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treat him as otherwise, notice must be brought home to me of his disfranchisement. Birney's case, therefore, was rightly decided.

But though rightfully decided, on the principle which I have just stated, it was natural that Birney's case should be accepted afterward as establishing the rule that there can be no conviction of a criminal offense without proof of guilty knowledge, and hence of guilty intent, and that even to the present day, this should be held to be settled law in Ohio. *Crabtree* v. *State*, 30 Ohio St., 382. The same view has been taken in Indiana (*Brown* v. *State*, 24 Ind., 113; *Farbach* v. *State*, 24 id., 77; *Goetz* v. *State*, 41 id., 62), and in Georgia. *Stern* v. *State*, 53 Ga., 229. The principle, indeed, has much in it that commends itself to us; and speaking in a large way, taking the terms rather in their ethical than their juridical sense, we may well say that without guilty purpose there can be no guilt. To the divine perceptions, such no doubt is the case. But in human systems we must remember that as

> "Evil is wrought
> By want of thought,
> As well as by want of heart,"

negligence, bringing about injury to others, is punishable not merely for the harm it does, but because an omission of due diligence and care in dealing with dangerous agencies is in itself a wrong. And then, in addition to this, comes the principle that there are some acts which it is within the power of the Legislature to prohibit irrespective of the intent, and that the State would go to pieces were not this power, in respect to some of these acts, exercised; and whenever this is the case, the defendant, if he did the act, is to be convicted, no matter what was his intent.

FRANCIS WHARTON.

—*Albany Law Journal.*

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SUPREME COURT OF THE UNITED STATES.

FOSDICK AND ALS. *v.* SCHALL.

A railroad company, having executed mortgages on its franchises, issues and profits, and all the property it then possessed, or might thereafter acquire, to secure the holders of certain bonds issued; its general manager afterwards enters into a contract with a manufacturer, to furnish a large number of coal cars, with a condition in the contract that the cars shall remain the property of the manufacturer until they are paid for according to the contract A large number of the cars are delivered and paid for accordingly, but a large number, although delivered, are not paid for. Afterwards, bills are filed by the bondholders and trustees for foreclosure of the mortgages, and a receiver is appointed by the court, with directions to pay all debts due and owing for operating the road for the past three months, and all indebtedness for engines, iron, wood, supplies, cars, or other property purchased within three months from the date of said appointment. The receiver entered into an agreement with the manufacturer of the cars to pay a rental for the same, which would amount to their value in five years. The mortgagees and trustees claimed the cars, under the terms of their mortgages, as after-acquired property of the railroad company, and contended that the court had no right to direct the receiver to appropriate the receipts of the road for the purposes above indicated until the interest was paid on the bonds of said company. HELD:

1. The lien of the mortgages did not attach to the cars, on their delivery under the contract, so as to prevent their reclamation as against the mortgagees, if the price was not paid according to the agreement.
2. When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, be reasonable.
3. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business, shall be paid from the current receipts before he has any claim upon the income.

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

Mr. Chief-Justice WAITE delivered the opinion of the court.

The Chicago, Danville and Vincennes Railroad Company, an Illinois corporation, on the 10th of March, 1869, executed a mortgage to William R. Fosdick and James D. Fish, trustees, to secure an issue of $2,500,000 of bonds. This mortgage covered all the franchises, issues and profits of the com-

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pany, and all the property it then owned or possessed or might thereafter acquire, either in law or equity. Provision was made to the effect that, in case of default in the payment of interest on the bonds continuing for six months, the trustees in the mortgage, on demand of the holders of at least one-half the bonds then outstanding and unpaid, might take possession of all the mortgaged property, together with all the books, records, papers, accounts and money of the company, and enter into the management and control thereof, paying all the expenses of taking, holding, managing and operating the property from the income and profits thereof, or, if the property should be sold, from the sale thereof. The property might be sold as an entirety, and the proceeds, after deducting the expenses of sale, applied to the payment of the interest and principal of the bonds.

On the 12th of March, 1872, a second mortgage was executed to the same trustees to secure a further issue of bonds to the amount of $1,5000,000.

On the 1st of February, 1873, after both these mortgages were executed, the railroad company and Michael Schall entered into a contract in writing, a copy of which is as follows:

"NEW YORK, February 1st, 1873.

"Sold this day for account of Mr. Michael Schall, of York,
"Penn.,
"To the Chicago, Danville and Vincennes Railroad Co.,
"Office, 38 Pine street, New York:

"Two hundred (200) eight-wheel gondola coal cars, as per specifications and agreement made by J. E. Young and herewith attached.

"Price, delivered on the track at Pittsburg, at depot of P., C. & St. L. R. R., seven hundred dollars per car. Cars to remain the property of Michael Schall until paid for.

"Delivery to commence, and cars to be taken, on or before March 1st, and at least (25) cars in each week thereafter until all are delivered, the seller having the option of increasing the number of cars to be delivered per week, if desired.

"Settlement to be made on delivery of each twenty-five (25) cars, or more, at the option of sellers, with the notes of the Chicago, Danville and Vincennes Railroad Company, payable in the city of New York, and adding interest at the rate of ten per cent. per annum. The first notes are to be drawn at sixty days from date of delivery, and for twenty (20) dollars on each car, and the balance for a like amount and payable monthly thereafter.

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"Cars to be lettered and numbered as per directions of Mr. Young.

"Invoice and shipping receipts to be sent to the railroad company's office, No. 38 Pine street, New York.

"It is understood the sellers shall not be responsible for the acts of Providence, strikes of workmen, or other causes beyond their control, which may retard and delay the manufacturing and delivery of the said cars as above stated.

"Shipping receipts to be evidence of delivery.

"(Signed), MICHAEL SCHALL.

"I hereby accept the above proposition for the R. R. Co.

"(Signed), J. E. YOUNG, *Gen. Manager.*"

Under this contract, 225 cars were delivered into the possession of the railroad company by Schall, numbered from 0141 to 0365, both inclusive, and lettered, "This car is the property of Michael Schall, York, Pa. Notes were executed by the company, according to agreement, for the price of the cars as they were delivered. Of these notes, $44,323.43 have been paid by the company, and $110,334.04 are outstanding. The cars were used by the company in the usual course of business.

On the 22d of February, 1875, Stephen Osgood, who held $9,000 of the bonds secured by the mortgage of 1869, and $2,000 of those secured by that of 1872, filed a bill in chancery in the Circuit Court of Will county, Illinois, against the railroad company, and Fosdick & Fish, trustees, with others, for a foreclosure of the two mortgages and a sale of the mortgaged property for the benefit of the bondholders, according to their respective priorities, and on the same day the court appointed Henry B. Hammond and John B. Brown receivers in the cause, with authority to take the moneys, property and effects of the company into their possession, and run and operate the railroad under the orders of the court until discharged. In the order making the appointment, it was specially provided, that out of the moneys which should come into the hands of the receivers by reason of the operation of the road, the collection of debts, or the sale of property, they should pay without further order as to particular demands—

1. The necessary current expenses of carrying out the duties of the trust.

2. "All debts now [then] due and owing by said railroad company for labor and services rendered in operating the

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railroad within the [then] last three months, and all indebtedness for engines, iron, wood, supplies, cars, or other property purchased within said period of three months for the use of the company."

3. Taxes, insurance, and charges of litigation; and

4. Liabilities for animals killed by engines or cars upon the line of the road.

On the 5th of May, 1875, the cause was removed to the Circuit Court of the United States for the Northern District of Illinois, on the application of Fosdick & Fish, trustees, two of the defendants, and, on the 17th of the same month, the receivers appointed by the State Court, filed in the Circuit Court an account of their receivership for the months of February, March and April.

On the 20th of May, Fosdick & Fish, as trustees, filed in the same Circuit Court of the United States, their bill against the railroad company and certain other defendants, for the foreclosure of the two mortgages of which they were trustees, and on the same day an order was entered in that court appointing Adna Anderson receiver, with authority to take possession of all the books, papers, vouchers and evidence of indebtedness, moneys and assets of the company, and all other effects of every kind, name, and nature which belonged to the company, or were held for its use and benefit, or in which it had any beneficial interest. He was also authorized to run, operate and manage the road and pay the expenses thereof, and manage and control all the property and affairs of the company. Authority was also given him to use the moneys of the company for any and all the purposes specified in the order, and he was required, as speedily as possible, to examine into the condition of the property and assets of the company, its contracts, leases, running arrangements, its business affairs, and take an inventory of its movable property, and make a schedule of its floating indebtedness for labor and supplies, and report the same, as soon as might be, with his recommendation as to the proper disposition of the same and payment thereof. Under this order, Anderson took possession of the property, and on the 11th of June, the receivers appointed by the State Court filed their final accounts and asked to be discharged from their trust.

The cars delivered under the Schall contract were in use by the company when the receivers appointed by the State Court took possession. Those receivers also continued to use the cars during all the time they operated the road, and Anderson took the possession when he entered upon his receiv-

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ership. On the 27th of November, 1875, Anderson having ascertained what the claim of Schall was, and finding that the cars were necessary for the use of the road, entered into an arrangement with him, subject to the approval of the court, by which the cars were valued at four hundred and twenty dollars each, and it was agreed that Schall should be paid seven dollars a month for each car as rent. The aggregate of payments at this rate for five years would equal the value of the cars, and it was further agreed, that if the rent was paid promptly, and in addition an amount which would be equal to interest at the rate of seven per cent. per annum on the deferred instalments, the cars should, at the end of that time, become the property of that company.

On the 19th of July, 1875, the Circuit Court denied a motion of Osgood to consolidate his suit removed from the State Court with that of Fosdick & Fish, but made an order allowing him and his associates to intervene in the latter suit for the protection of their respective interests upon taking the necessary steps therefor. Accordingly, on the 6th of January, 1876, Stephen Osgood, Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Gill, Alanson A. Sumner, Chandler Robbins, and William T. Hickock, owners and holders of a large amount of bonds secured by the several mortgages which were in the process of foreclosure, with the permission of the court, filed their petition of intervention.

On the 27th of January, 1876, Schall filed an intervening petition in which, after setting forth the facts of his claim substantially as they have already been given, and averring that he had been paid at the rate of seven dollars a month as rental during all the time the cars had been in use by the present receiver, he asked that the balance, his due, might be paid him out of any funds to the credit of the cause not otherwise appropriated, or that the cars might be returned to him.

Fosdick, Fish, and the intervening bondholders, answered this petition, claiming that the title of the cars had passed to the railroad company under the contract with Schall, and that consequently the lien of the mortgages had attached to the cars as after-acquired property. They denied the right of Schall to payment for the cars out of the income of the road, or out of the proceeds of the sale, and they denied his right to a return of the cars.

On the 5th of December, 1876, the court entered a decree in the suit of Fosdick and Fish for a sale of the mortgaged

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property, not, however, including the cars of Schall, and on the 7th of February, 1877, the property was sold in accordance with the provisions of the decree, to Huidekoper, Shannon and Dennison, for $1,450,000. On the 12th of April, the sale was approved by the court, and the master ordered to convey the property to the purchasers.

On the 28th of April, 1877, the master, to whom the matter of the intervening petition of Schall had been referred, reported the facts as they have already been stated, and also that the cars were necessary for the use of the road, and that the arrangement which had been made by the receiver was a beneficial one, whether the road remained in the hands of the receiver or passed into the possession of other parties.

To this report, Fosdick & Fish, and the intervening bondholders, excepted, in substance, because the master found the title to the cars to be in Schall and not in the company. Upon the final hearing, the court held that Schall had not parted with his title to the cars, and was entitled to the possession. Accordingly, it was ordered that the receiver, if in possession, or the purchasers at the sale, should restore the cars to Schall, and that the clerk of the court, out of the funds standing to the credit of the cause, should pay him the sum of $9.450, as rental for the cars at the rate of seven dollars each per month for the six months preceding the 22d of February, 1875, the date when the receivers of the State Court were appointed and took possession, and the further sum of $5,118.75, for a like rental during the time the cars were used by the receivers of the State Court. It nowhere appears, from the record, that there are any funds in court to the credit of the cause, except such as arose from the sale of the mortgaged property.

From this decree, Fosdick, Fish, and the intervening bondholders, have appealed.

Two questions are presented by the assignment of errors in this case.

1. Did the lien of the mortgages attach to the cars of Schall on their delivery to the company under his contract, so as to prevent their reclamation, as against the mortgagees, if the price was not paid according to agreement?

2. Was the order for the payment out of the fund in court of the rental of the cars, during the time they were used by the receivers appointed by the State Court, and for six months before, justifiable under the circumstances of this case?

As to the first question, it is contended that the mortgage

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created a subsisting and paramount lien on the cars as soon as they were put into the possession of the railroad company under the contract' and that the reservation of the title was void under the laws of Illinois, because the contract was not recorded.

It must be conceded that contracts like this are held by the courts of Illinois to be in effect, so far as the chattel mortgage act of that State is concerned, the same as though a formal bill of sale had been executed, and a mortgage given back to secure the price. We had occasion to consider that question in *Hervey* v. *R. I. Locomotive Works*, 93 U. S., 672, and there held, following the Illinois decisions, that if such an instrument was not recorded in accordance with the provisions of the chattel mortgage act (R. S. Ill., 1874, 711, 712), a lien like that of Schall would have no validity as against *third persons*. Whatever may be the rule in other States, this is, undoubtedly, the effect of the Illinois statute as construed by the courts of that State. In *Green* v. *Van Buskirk*, 5 Wall., 307, this court also held that "where personal property is seized and sold under an attachment, or other writ issuing from a court of the State where the property is, the question of the liability of the property to be sold under the writ must be determined by the law of that State, notwithstanding the domicile of all the claimants to the property may be in another State." *Hervey* v. *Locomotive Works*, *supra*, was also a case of seizure and sale under judicial process, and the language of the court, as expressed in its opinion delivered through Mr. Justice Davis, is to be construed in connection with that fact.

As between the parties, notwithstanding the Illinois statute, the transaction is just what, on its face, it purports to be "a conditional sale, with a right of rescision on the part of the vendor, in case the purchaser shall fail in payment of his instalments—a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of his losing his lien" if it works a legal wrong to third parties. (*Murch* v. *Wright*, 46 Ill., 488.) The question, then, is, whether these mortgages occupy the position of third parties within the meaning of that term as used in the statute.

They are in no sense purchasers of the cars. The mortgage attaches to the cars, if it attaches at all, because they are "after-acquired" property of the company; but as to that class of property, it is well settled that the lien attaches subject to all the conditions with which it is encumbered when it comes into the hands of the mortgagor. The mort-

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gagees take just such an interest in the property as the mortgagor acquired; no more, no less. These cars were "loose property, susceptible of separate ownership and separate liens," and "such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company, and paramount thereto." (*U. S.* v. *New Orleans R. R.*, 12 Wall., 365.) The title of the mortgagees in this case, therefore, is subject to all the rights of Schall under his contract.

The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously-existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and, in the meantime, the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.

It follows that the decree ordering a return of the cars to Schall was right. Whether, if the property is worth more than is due upon the contract of purchase, the mortgagees can obtain the benefit of the overplus, is a question we are not called upon to consider.

As to the second question:

We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which, it is supposed, will operate for the general good of all who are interested. This results, almost as a matter of necessity, from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done, to a greater

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or less extent, on credit. This credit is longer or shorter, as the necessities of the case require, and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment and improvements, are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way, the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom, in equity, they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid, is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts, made in the ordinary course of business, shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way, the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may, in terms, give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company, and are subject to its control. (*Galveston R. R.* v. *Cowdrey*, 11 Wall., 483; *Gilman* v. *R. R.*, 91 U. S., 617; *Bridge Co.* v. *Heidelbach*, 94 U. S., 800.)

The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mould his order that, while favoring

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one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is appointed, and it appears, in the progress of the cause, that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought, in equity, to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property, or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders, and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus, it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way, the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income, from the proceeds of the sale, what is thus again diverted from the current debt fund, in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must, to a great-

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er or less extent, influence the chancellor when he comes to act. The power rests upon the fact that, in the administration of the affairs of the company, the mortgage creditors have got possession of that which, in equity, belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration, by the mortgage creditors, of that which they have thus inequitably obtained. It follows, that if there has been, in reality, no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of the diversion. If, in the exercise of this power, errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case as established by the evidence.

In this case no special conditions were attached to the order appointing a receiver in the Circuit Court of the United States, and it is not contended that the intervener has brought himself within the rule fixed by the State Court in respect to the payment of general creditors. He asked to be paid a rental for his cars, but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the State Court, he contracted to sell his cars to the company at an agreed price, payable in instalments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears no moneys growing out of the receivership remain to be applied on the bonded debt, and if there did, through the rental already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership, or of the company, has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court. *Prima*

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facie that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.

The decree of the Circuit Court is reversed so far as it directs the payment of the sum of $14,568.75 to Schall, the appellee, from the fund in court, but in all other respects it is affirmed, and the cause remanded with instructions to so modify the decree appealed from as to make it conform to this judgment. The costs of the appeal must be paid by the appellee.

SUPREME COURT OF APPEALS OF VIRGINIA.

WROTEN'S ASS'NEE *v.* ARMAT AND ALS.

JANUARY TERM, 1879.

The Exchange Hotel Co., of Fredericksburg, in order to complete their building, which they had commenced before the war; in June, 1866, borrowed of the National Bank of Fredericksburg, $10,000, to be secured by a deed of trust on the property, and by direction of the Company, the President and Secretary of the Company, by deed dated the 27th of June, 1866, and duly recorded, conveyed the property in trust to secure the money. The Company then employed Wroten, a builder, to complete the building, and contracted to give him a deed of trust upon it, subject to the first lien, to secure any balance due him on its completion. The Company, out of the money borrowed, paid Wroten $8,000, and when the work was completed, there was due him $5,791.50. He had recorded the contract to secure the mechanic's lien, and on the 1st of January, 1867, the Company conveyed the property, subject to the lien of the first deed, in trust to secure the said balance. In April, 1870, judgment creditors of the Hotel Company, whose debts were due before the first deed was made, filed their bill against the Company, the Bank, and Wroten, claiming that under the statute the deed to secure the Bank enured to the benefit of all the creditors of the Company, being such at the time of its execution; and so the court held, and the property being sold under the decree, the proceeds were distributed *pro rata* among the plaintiffs and the Bank. Afterwards, the assignee in bankruptcy of Wroten, filed a bill to review the decrees, and insisted that the deed to secure the Bank was null and void on the ground that under the act of Congress, under which the Bank was organized, it was forbid to lend money on real estate; and also on the ground that as against Wroten's mechanic's lien, the trust in favor of the Bank extended only to the property in the condition it was when the deed was executed. HELD:

1. The Act of Congress of the 3d of June, 1864, Revised Statutes of the United States, sections 5136, 5137, under which this Bank was organized, does not imply a negation of the corporate power on the part of the National Banks which might be organized under it, to make a loan of money on real estate; does not annul any loan made by any such Bank; or release or discharge any deed of trust or mortgage on real estate taken by the Bank to secure the payment of such loan.

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2. If the Act of Congress plainly prohibited a bank organized under it, to take a deed of trust or mortgage to secure a loan in any case, or made it penal to do so, such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture; and it could not be avoided by the borrower or his creditors.
3. Wroten having contracted to complete the building, with a ful knowledge of the means which had been used to raise the money to pay for the work, and having received $8,000 of said money, is equitably estopped from claiming against the deed of trust executed to secure the return of the money loaned.
4. The contract between Wroten and the Hotel Company having been made and recorded after the deed to secure the loan to the Bank, his mechanic's lien was posterior and subordinate to the lien of the Bank under the deed to secure it, and was in fact merged in the lien by deed of trust afterwards taken by him to secure the same debt, in which the prior lien of the Bank was expressly recognized.
5. The lien of the Bank under its deed of trust, extended to the whole property as it was at the time of the sale, and was not confined, as against the mechanic's lien, to the property as it was when the deed was made.
6. An objection that the deed of the 27th of June, 1866, did not have affixed thereto the seal of the Hotel Company, nor was said Hotel Company by name a party to it, never made in any of the pleadings or proceedings in the cause, and only in the petition for an appeal, comes too late, and will not be considered.

The facts are sufficiently stated in the head-notes and opinion of the Court.

Goodrich, *Little* and *Wallace* for the appellants.

Marye and *Fitzhugh* for the appellees.

MONCURE P.—Three questions are presented to us for our decision in this case, either one of which seems to be conclusive of it. They are, first, that upon general principles, the National Bank of Fredericksburg is entitled to priority of payment of the debt due to it by the Exchange Hotel Company of Fredericksburg over the debt due by the said company to the appellant, A. B Botts, as assignee in bankruptcy of George W. Wroten; which said debts are in the proceedings mentioned and described. Secondly, that upon the principle of equitable estoppel, such right of priority certainly exists; and thirdly, that the appellant was certainly entitled to no relief by bill of review. We still consider these questions in the order in which they are above stated, and,

First, that upon general principles, the National Bank of Fredericksburg is entitled to priority of payment of the debt due to it by the Exchange Hotel Company of Fredericksburg over the debt due by the said company to the appellant, A.

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B. Botts, as assignee in bankruptcy of George W. Wroten.

The deed of trust under which the said bank claims, bearing date on the 27th day of June, 1866, and having been duly recorded on the 28th of June, 1866; while the deed of trust under which the said assignee of Wroten claims, bears date on the first day of January, 1867, and was recorded on the 22d of January, 1867; the maxim of law, *prior in tempore potior in jure*, would plainly show the right of priority of the said bank, unless there be some provision of the charter of the bank which disables it from claiming under the deed of trust executed for its security by the Hotel Company as aforesaid.

Accordingly, it is contended by the learned counsel for the appellant, that there is some such provision of the said charter. Let us now inquire and determine whether there is or not.

There can be no question but that a corporation is the creature of its charter, from which it derives not only all its powers, but its very existence. It certainly has no power which its charter denies to it. But in the absence of such denial, it has certain implied powers which are as complete as if they were expressly given or affirmed in the charter. One of these powers is the power to acquire estate, real or personal. Another is the power to acquire a credit by bond, bill of exchange, or other chose in action, and to obtain security for the payment of such credit by mortgage, deed of trust, or other security. That a bank, the main object of whose creation is to loan out money, may acquire such a credit and obtain such security, would be a plainly implied power in the absence of a plainly expressed negation of such a power on the face of the charter of the bank. And if the charter could be fairly construed so as to make it consistent with the existence of such a power, it would, accordingly, be so construed.

Now, let us examine the charter in this case and see if there be anything in it, and if anything, what, which negates the power of the bank to acquire such a credit or obtain such a security.

The National Bank of Fredericksburg was organized very soon after the war between the Confederate States and United States, under the act of the 3d of June, 1864; see Revised Statutes of the United States, title 62, page 998. Section 5136 declares that "upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the

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name designated in the organization certificate, it shall have power," &c. The seventh enumeration of express powers is in these words:

"Seventh.—To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

Section 5137 declares that "a National Banking Association may purchase, hold and convey real estate for the following purposes, and for no others:

"1st. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"2d. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"3d. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"4th. Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

These are the only provisions of the said Act of Congress which can have any effect to imply a negation of corporate power on the part of the National Banks which might be organized under it to make a loan of money on real security. Can they have any such effect? Can their effect be to annul any loan made by any such bank; to release and discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of any such loan?

We are of opinion that they cannot have any such effect.

It will be observed that none of these provisions prohibit the banks organized under the said Act of Congress, to loan money on real estate, nor impose any penalty on the act of any such bank in so doing. The most they do is, to declare that such banks shall have power to loan money "on personal security." Does this exclude, by necessary implication, the common law power of such a corporation to loan money on real security, or any other security which would be satisfac-

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tory to the bank, or might be desired by any persons bound as endorsers for said loan, for their indemnity? And that in the enumeration of the purposes for which, and no others, such an association may purchase, hold and convey real estate are embraced the following, viz.: "2d. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted." See also the third and fourth specifications. How long previously contracted? A year, a month, a week, a day? There is no specification of time which must elapse between the loan and mortgage or deed of trust to make the latter valid. Was it not the object of the specification to indicate that the banks organized under the said act were not to engage in the business of speculating in lands, but in the business of making loans on bills of exchange, and other negotiable securities; as incidental, however, to which latter business they were to have the power to take mortgages and deeds of trust on real estate for the better security of said loans, and any persons bound as endorsers for said loans, were to have the power to take such mortgages and deeds of trust for their indemnity. Indeed, the third and fourth specifications expressly legalize conveyances of real estate made to any such bank in satisfaction of debts previously contracted in the course of its dealings, or such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

But suppose the Act of Congress plainly prohibited a bank organized under it to take a deed of trust or mortgage to secure a loan in any case, or made it penal to do so, would it follow that the deed or mortgage in such case would be void, and that the borrower would be entitled to have the money loaned, and, at the same time, to hold on to the property which he stipulated to give or to pledge for its security? For whose benefit could any such prohibition have been made or such penalty imposed? Certainly not for the benefit of the borrower or his sureties, contrary to his or their express contract, the benefit of which he or they had received. But such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture.

Let us now examine some of the authorities referred to on the subject, and see how far they tend to sustain these views.

In a case decided by this court, *The Banks* v. *Portiaux*, 3 Rand., 136, it was held that under an act of assembly authorizing a bank to hold so much real property as may be

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requisite for its immediate accommodation, in relation to the convenient transaction of its business and no more, the bank may purchase more ground than is necessary for the erection of a banking-house, build fire-proof houses on the vacant land, for the greater security of the banking-house, and sell them out to third persons. And that, even if the bank violated its charter in so doing, the only proceeding against it would be by *quo warranto;* and the purchasers of the houses cannot resist a specific performance of their contracts, by alleging that the bank had exceeded its powers in erecting and selling the houses.

In another case decided by this court, *Rivanna Navigation Co.* v. *Dawsons*, 3 Gratt., 19, only three judges were present, Baldwin, Stanard and Brooke. Baldwin, J. delivered an opinion, and the only one that was delivered in the case, in which he said: "But a general prohibition (to purchase real estate) would not be inferred from a mere partial enactment of the incidental common law power; as for example, from a clause authorizing a bank, or insurance, or manufacturing company, to purchase land for its necessary buildings. Such a clause, whether with or without limitation as to quantity or value, would not exclude the incidental power to take mortgages, or other securities, on real or personal estate, for debts due the corporation, or assignments or conveyances of chattels or lands in commutation therefor." "To avoid altogether the contract of a corporation made in reference to the objects of its institution, is a measure of extreme rigor, and may be productive of great injustice to the corporation on the one hand, or to the other contracting party on the other. An incapacity to *take*, will not even be inferred from an inhibition to *hold*, though the policy of the latter be to prevent the accumulation by the corporation of a specified description of property, if the purpose of the conveyance be a sale of the property by the corporation, and the application of its proceeds to the objects contemplated by the charter. This proposition, reasonable in itself, may be fairly deduced from the cases of the *Banks* v. *Portiaux*, 3 Rand., 136; *Leazure* v. *Hillegas*, 7 Serg. & Raw., 313; and *Baird* v. *The Bank of Washington*, 11 Id., 411." "At most the act is only voidable on the ground of misuser or abuse of the franchise, and cannot be drawn in question collaterally, especially by those having no longer any interest in the subject. *The Banks* v. *Portiaux*, *ut sup.*; *Silver Lake Bank* v. *North*, 4 John. Ch. R., 373." Stanard J. concurred in the results of Baldwin's opinion. Brooke J. dissented.

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The cases of *Silver Lake Bank* v. *North*, 4 John. Ch. R., 370; *Leazure* v. *Hillegas*, 7 Serg. & Raw., 313; and *Baird* v. *The Bank of Washington*, 11 Id., 411, above referred to, were cited and much relied upon by the learned counsel for the appellees in this case, and have an important bearing upon it.

In the *Silver Lake Bank* v. *North*, which was decided by that great Judge, Chancellor Kent, he said: "Another objection is, that the plaintiff had no right to take a mortgage concurrently with the loan, in order to secure it; and that their charter only authorized them to take mortgages for 'debts previously contracted.' If this objection was strictly true in point of fact, I should not readily be disposed to listen to it. Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter, than for this court, in this collateral way, to decide a question of misuser, by setting aside a just and *bona fide* contract. But if we were driven to that necessity, we might, on colorable grounds, consider this to be a mortgage to secure a debt previously contracted, for it is in proof, that 'previous to the date and execution of the mortgage, the plaintiff had agreed to loan the money,' and it was loaned and paid when the mortgage was delivered. The debt may be said to have been contracted for at the time of the agreement, and the mortgage taken for its security. But I do not rest on any verbal criticism of the kind. If the loan and the mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property and engaging in land speculations. A mortgage taken to secure a loan, advanced *bona fide* as a loan, in the course, and according to the usage of banking operations, was not, surely, within the prohibition."

In *Leazure* v. *Hillegas*, *supra*, the act of 17th March, 1787, enabled the Bank of North America to have, hold, purchase, &c., lands, &c., and also to sell, &c., the same lands, &c., provided that such lands, &c., which the said corporation was thereby enabled to purchase and hold, should only extend to such lots of ground, and convenient buildings, &c., as they might find necessary for carrying on the business of said bank, &c., and should actually occupy; and to such lands and tenements as were or might be *bona fide* mortgaged to them

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as securities for their debts. It was held that the bank might purchase absolutely, lands in a distant county which they did not occupy, though their title, like that of an alien, is defeasible by the Commonwealth; and if they convey to a third person without claim by the Commonwealth, such third person holds the same estate defeasible in like manner. The unanimous opinion of the court in the case was delivered by Tilghman C. J.

In *Baird* v. *The Bank of Washington*, *supra*, it was held, that where, by the act of incorporation, a bank is empowered to hold "such lands as are *bona fide* mortgaged or conveyed to it in satisfaction of debts previously contracted in the course of its dealings," it has a general power to commute debts *really due* for real estate; and this power does not depend upon, whether in the opinion of the jury, the debt was in danger, and prudence required that the real estate should be taken in satisfaction of it; but it seems that even if the bank could not hold such real estate, the acquittance of the debt would not be void, and the parties remitted to their original rights; for the bank may take for the benefit of the State, which alone can take advantage of the defect of title. It seems, too, that if the conveyance were not directly to the bank, but to trustees, with a view not to permanent ownership, but to raise money by a sale of the property, it would be forbidden neither by the spirit nor the letter of the act of incorporation.

Several cases have very recently been decided by the Supreme Court of the United States, construing the National Bank Act in question, which are entitled to great weight in the decision of the question now under consideration, as well because of the recency of their decision, as because of their being adjudications of the highest, or at least one of the highest tribunals in the land, construing an act of Congress (the very act we now have under consideration) which bears the same relation to that tribunal which an act of a State legislature bears to the highest appellate court of that State.

One of these is the case of *Gold Mining Co.* v. *National Bank*, decided in October, 1877, and reported in 6 Otto, p. 640; in which it was, among other things, held, that a defendant, sued by a National Bank for moneys it loaned him, cannot set up as a bar, that they exceeded in amount one-tenth part of its capital stock actually paid in. The court, in its opinion, said: "The first objection to the recovery arises from the amount of the debt. The plaintiff is a National Bank organized under the Act of Congress of June 3,

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1864, with a capital stock of $50,000. By the 29th section of that act it is provided as follows: The total liabilities to any association, of any person or of any company, &c., for money borrowed, &c., shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. Rev. St., § 5,200.

"After obtaining and holding to its own use the money, can the Mining Company be allowed to interpose the plea that the bank had no right to loan the money? In *Harris* v. *Runnels*, 12 How., 79, where the defendant sued upon a note, set up the illegality of its consideration, it was held that the whole statute then in question must be examined to discover whether it intended to prevent courts of justice from enforcing contracts in relation to the act prohibited; and that when a statute prohibits an act, or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it. A statute provided that slaves should not be brought into the State without a previous certificate signed by two freeholders. Slaves were brought in without such certificate and sold, and the purchaser was held liable for the purchase-money. Mr. Justice Wayne said that the rule was allowed, not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy.

"In *O'Hare* v. *The Second National Bank of Titusville*, 77 Pa. St., 96, the question was made on the statute we are considering, and it was objected that the bank could not recover the amount of the loans in excess of the proportion specified. The court held that the section of the statute referred to was intended as a rule for the government of the bank, and that the loan was not void. See also *Pangborn* v. *Westlake and al.*, 36 Iowa, 546; *Vining and al* v. *Bricher*, 14 Ohio State, 331.

"We do not think that public policy requires, or Congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank."

The opinion of the court was delivered by Mr. Justice Hunt, and the judgment of the court below was unanimously affirmed.

In a still more recent case, decided by the same court during the present year, 1878, and reported in the February number of "*The Reporter*," *Union Gold Hill Mining Company* v. *Rocky Mountain National Bank*, the construction of the

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same provision of the same Act of Congress was involved, and a similar decision was made; the same Justice delivering the opinion of the court, affirming the judgment of the court below. See also *Haywood* v. *National Bank*, 6 Otto, 611.

Several cases apparently to the contrary of the foregoing were cited in the argument of the learned counsel for the appellant, and especially the case of *Fowler* v. *Scully*, 72 Penn. St. (22 P. F. Smith), 456; also reported in 13 American Reports, 699. In that case the judgment of the court below was reversed by a divided court; Agnew J. delivering the opinion of the majority, and two of the Judges, Sharswood and Williams, dissenting.

Without further commenting, however, upon this and some other like cases referred to on the same side, it is sufficient to say, that in our opinion, if they be in conflict with this case, they are outweighed by the cases referred to on the other side, which we have already commented upon.

In the case under consideration, the Exchange Hotel Company was incorporated just before the late war between the Confederate States and the United States, to erect a first-class hotel in the city of Fredericksburg, which was deemed to be very important to the convenience and prosperity of that city. When the war came on, the hotel, about the erection of which a great deal of money had been expended, was still unfinished, and was of little or no value, in that unfinished state, for any purpose. It was occupied during the war by Confederate and Federal forces alternately, and during and after the war by colored people who flocked to the said city. When the war was over, and efforts were being used to improve the city, which had sustained great and almost irreparable damage, it was considered all important to its prosperity that the Exchange Hotel should be completed if possible, and as soon as possible. But it would require at least ten thousand dollars to complete it. And where to obtain that large amount, in those trying times, was a question very hard to be solved. It could not be obtained of an individual, and could only be obtained of the National Bank of Fredericksburg, whose stockholders, directors and officers were deeply interested in the prosperity of the city, and deeply anxious concerning it. It was their duty, of course, to do all they legally could to promote the prosperity of the city, and with that view, to aid in the completion of the Exchange Hotel. They, therefore, agreed to loan $10,000 to the company for twelve months, upon being well secured. But the difficulty was in procuring satisfactory security for so large a

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sum during the period and under the circumstances which then existed. To depend alone on personal security for so large a loan and so long a period of credit, would have been extremely hazardous, however good the apparent credit of the parties may then have been. It seemed to be absolutely necessary to the success of the object in view that security should be obtained by a lien on real estate, either directly by the bank itself, or indirectly by the maker and endorser of the note. Had such security been obtained by the maker and endorser of the note by a deed of trust executed on the Exchange Hotel for their indemnity, no question would have been raised as to the validity of the deed, or of the note, to secure the payment of which it would have been executed. What difference can it make that the deed of trust was executed to secure the payment of the note without expressly and literally providing for the indemnity of the maker and endorser? Is not the effect precisely the same?

Then, again, the money was not invested in the purchase of real estate. Nor was it borrowed upon the security of real estate for the purpose of being expended otherwise than upon that estate. On the contrary, it was borrowed to be expended upon that estate, in making it, from being an expensive and unproductive building, a first-class hotel, so necessary to the prosperity of the city, in which all its citizens were deeply interested, as was also the State at large. At that time, no expenditure was considered more important for the city, or more prudent and proper, looking to the interest of the owners of the hotel. Property in and about Fredericksburg soon after the war took a rise, and it was hoped and believed would continue to rise, so that the completion of the hotel would be beneficial, alike to its owners and the public. For several years after the hotel was completed, it was leased out for a large sum, as much as $2,500 *per annum*, which, if it had continued for a few years, would have enabled the company to have paid off all its debts. Had that reasonable and expected result followed, all would have commended the propriety and prudence of what was done in regard to the completion of the work. But instead of such a result, there was a sudden and unexpected change in the times and in the value of real estate in and about Fredericksburg. The tenants of the Exchange Hotel became bankrupt, the property became of little value, and could not be rented out for little if any more than enough to pay the amount of taxes and insurance annually due thereon, and the sale of

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the property became necessary to pay the amount which had been borrowed to complete the hotel.

Is it reasonable or right that such an improbable and unexpected result should produce a radical and complete change in the rights of the parties?

We think not; and we are therefore of opinion that upon general principles, the National Bank of Fredericksburg is entitled to priority of payment of the debt due to it by the Exchange Hotel Company of Fredericksburg over the debt due by the said company to the appellant, A. B. Botts, as assignee in bankruptcy of G. W. Wroten.

But even if we can be wrong in that conclusion, we think,

Secondly, that upon the principle of equitable estoppel such right of priority certainly exists.

The money was borrowed by the said company for the special and only purpose of completing the hotel, and was secured by a deed of trust upon the hotel. These facts were known to George W. Wroten, the mechanic employed by the company to complete the hotel, who was to receive payment out of the money so borrowed, to the extent to which it could be spared for that purpose, and the balance which might remain due and upaid to him, after receiving such payment, was to be secured to him by a lien on the hotel, subject expressly to a prior lien to the holder of the note for the money borrowed as aforesaid. Of that money, the sum of eight thousand dollars was paid at once to George W. Wroten, and the balance was paid for insurance, taxes and other necessary expenses of the property. And more than six months after the date and recordation of the deed of trust executed to secure the return of the money borrowed as aforesaid, the said Wroten received a deed of trust, executed by the Hotel Company on their said property, to secure the payment of the balance due to him, but expressly subject to the prior lien for the balance due of the money borrowed as aforesaid. Now is it not plain and clear that George W. Wroten, having contracted to complete the Exchange Hotel, with a full knowledge of the means which had been used to raise the money to pay for the work, and having received eight thousand dollars of the said money, is equitably estopped from claiming against the deed of trust executed to secure the return of the money loaned as aforesaid, the priority of which deed over that under which he claims is expressly admitted on the face of the latter? We certainly think so, and we consider it unnecessary to cite any cases on the subject. See *Insurance Co.* v. *Wilkinson*, 13 Wall., p. 233.

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But even if we can be wrong in that conclusion also, we think,

Thirdly and lastly, that the appellant was certainly entitled to no relief by bill of review.

A bill of review can only be brought upon two grounds: 1st. Error in law apparent upon the face of the decree; 2d. The discovery of new matter which could not have been used at the time of making the decree. Story's Eq., § 403 *et seq.*; 2 Rob. Pr., 414, old ed. The bill in this case was brought upon the former ground only—error in law apparent upon the face of the decree. Error in fact in a final decree can be corrected only on appeal to an appellate court, and not on a bill of review in the same court. What may be said to be "the face of the decree," within the meaning of the rule, is different in England and in this country. In England, the decree embodies the substance of the bill, pleadings and answers. In the courts of the United States, the decree usually contains a mere reference to the antecedent proceeding without embodying them. But for the purpose of examining all errors of law, the bill answers, and other proceedings are, in our practice, as much a part of the record before the court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained. Story's Eq. Pl., § 407; *Putnam* v. *Day*, 22 Wall., 61.

In this case, we have endeavored to show that there is no error in the decrees complained of, and if we be right in that respect, there can of course be no good ground for a bill of review. The only ground for relief relied on in the bill of review which we have not already disposed of is, the claim to a mechanic's lien under the statute, by virtue of which, priority seems to be claimed for Wroten, not only over Armat and the other judgment creditors of the Hotel Company, but also over the National Bank. The articles of agreement between Wroten and the Hotel Company bore date on the 14th of August, 1866, and were recorded in the Corporation Court of Fredericksburg on the 22d day of October, 1866, from which latter date he was, no doubt, entitled to a mechanic's lien on the said property under the statute. But that lien was posterior and subordinate to the lien of the said bank under the said deed of trust in their favor, recorded on the 27th of June, 1866, and was in fact merged in the lien by deed of trust afterwards taken by Wroten as aforesaid to secure the same debt, in which deed it was expressly declared that the property conveyed was subject to the prior lien in favor of the bank as aforesaid. There is in the record no

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copy of the said articles of agreement; no doubt because the lien acquired by having them recorded was considered by Wroten as merged in the lien of the deed of trust as aforesaid. The effect of the said deed of trust of the 27th of June, 1866, was to enure to the benefit of all the then existing creditors of the Hotel Company *pro rata*, which effect was not denied by Wroten, though he was not one of the existing creditors (but was a subsequent creditor) of the Hotel Company, and was thus postponed to all of the said existing creditors. But he contended that this right of the said existing creditors ought to be confined to the property in the condition in which it was on the 27th day of June, 1866, when the said deed of trust for the benefit of the bank was recorded. In this, however, he was clearly wrong, and the court below accordingly decided that the said existing creditors had priority over Wroten in regard to the property in the condition it was in at the time of the sale thereof under the decree. The property was first cried out to Wroten as the highest bidder therefor, and he claimed to be entitled to the property as such highest bidder, though he did not comply with the terms of sale. The court, however, held that the said sale was not valid, declined to confirm it, and decreed a re-sale, which was accordingly made. Thus the only apparent grounds of complaint which Wroten had to the final decree when rendered, were the two before referred to, viz.: that the prior lien of the existing creditors should be confined to the property in the condition it was in when that decree was rendered; and 2d. That *he* ought to have been confirmed as purchaser. But he took no appeal and apparently acquiesced in the final decree until more than two years thereafter, when he had become a bankrupt,, and when his assignee in bankruptcy filed the said bill of review, but did not therein rely on either of the said two grounds.

We think the court below did not err in dismissing the said bill.

It may be proper, before concluding our opinion in this case, to notice an objection taken, for the first time, in the petition for an appeal in this case, that the deed of trust of the 27th day of June, 1866, before referred to, "did not have affixed thereto the seal of the said Hotel Company, nor was the said Hotel Company by name a party to the same." To the said objection, a short but all sufficient answer is, that it comes "too late." It was not made in the appellant's answer to the original bill, nor in the progress of the original suit, nor in the bill of review, nor in the proceedings on that

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bill. But on the contrary, the validity of that deed as a deed duly executed by the said corporation, was admitted by the appellant, either expressly or by plain implication, throughout the proceedings in the cause in the court below. Had such an objection been made in the court below while the cause was pending therein, all foundation for it, if any such in fact existed, might have been completely removed by the most conclusive proof exhibited by the National Bank of Fredericksburg. Instead of making the objection, if there was any foundation for it, at the proper time, the validity of the deed was, tacitly at least, admitted; there was a decree for a sale in pursuance of it, all the creditors of the Hotel Company, except the appellant, united in becoming purchasers of the property at said sale, in proportion to their claims; credit was given by them on their said claims for their ratable proportions of the purchase-money; the property was conveyed to them; a final decree was entered in the cause; and not until after a decree was made dismissing the bill of review filed by the appellant, several years after the final decree was rendered in the original suit, was the objection aforesaid made. It would doubtless not be a difficult matter, even now, to show that the objection is unfounded; but as it is wholly unnecessary to do so, this opinion will, therefore, here be ended.

We are of opinion that there is no error in the decree appealed from, and that the same ought to be affirmed, which is decreed accordingly.

The other judges concurred in the opinion of MONCURE P.

DECREE AFFIRMED.

NOTE.—While the case of *Union National Bank of St. Louis* v. *Matthews*, decided by the Supreme Court of the United States, reported in our March number, and purporting to be at the *October* Term, 1878, of that court, settles the same principle the same way as the main one in this case is settled: It is but just to say, that the decision in this case was delivered nearly a month before that by the Supreme Court of the United States, and that neither decision was made with any knowledge of the other, and hence there is no reference in either to the other. There could be none by our court as, as before stated, its decision was first rendered.—ED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

BOYNTON AND ALS. *v.* MCNEAL AND ALS.

FEBRUARY TERM, 1879.

B. conveys a house and lot to H. in trust for the separate use of B's wife. M., a creditor of B., files a bill to set the deed aside as fraudulent and void as to creditors of B.. and so the court decrees. B. then executes a deed of homestead on the house and lot, and files his petition in the cause to be allowed his homestead. B. is entitled to his homestead in the house and lot as against M., the creditor.

This was a suit in equity in the Corporation Court of the city of Alexandria, brought in April, 1871, by McNeal & Beacham, partners, and James H. Stevenson, to set aside a deed made by E. S. Boynton, dated the 15th of January, 1871, by which said Boynton conveyed to George Hewes a house and lot in the city of Alexandria, in trust for the separate use of Caroline E. Boynton, the wife of said Boynton. The bill charged that the firm of E. G. Boynton & Co. was indebted to the plaintiffs, McNeal & Beacham, $210.74, and to Stevenson & Co. $222.04, for goods sold to Boynton & Co. in December, 1870, and that the deed was made to hinder, delay and defraud the plaintiffs, and without any consideration deemed valuable in law.

On the 14th of December, 1871, the court held that the deed was null and void, so far as is concerned the several amounts therein decreed to the plaintiffs, and decreed that E. S. Boynton should pay to the plaintiffs, McNeal & Beacham, $210.74, with interest, and to Stevenson $222.04, with interest; and unless this was done in thirty days, a commissioner named should sell the house and lot on terms stated in the decree. This decree, so far as it directed a sale of the property, was afterwards set aside.

In February, 1872, E. S. Boynton executed his deed of homestead, and filed his petition for appraisers under the homestead law. He also filed his answer to the bill, in which he averred, that when the deed was made he was solvent, and denied that it was intended to hinder, delay and defraud the plaintiffs. But if the deed should be held to be void, then he claims his homestead in the house and lot aforesaid, and asks the court to protect him in his right.

On the 21st of January, 1874, the cause came on to be heard, when the court decreed that E. S. Boynton was not

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entitled to claim a homestead in the house and lot, and that his application therefor be overruled; that as to the debts due to the plaintiffs, the deed to Hewes was fraudulent and void. And a commissioner was directed to report whether the rents and profits would pay these debts within five years.

The commissioner reported that the rents would not pay the debts in five years. And the cause came on again to be heard on the 14th of March, 1874, when the court made a decree, appointing commissioners to make a sale of the house and lot on terms stated in the decree. And thereupon, E. S. Boynton, Mrs. Boynton, and the trustee, Hewes, applied to this court for an appeal, which was allowed.

F. L. Smith, Jr., for the appellants.

D. L. Smoot for the appellee.

STAPLES J. One of the appellants, E. S. Boynton, on the 25th January, 1871, executed a deed, conveying a house and lot, in the city of Alexandria, to a trustee, "for the sole benefit of his wife, Caroline E. Boynton." At that time, the appellant, as a member of the firm of E. S. Boynton & Co., was indebted to certain creditors to the amount of five hundred dollars. In August, 1871, these creditors, the appellees here, filed a bill in the Corporation Court of Alexandria, to set aside this deed, upon the ground it was intended to hinder and delay creditors, and was not, upon consideration, deemed valuable in law. The case coming on to be heard at the December Term, 1875, that court entered a decree declaring the deed null and void, and setting it aside, so far as it affected the claims of the appellees. Thereupon, the appellant, E. S. Boynton, filed his application, asserting a claim of homestead in the property, but the application was rejected by the court, and the claim to the homestead denied. From that decree, an appeal was allowed by one of the judges of this court.

The question is substantially the same as that which arose in *Shipe, Cloud & Co.* v. *Repass et als.*, decided at Wytheville, and reported in 28th Gratt., 716, 729. It was there held, by a majority in a court of three judges, that when a conveyance is set aside for fraud at the suit of the grantee's creditors, he is not estopped as against them, to assert his claim of homestead in the property embraced in the deed. At the time that decision was made, the court had access to but few of the authorities bearing upon the question. A ref-

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erence to the opinion will show the grounds upon which it was based, and it is not proposed to repeat them here. Since the present case has been under consideration, I have taken occasion to re-examine the whole subject, and to look more fully into the authorities, and I find no reason to doubt the correctness of the former decision. In Thompson on Homestead and Exemptions, the most recent work on the subject, the cases are collected, and the question carefully considered on reason and authority.

I propose to quote somewhat extensively what he has said, as my own argument in the present case. After stating the rule in question, he proceeds as follows: Two reasons for this rule may be deduced from the cases—first, that the homestead privilege is created for the benefit of the wife and children, as well as that of the husband and father, and, therefore, it is not right that the former should be prejudiced by the wrongful act of the latter. Second: That the conveyance being void as to creditors, it stands as to them as though it had never been made. If it had not been made, the debtor (or his wife) could have asserted the right of homestead in the premises against them; and they, the creditors, cannot assume the inconsistent positions of asserting the nullity of the conveyance, and claiming a right under it. In other words, a fraudulent conveyance does not enlarge the rights of creditors, but leaves them to enforce the rights they would have had if no such conveyance had been made. Expressed in still another way, the interest which the creditor has in the property, by virtue of his lien, is a *derivative interest* proceeding from the debtor, and dependent upon his title. Hence, the creditor cannot acquire a right under the debtor's title, and, at the same time, impeach that title. He cannot sell, under his execution, the debtor's title, and, at the same time, deny the debtor's rights of homestead, on the ground that the latter has no title. By attempting the sale, the creditor affirms that the debtor has a salable interest, and the law means that interest should not be taken away, and the debtor distributed in his possession by judicial process.

When the law declares that a debtor's disposal of his property, with intent to defraud his creditors, shall be voidable at the instance of his creditors, and, at the same time, declares that specific property of the debtor shall be exempt as against his creditor's adverse claims, the provisions are *in pari materia*, and must be construed together, and the latter provision must be held to except this exempt property from the operation of the former provision. Certainly it would

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be very inconsistent to say that a debtor's disposal of his property, and which property, in so far as the creditor and his claims are concerned, may be said to have no existence at all, is a fraud upon the creditor. No creditor can be, in legal contemplation, defrauded by a mere conveyance made by his debtor of any of his property, which such creditor has no right, by law, to appropriate, or even to touch, by any civil process. A conveyance of the homestead by the husband to the wife, cannot be held fraudulent as to creditors, for the reason that, being exempt, it was no more beyond their reach than before.

To my mind, this reasoning is not only just and sound, but is absolutely unanswerable. There is much more on the same subject in the same work, but the limits of this opinion will not justify further citation. It will be seen, however, that one of the reasons given by the author for the rule stated, is that the creditor cannot be said to be hindered or delayed or prejudiced by a fraudulent conveyance embracing property subject to the homestead, because the debtor is entitled to hold it exempt from the payment of his debts. A striking illustration of this principle is furnished by the cases respecting property exempt from execution at law. According to the course of English decisions, it was long settled, that to make a voluntary conveyance void as to creditors, it must transfer property which would be liable to be taken in execution for the payment of debts. The reasoning upon which this doctrine was based, was that the statute of frauds and perjuries was not intended to enlarge the remedies of creditors, or to subject any property to execution not already, in law or equity, subject to the demands of creditors. A voluntary conveyance of property not so subject, could not be injurious to them, nor within the purview of the statute, because it would not withdraw any fund from the power of the creditor which the law had not already withdrawn from it. And it would be a strange anomaly to declare that to be a fraud upon creditors, which, in no respect, varied their rights or remedies. And hence, it has been held, that a voluntary settlement of stock, or of any other property not liable to execution, is valid, whatever may be the condition of the grantor. This is the doctrine held by some of the most eminent judges of England. 1 Story Equ. Pl., sec. 367–8. It is true that Chancellor Kent, and other American jurists, have very justly questioned its soundness, upon the ground that, although property thus conveyed could not be reached at law, equity might interfere and give the necessary relief;

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for, otherwise, a debtor might convert all his property into stock, and settle it upon his family, in defiance of the claims of creditors. But neither Chancellor Kent, nor any other American judge, in discussing this question, ever maintained that a fraudulent or voluntary conveyance enlarged the rights of a creditor, or that he could be prejudiced by a conveyance of property which is exempt, both at law and in equity, from the payment of debts. Take, for example, the property exempt from levy and distress under what is known as the poor debtor's law. It will scarcely be maintained that if the debtor should make a fraudulent deed, conveying this property, along with other property subject to his debts, he would thereby forfeit his claim to exemption as against the creditor.

The language of the constitution is equally emphatic with respect to the homestead. It declares that every householder, or head of a family, shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, sale under execution, order, or other process, his real and personal property, &c., to the value of not exceeding $2,000, to be selected by him.

It is said, however, that by the express terms of this provision, the debtor can only claim the homestead in property which is his own, and not in that which is another's.

The Supreme Court of Ohio, in *Sears* v. *Hanks*, 14 Ohio St. R., 298, has given so complete an answer to this question, I will content myself with quoting a part of Judge Scott's opinion in that case: "Although estoppels are mutual, the plaintiffs claim a right, notwithstanding the conveyance, to regard the property as still belonging to the debtor, and, at the same time, disregarding the decree which they have asked and obtained, to insist that their debtor has no interest whatever in the premises. The debtor is estopped equally from claiming, and from disclaiming, while the creditor may do either, and each in turn, as his interest may dictate. Such a position can hardly be maintained. The rights of the plaintiffs in this action are only those which belong to creditors seeking to set aside a voluntary conveyance of their debts made in fraud of their rights, and to enforce their judgment liens against the property so conveyed. Their claim is not under or through the fraudulent conveyance, but adverse to it, and when, at their suit, it has been set aside and declared wholly void as against them, they cannot be allowed, as creditors, to set up this void conveyance against which they are claiming, for the purpose of enlarging their rights or remedies

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against their debtor, or for the purpose of estopping him from the assertion of the rights which he would otherwise have as against them. As between creditor and debtor, the deed is simply void, and cannot, therefore, affect the rights of either. A judgment creditor's lien is only upon the property of his debtor, and the purchaser at a sale on execution takes, in general, only the debtor's title. If the debtor has no title or interest in the property levied on, there is nothing for the creditor to sell, and it is not competent for the creditor, while selling the alleged title of his debtor, to deny his right to a homestead on the ground that he has no interest in the property about to be sold. If he has an interest in the homestead property, which the creditor can sell, he has an interest enough to secure his homestead from sale. The validity of the fraudulent conveyance as between the parties to it, is no concern of the creditor's when it has been set aside as to him. All he can ask is, that as against him, it shall confer no rights upon any one. Were these plaintiffs judgment creditors of the fraudulent grantee, and levying their execution as such, the case would have been entirely different; and it might then well be said, in response to the present claim of Hanks, the creditor, that one person cannot have a homestead in the property of another."

I might also quote a very clear and satisfactory argument of Judge Dillon in *Cox* v. *Wilder*, 2 Dill. R., 49, and of the Supreme Court of Wisconsin, 11 Wisc. R., page 114, to the same effect, but the citations already given contain all that is necessary upon this particular point.

All that has been said relates, of course, to a controversy between the debtor and creditor exclusively. The deed being valid between the parties, no claim or assignment of homestead can affect the rights of the fraudulent grantee. But if he raises no objection, if he does not rely upon the estoppel, and the controversy is narrowed to a contention between debtor and creditor, I can see nothing to preclude the former, as against the latter, from asserting his claim of homestead.

We have heard much of a "public policy" which requires the courts to intervene for the suppression of fraud—all of which is well enough as a guide for judicial discretion when properly understood and defined—but what is "public policy?"

As a basis of judicial decision, it is wholly unreliable. In the License Cases, 5 Wall. U. S. R., 469, the Supreme Court of the United States has said: This court can know nothing of public policy except from the constitution and laws, and the

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course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the Legislature. Questions of policy determined there are concluded everywhere."

It is idle to say a man cannot take advantage of his own fraud. How is he taking advantage of his fraud in claiming property not subject to the debts? But if the attempted fraud of the debtor is in all cases to defeat the homestead, the result will simply be to give to the creditor a profit out of the transaction at the expense of the family of the debtor, for whose benefit the exception is mainly intended. And it becomes a grave question to be considered, how far "public policy" requires that the family of the debtor shall be punished for his misconduct?

But why do we look only to cases of actual fraud? Instances of constructive fraud are much more numerous, and more frequently the subject of judicial investigation. Many a man, whose actual indebtedness bears but a small proportion to his property, makes a settlement upon his wife or children, and afterwards spends or loses so much of his estate as not to leave enough to discharge his debts. No one doubts that a settlement of this sort may be made with a perfectly honest intent, and yet the law pronounces it fraudulent, and it will be set aside at the suit of creditors. The case of *Johnston* v. *Gill*, 27 Gratt., 587, is just such a case. The books abound with others of a similar character, in which there is not a whisper of actual fraud. And yet, according to the reasoning of those who advocate a "sound public policy," the settlement defeats the homestead, and confers upon the creditor rights he would not have had without the settlement. In this very case, there is no reason to suppose any actual fraud was intended. All the circumstances rebut any such conclusion. At the time the deed was executed, the indebtedness of the appellant did not exceed $500; there were no liens upon the property, nor have any been since acquired, except such as resulted from the mere filing of the bill. If the appellant, instead of conveying the property for the benefit of his wife, had filed his claim of homestead, the result would have been nearly the same, and the transaction would have been entirely legitimate. But it seems that, in this particular case, the form of the instrument stamps the transaction as fraudulent; the wife loses the benefit of the provision made for her, the husband

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forfeits the homestead, and the creditor acquires title under a deed to a third person, which is a nullity as to him. A course of reasoning which leads to such results must be radically unsound and vicious. It cannot receive the sanction of my support. I know that cases will sometimes occur, in which the deed is tainted with actual fraud. If, in such cases, it is deemed advisable to deprive the debtor of the homestead for the benefit of the creditor, the Legislature can apply the remedy under such limitations as may be needful and proper. Whatever may be said with respect to the general policy of these homestead provisions, as long as they remain, it is the duty of the courts to construe them liberally by the express mandate of the constitution.

In conclusion, I will state that the views here expressed are fully sustained by the decisions of the Supreme Courts of Mississippi, Alabama, Louisiana, Kentucky, North Carolina, Massachusetts, Maine, Vermont, New Hampshire, Iowa, Michigan, Wisconsin, Texas and Missouri, by the opinion of Judge Dillon in *Cox* v. *Wilder*, 2 Dill., and the opinion of Judge Hopkins in *McFarland* v. *Goodman*, 6 Bissell R., 111, and by the several authors who have treated the subject. See Smyth on Homestead and Exemption, sec. 532; Thompson on Homestead and Exemptions, sec. 406 to 418, and Bump on Fraudulent Conveyances, page —, where all the cases are cited.

There are some opposing decisions, I admit, but they will be found generally to relate to conveyances of chattels as affected by particular statutes of the several States. Thompson, sec. 425, *et sequitur*. The case of *Brackett* v. *Watkins*, 21 Wend. R., 68, relied upon in the dissenting opinion in *Shipe, Cloud & Co.* v. *Repass, supra*, it seems has been overruled in New York by *Wilcox* v. *Hanley*, 31 New York R., 657. It would seem, also, that the case of *Mandlove* v. *Barton*, 1 Ind. R., 39, also cited in the same opinion, if not overruled, was certainly not followed in the subsequent case of *Vandebar* v. *Love*, 10 Ind. R., 54; Thomp., sec. 429.

The Pennsylvania cases proceed upon the ground, that the exemption laws of that State were intended for honest men, and not for cheats and rogues—words interpolated into the statute by the Honorable Court. Upon the same principle, I do not see why, in every case upon an application for a homestead, an issue should not be directed to determine whether the appellant is an honest man. According to my understanding, these exemptions are allowed without reference to the merit or demerit of the debtor. They are founded upon

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a policy that has no relation to the character or conduct of the parties claiming the benefit of them. Neither our constitution nor our statutes make any such exception. And without at all concurring in the observation that every man is a cheat and a rogue who makes a conveyance invalid as to his creditors, until the Legislature thinks proper to interfere, I shall be content to follow the authorities which hold such a conveyance as to them (the creditors), at least, does not divest the debtor of his right to a homestead. My opinion, therefore, is, that the decree of the Corporation Court is erroneous, and must be reversed, and remanded for further proceedings in conformity with the views here expressed.

MONCURE P. and ANDERSON J. concurred in the opinion of STAPLES J.

CHRISTIAN J. dissented. He referred to his opinion in the case of *Shipe, Cloud & Co.* v. *Repass*, 25 Gratt., 716. BURKS J. also dissented.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

DANVILLE BANK *v.* WADDILL'S ADM'R.

JANUARY TERM, 1879.

1. On an exception to the refusal of the court to set aside a verdict and grant a new trial, on the ground that the verdict is contrary to the evidence, if the evidence and not the facts, is certified, the appellate court will not reverse the judgment, unless, after rejecting all the parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court still appears to be wrong.
2. If an instruction is given to the jury, without objection at the time, and no exception, or notice of exception, is taken or given before the verdict is rendered, the giving the instruction cannot be a ground for setting aside the verdict and granting a new trial of the case.
3. In an action of *assumpsit* to recover a sum of money in gold, which had been delivered by the plaintiff to the defendant for safe keeping, the only plea in the case was *non assumpsit*. There was no question as to the delivery of the gold to the defendant, but the defense was, that he had been robbed of it, and the effort of the plaintiff was to prove a fraudulent appropriation of it by the defendant conspiring with another person. HELD:
   I. Evidence of the general character of the defendant, by him, is not admissible, and, therefore, the failure to produce it is not any ground for an inference unfavorable to his integrity.
   II. The counsel for the plaintiff, in his argument before the jury, having relied on the fact that the defendant had introduced no proof of his character, after the argument was concluded, the court, properly, of

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its own motion, instructed the jury that the character of the defendant, as a party to the suit, was not involved in the issue to be tried; that he had no right to introduce proof of his general character, and that the jury should disregard all argument made before them by the plaintiff's counsel, based on the failure of the defendant to introduce such evidence.

III. A new trial, properly refused, which was asked, based upon the affidavit of two of the jurors, that they had misapprehended the instruction of the court, and thought it required them to give full credit to the testimony of the defendant, who had given his testimony in the case; the instruction given by the court having been accompanied with the further instruction at the instance of the plaintiff, that the plaintiff might introduce evidence to impeach the defendant's character as a witness.

IV. Before evidence of the acts or declarations of one who is claimed to have been a conspirator with another to commit any offence, or actionable wrong, the judge must be satisfied that, apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy.

V. In such a case, after the conspiracy has been consummated, the common purpose carried fully into effect, no subsequent declarations of any of the conspirators, not made in the presence of the others, are admissible as evidence against the latter.

VI. If a person, to whom a sum of money has been entrusted for safe keeping, is robbed of it, he is not liable to the person who entrusted him with it for the money.

This is the sequel of the case of the *Danville Bank* v. *Waddill*, reported in 27 Gratt., 448, and 1st *Virginia Law Journal*, 30. Waddill having died whilst the cause was pending in this court, on its return to the Circuit Court of Danville, it was revived against his administrator with the will annexed. The case was *assumpsit*, and the only plea *non assumpsit*, and the object of the suit was to recover the sum of $4,865 in gold, which the bank had put into the hands of Waddill for safe keeping in April, 1865. There was no dispute as to the fact that the gold had been delivered by the directors of the bank to Pleasant Waddill for safe keeping, it being the time when the enemy were approaching Danville. The ground of defense was, that he had been robbed of it, and the only controversy before the jury was, whether he had been robbed, or whether he had fraudulently appropriated the money to his own use. And the plaintiff endeavored to establish the fraudulent appropriation, by evidence of the possession of considerable quantities of gold, from 1865 down to 1868, by his son, John M. Waddill, and of what he did with it, and said about it.

On the trial of the cause, the court excluded this evidence from the jury, and there was a verdict and judgment for the defendant. And the plaintiff obtained a writ of error and *supersedeas*.

Four bills of exception were taken in the case, but they all seem to have been taken after the verdict was rendered;

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and it does not appear that any notice of intention to except to the ruling of the court was given at the time, or at any time before the verdict.

The first exception is to the refusal of the court to grant the plaintiff a new trial on the ground the verdict was contrary to law and the evidence; and, on the motion of the plaintiff, the court certified the evidence. Waddill had given his evidence on the former trial, and his testimony, as then given, was proved on this, and there was the testimony of other witnesses which corroborated his statements.

The second exception relates to an instruction given to the jury. The plaintiff asked for a new trial on the ground that after the argument had been concluded, in which argument the counsel for the plaintiff relied upon the fact that the defendant had offered no proof of the character of Waddill, before the retirement of the jury, the court, of its own motion, instructed the jury that the character of Pleasant Waddill, the original defendant in the cause, was, as a party to the suit, not involved in the issue to be tried, and that the defendant had no right to introduce proof of the general character of said Pleasant Waddill as a party to the suit originally; that the jury should disregard all argument made before them by the counsel for the plaintiff, based upon the failure of the defendant to introduce before the jury testimony as to the general character of Pleasant Waddill as a party to the suit. But the court, at the request of the plaintiff's counsel, accompanied the instruction with the following explanation to the jury, to wit: That as the said Pleasant Waddill had testified as a witness at a former trial, and as this testimony at said former trial was proved before the jury at the present trial by a witness who heard it given, that the plaintiff had a right at the present trial to introduce evidence before the jury to impeach the said P. Waddill as a witness, by proving his general character; the plaintiff, by counsel, insisting that this instruction given by the court of his own motion was erroneous and calculated to mislead the jury, moved the court, because of said improper instructions, to set aside the verdict and award a new trial, but the court overruled the motion.

After the foregoing motion had been overroled, the plaintiff renewed the motion, and offered to read, in support thereof, the joint affidavit of two members of the jury which rendered said verdict. In their affidavit, they say they were induced to believe that the law required the plaintiff to prove that Pleasant Waddill was not robbed; that the said

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Waddill having stated, in his testimony, that he was robbed, in consequence of what the court said to the jury about the argument of counsel as to the character of Waddill, we were bound to give full credit to Waddill's testimony; we, therefore, concurred in the verdict of the jury for the defendant, which we would not have done if we had believed that we were authorized to discredit Waddill's testimony.

But the court refused to receive the said affidavit, or permit it to be read, because the jury had been instructed that evidence might have been offered to impeach the character of Waddill as a witness, and overruled the motion. This was the third exception.

The fourth exception is to the refusal of the court to admit the deposition of P. A. Hay offered by the plaintiff. This witness makes various statements in reference to the possession of gold by John M. Waddill, the son of Pleasant Waddill, and of what John M. Waddill stated to the witness. After the refusal of the court, in the first instance, to admit the deposition, the plaintiff withdrew their offer of said deposition, and introduced evidence tending to shew that Pleasant Waddill, who was a man of large estate, had given to his son, the said John M. Waddill, $1,700 of said gold subsequent to the 11th of April, 1865, viz., in 1866, 1867, and after having introduced said evidence, the plaintiff again offered to introduce said deposition—to the introduction of which deposition, as a whole, and to each question and answer thereof, the defendant objected. Thereupon the court examined said deposition, and struck from the same every question and answer asking or detailing any statements or admissions of said John M. Waddill. To the striking out which questions and answers the plaintiff objected; but the court overruled the objection, and the plaintiff excepted.

J. Alfred Jones and *E. Barksdale* for the plaintiff.

Ould & Carrington for the defendant.

BURKS J. delivered the opinion of the court, in which it was held as stated in the head-notes.

CHRISTIAN J. concurred in the opinion of BURKS J. as to the refusal of a new trial, on the ground that the verdict was contrary to the evidence. He dissented on the second exception. He considered that this was a case which makes an attack upon character. The suit charged Pleasant Wad-

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dill with fraud. He also thought that the court erred in excluding the statements of John M. Waddill, the son of Pleasant Waddill.

ANDERSON and STAPLES JJs. concurred in the opinion of BURKS J.

MONCURE P. concurred in the opinion of CHRISTIAN J.

JUDGMENT AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

COLLEY'S ADM'R *v.* SHEPPARD'S ADM'R.

January Term, 1879.

In an action of debt upon a bond by C's adm'r against S's adm'r, profert of the bond is excused on the ground that it was lost by accident. S's adm'r pleads payment, and special pleas, in which he avers that the bond was not lost or destroyed by accident, but was destroyed by the obligee in her lifetime with the intention and for the purpose of relieving S. from the payment of the debt; and this he is ready to verify; and issues were made up, on the pleas. On the trial of the cause, the defendant insists, the plaintiff should first prove to the satisfaction of the court the original existence of the bond, and its loss: And it was agreed that all the evidence in the cause shall be heard, and the defendant may move to exclude it; and on his motion all the evidence was excluded. HELD:

1. Every pleading is taken to confess such traversable matter on the other side as it does not deny. The pleas, therefore, confess the original existence of the bond as described in the declaration and its destruction. There was, therefore, no necessity on the plaintiff to prove to the satisfaction of the court the original existence and loss of the bond before receiving testimony as to its contents.
2. If the pleas put in issue the loss of the bond, then that issue must be tried by the jury; and if there was evidence introduced before the jury bearing on the question of the loss of the bond, it was for the jury to decide upon the sufficiency of the evidence to establish the loss; and it was error in the court to exclude it.
3. If it was incumbent on the plaintiff to prove the original existence and the loss of the bond, before proving its contents, the evidence was sufficient in this case.

This was an action of debt upon a bond brought in March, 1860, in the Circuit Court of the city of Richmond, by Wm. L. White, Jr., as administrator of Nancy Colley, deceased, against Joseph M. Sheppard. The declaration set out a bond for $723, bearing date the 8th of January, 1856, payable on demand, executed by Sheppard to Nancy Colley in her life-

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time, which, having been lost by accident, the plaintiff could not make profert thereof.

In May, 1860, Sheppard demurred to the declaration, and the plaintiff joined in the demurrer. And no further proceedings seems to have been taken in the case until December, 1865, when a *scire facias* was issued to revive the suit against Thomas Pollard, personal representative of Sheppard. And the case was continued from time to time, until June, 1873. At the June Term, 1873, the court overruled the demurrer, and the defendant pleaded payment, and tendered three special pleas, to which the plaintiff objected. The court sustained the objection to the first special plea, but overruled it as to the second and third. The plaintiff replied generally to the two special pleas, and the plea of payment; and issues were made up upon these pleas.

The defendant did not except to the opinion of the court rejecting the first special plea; but the plaintiff excepted to the admission of the second and third of these pleas. The pleas are as follows:

1st plea. And the said defendant, by James Lyons, his attorney, comes and defends the wrong, &c., and says that the plaintiff ought not to have or maintain his action against him, because he says, that the said bond in the declaration mentioned has not been lost or destroyed by accident, as the plaintiff has in his declaration stated, and of this he puts himself upon the country, &c.

2nd plea. And for a further plea in this behalf, this defendant says, that the plaintiff ought not to have or maintain his action against him, because he says that the writing obligatory mentioned in the declaration was not lost or destroyed by accident, but was destroyed by the obligee in the said writing obligatory, with the intention and for the purpose of releasing the said Joseph M. Sheppard from the payment of the debt mentioned therein, and this the said defendant is ready to verify; wherefore he prays judgment, &c.

3rd plea. And for a further plea in this behalf, the said defendant says, that the said plaintiff ought not to have or maintain his action against him, because he says that the writing obligatory mentioned in the declaration was not lost or destroyed by accident, but was destroyed by the obligee in the said writing obligatory, with the intention and for the purpose of releasing the said J. M. Sheppard from the payment of the debt mentioned therein, and therefore the defendant says that the said Nancy Colley, released and discharged him from the said obligation, and from the payment of the said sum of money in the writing obligatory mentioned,

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and this he is ready to verify; wherefore he prays a judgment, &c.

The cause came on to be tried at the same term of the court. After the jury was sworn, and the plaintiff introduced his first witness, the counsel for defendant stated that they should insist that the plaintiff should first prove the original existence of the bond referred to in the declaration, and thereafter its loss; and that upon this question the evidence should be addressed to the court, and the fact of the existence and loss of the bond established to the satisfaction of the court, before any secondary evidence of its contents could be presented to the jury; after which the examination of witnesses was permitted to proceed before the court and the jury, with a reservation to the defendant of the right to move to exclude the evidence from the consideration of the jury upon the ground of its insufficiency to establish the facts necessary to entitle the plaintiff to introduce secondary evidence of the contents of the said bond.

The trial then proceeded; the plaintiff and a number of witnesses were examined, on his behalf, and also one for the defendant; and when all the evidence had been submitted to the jury, the defendant moved the court to exclude all the evidence which had been offered, from the consideration of the jury, upon the ground that the evidence was not sufficient to establish the loss of the bond, so as to enable the plaintiff to introduce secondary evidence of its contents. This motion the court sustained, and excluded the evidence. And the plaintiff excepted, setting out the evidence in his bill of exceptions.

There was a verdict and judgment for the defendant; and thereupon the plaintiff applied to a judge of this court for a writ of error and *supersedeas;* which was awarded. The view taken of the evidence by this court is presented in the opinion of *Staples J.*

John B. Young and *C. White* for the plaintiff in error.

Wm. W. Crump and *Bev. T. Crump* for the defendant in error.

STAPLES J. delivered the opinion of the court, in which the other judges concurred.

HELD as stated in the head-notes.

JUDGMENT REVERSED.

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MISCELLANY.

LADY LAWYERS.—The London correspondent of a contemporary says: The sisterhood of enterprise is not exhausted in the single individual who failed to satisfy the examiners in her recent attempt to pass the first stage of the examination for the LL.D. degree in the University of London, the most chivalrous as it is well nigh the youngest of the academical institutions. The courtesy of this university, as expressed in its determination to admit women to its degrees—all of which are professedly of a secular kind—is, even in the present moment, being drawn upon by some eleven or twelve female candidates for matriculation. What their fate may be is, for the present, and for a few days beyond the present, a mystery inscrutable to outsiders, although I have good authority for believing that amongst them are to be found some extremely promising specimens of female scholarship. I wish, however, to advert a little to the circumstances of the recent unsuccessful candidature for the LL.D. degree, one point of which seemed to be the accidental and singular choice of a legal distinction, whereas female ambition of the academical kind had previously seemed to gravitate to the faculty of medicine as offering the most direct facilities for reducing theoretical requirements to lucrative or remunerative practice. This selection is not to be regarded, I find, as one of caprice, being rather the result of a fixed determination to open, if possible, the way for women to achieve forensic, and, in the long run, judicial honors. It is intended as a movement by which the Bar, and all the rewards of the Bar, shall be open to female rivalry, and already the Benchers of one of the Inns of Court have been applied to for the recognition of the eligibility of ladies as students in their honorable societies. The answer, I believe, has not been favorable, and the failure of the single candidate for a law degree in the University of London is not calculated to precipitate a decision in favor of female law students or female barristers. Yet it is scarcely a secret that the circle of ladies who are responsible for the recent candidature, have for some time furnished examples of practitioners who have practised *sub rosa*, using a gentleman as a kind of formal or *dummy* partner as solicitor's or chamber counsel. In the future, we may have to contemplate the "fair girl graduates" covering their "golden hair" with the portentous grey of the wig of the barrister, the Queen's Counsel or the judge.—*Irish Law Times.*

LADIES IN COURT.—The late excellent judge, Justice Cresswell, had the failing of addressing his brother judges in a somewhat consequential and authoritative manner, which much annoyed Maule. Leaving the Court of Common Pleas one day in disgust whilst one of those performances was going on, he met Lord Campbell, and remarked, "There's that fellow Cresswell talking to the other judges like a magistrate talking to three black beetles!" Any one who knows the appearance of the learned judges during a winter term, in their black cloth robes and narrow ermine trimming, will better see the full force of the remark. He would never allow the court to be cleared of females even during the most disgusting trials. "Decent wo-

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men don't come into courts of justice," he would remark. "Speak out, my poor girl," we once heard him say, "it must be very painful for you to go into all the bad language and disgusting detail, but it is necessary to the ends of justice; and besides, all these finely dressed ladies here (pointing to the high-sheriff's lady and others who sat on the bench beside him) have come miles to hear what it shocks a poor innocent girl to repeat!" We were present and heard this, and record that five minutes afterwards, there were vere very few "fine ladies" indeed beside the sarcastic little judge upon the bench.—*Leisure Hour.*

ACKNOWLEDGEMENT.—We acknowledge our indebtedness to the press throughout the State for the terms of commendation in which they have been pleased to speak of our work.

CODIFICATION.—We have an article making some valuable suggestions on this very important subject from the graceful pen of Alexander H. Sands, Esq., of the Richmond Bar, which we propose publishing later in the year, when we hope it will do more real good by directing the mind of the Legislature to the subject, than if published at this time.

BOOK NOTICES.

DESTY'S ADMIRALTY MANUAL.—A Manual of the Law relating to Shipping and Admiralty as determined by the Courts of England and the United States. By ROBERT DESTY, author of "Federal Procedure," "Federal Citations," "Statutes relating to Commerce," "Navigation and Shipping," etc. San Francisco: Sumner, Whitney & Co., 1879.

This little work will be found to be very useful to those engaged in the branches of the profession of which it treats. It seems well arranged, in nineteen chapters, entitled Power to Regulate Commerce, Registry, Enrollment, and License of Vessels, Owners, Sale and Transfer, Liens, Bottomry, Master, Seamen, Charter-Party, Bill of Lading, Carriers, Freight, General Average, Salvage, Towage, Pilotage, Wharfage, Collision, Prize. Under these general titles the matter is grouped in sections, with heavy-faced catch-lines, and under each section are the title of cases, with volume and page of the report, referring by numbers to the corresponding paragraphs of the sections. There is no attempt to state principles elaborately. Everything is expressed in the most concise style, with table of contents and index. The size is very convenient for a pocket manual, and resembles very much those very valuable works of Mr. Stephens in appearance. The author and publishers are too well known to require further notice of the work from us.

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DIGEST OF AMERICAN REPORTS.—Digest of Decisions in the Courts of last resort of the Several States contained in the American Reports, from Volume I to XXIV, inclusive. With an Index of Notes. By ISAAC GRANT THOMPSON, 1870–1879. Albany: John D. Parsons, Jr., Publisher, 1879. Through J. W. Randolph & English, Publishers, Richmond, Va.

We have received the foregoing work. It includes the former digest of the first twelve volumes of these reports, and supersedes that work. It has a schedule of the State Reports digested, a table of overruled, doubted and denied cases, and index to the notes of the reporter, and an index of the cases digested. It contains reference to an immense amount of valuable and well selected law. Will be found indispensable to those having the reports, and very useful to those who do not have them. The work is admirably gotten up by the publisher.

MINOR'S INSTITUTES.—Institutes of Common and Statute Law. Vol. IV in two parts. The Practice of the Law in Civil Cases, Including the Subject of Pleading. By JOHN B. MINOR, LL. D., Professor of Common and Statute Law in the University of Virginia. 1878.

We acknowledge our obligations to the eminent author, for a copy of this work, which will be found to be of the greatest practical use, not only to the practitioner, but to the student. The subjects, so ably and clearly discussed, will be found, as stated by the author, to be arranged under the following general heads:

(1) Part I.—Analytical view of the modes of *securing* against invasion, the rights which relate to the *person and to property*, and of *transferring* rights which relate to property from one person to another.

(2) Part II.—Analytical view of the modes of vindicating rights whether *relating to the person or to property*, where they have been *actually invaded*, and of obtaining redress for the wrong.

These headings furnish an idea of the comprehensive and useful character of the great work of this learned author, to whom, we believe, the profession in the South is more indebted than to any other one man. We studied law under the author, and no one could have enjoyed this privilege and remained an impartial critic of his work. We believe him to be the greatest teacher of the law that this country has ever produced; his mind is of that peculiarly clear, trenchant, and analytical caste, which enables him to grasp, readily, the great principles of the law, and having done this, he possesses the most wonderful facility of imparting his information to others, of any teacher that we ever knew. We think that Professor Minor is as great as an author as he is as a teacher, and that his several volumes entitled "Minor's Institutes," comprising almost the whole field of our great profession, will, when completed, be found among the most valuable law books that have ever been published anywhere. He is not only a learned author, but his statements of all propositions, as far as we have been able to examine them, will be found to be accurate, clear and concise. We feel sure that we cannot commend these works too highly.

For sale by McKennie & Son, University of Virginia; Randolph & English, and West, Johnston & Co., Richmond, Va.

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Vol. III, treating of the "Rights which relate to personal property," is expected to be issued befor the end of the current year.

LINDER'S REMINISCENCES.—Reminiscences of the early Bench and Bar of Illinois. By Gen. USHER P. LINDER. With an Introduction and Appendix by the Hon. Joseph Gillespie. Chicago: The Chicago Legal News Company. 1879.

We have received the foregoing work from the publishers, and we have read many of the sketches contained in it. We must confess, that these sketches have not had the effect of giving us a very high estimate of the capacity of the author for his work, or of the Illinois Bench and Bar. We would fain believe that the author was not on good terms with many of the subjects of his sketches, and that the publication of the work is owing to the great enterprise of the publishers.

COOLEY ON TORTS.—A Treatise on the Law of Torts or the Wrongs which arise, Independent of Contract. By THOMAS M. COOLEY, LL. D. 1879. Chicago: Callaghan & Co. Through J. W. Randolph & English, Richmond, Va.

We have received this very useful work. It sets forth, with great clearness, "the general principles under which tangible and intangible rights may be claimed, and their disturbance remedied in the law." The eminent author is too well known to require commendation from us. We commend the work to the profession as one that will meet a want now existing. The work of the publishers is well done.

JONES ON RAILROAD SECURITIES.—A Treatise on the Law of Railroad, and other Corporate Securities, including Municipal and Bonds. By LEONARD A. JONES, ESQ., Author of a Treatise on Mortgages. 1879. Boston: Houghton, Osgood & Co. The Riverside Press, Cambridge. Through J. W. Randolph & English, Richmond, Va.

This is a very excellent treatise on a branch of the law, which is growing in importance each year. The author presents the common law of the subject, and the modifications of that law as made by statutory enactments and judicial decisions, in a way to avoid confusion of statement, and so as to enable one to ascertain as easily as possible the law on any part of the subject for any State of the Union. Eminent members of the profession, in different sections of the country, commend the work in the highest terms, and we think it will be found to be very useful in those departments for which it was designed.

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THE

VIRGINIA LAW JOURNAL.

MAY, 1879.

THE POOR MAN'S LAW.

Having had occasion recently to examine what is familiarly known as "The Poor Man's Law," contained in the Code of Virginia (1873), chap. 49, sections 33 and 34, and to consider its bearing upon a contract made in 1857, I was unable, for a time, to understand the meaning of the last clause of the 34th section. I think I succeeded in gaining the idea which the clause in question was *intended* to convey; and, while perhaps no serious trouble will ever result from the awkward phraseology of the sentence alluded to, yet, as I think I have discovered a valid objection to *one* section of what is now accepted as the Code of Virginia, it will not be out of place to state that objection, particularly if an explanation is offered which will make plain the legislative intent.

The 33rd and 34th sections of chap. 49 of the Code of 1873, set out specifically the exemptions allowed to a "husband, parent or other person who is a housekeeper and head of a family" in cases of "distress" or "levy," and the 34th section closes with these words, viz.: "and provided further, that upon all contracts made and entered into before the passage of this act, only so much of the above mentioned property shall be exempt from distress or levy as are hereby exempted under the provisions of this and the next preceding section." From this it would seem that the Legislature intended the exemptions to be held against *all* contracts, whether entered into before the passage of the act or afterwards; in other words, that the law should be retro-active in its operation, and thus present at once a constitutional question, which the courts would not be slow to act on, and that to the detriment of the statute.

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But the Legislature did not intend any such thing, and the compiler of the statutes, in his eagerness for brevity, perhaps, has entirely failed to express the true meaning of the law.

By reference to the several acts on this subject, viz.: of March 30, 1837, February 1, 1854, March 29, 1860, and February 20, 1867, respectively, it will be observed that the exemptions have been materially increased by each succeeding enactment, and hence, when, on the 20th of February, 1867, the General Assembly came to pass a law more favorable to poor debtors than any, or all other such laws in Virginia had theretofore been, it was eminently proper to specify the exact operation of the same, Therefore, in the Acts of 1866–7, pp. 656–7, where we find the law amended and additional exemptions provided for, we notice that the act commenced from *its passage*, or the 20th of February, 1867, and the last clause of the 34th section, as amended, is as follows: "And provided further, that upon all contracts made and entered into before the passage of this act, only so much of the above mentioned property shall be exempt from distress or levy, as are hereby exempted under the provisions of the said thirty-third and thirty-fourth sections of chapter forty-nine of the Code of eighteen hundred and sixty."

The law in the Code of 1860 was passed on 29th of March, 1860, and is materially different from the Act of 1867, and consequently, the Legislature in adopting the latter, expressly say, that as to pre-existing contracts, the law as it *then* stood should govern, as to contracts thereafter entered into the new statute should be followed.

The Act of 1867 is the *last* on the subject, and is embodied in the Code of 1873, with this exception, viz., that the last clause of section 34 has been changed by the compiler, probably by accident, so that the meaning of the Legislature is not expressed. If the last clause of section 34, as contained in the Acts of 1866–7, p. 657, is substituted for the corresponding clause in section 34 of chap. 49, Code 1873, the law will be expressed as the Legislature intended, and the meaning will be clear.

Charlottesville, Va. G. P.

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FRANCIS LEE SMITH.

A Brief Sketch of the Life and Character of Francis Lee Smith, formerly Attorney and Counsellor at Law at Alexandria, Va.

Francis Lee Smith, eldest son of John A. W. and Maria L. H. Smith, was born in Warrenton, Va., November 25th, 1808. Through his paternal ancestry he traced his lineage from the Littletons, of England, the Washingtons, Adamses and Marshalls, of Virginia. His maternal grandmother was a lineal descendant of Richard Lee, known as "The Emigrant," who came to Virginia from England in 1641. His maternal grandfather was Capt. John Hawkins, an officer of the Revolutionary army, who served with the Virginia troops, and who claimed descent from Admiral Hawkins, of the British Navy.

Francis Lee, or "Frank Lee" as he was familiarly called when a child, received a good education at the country schools in and about Warrenton, and had many helps to learning by association with several brilliant and accomplished gentlemen who were wont to take an interest in this attractive boy, already remarkable for his handsome visage, graceful figure, and happy, vivacious temper. The earliest record we have of his experience in the stern exactions of life, lies in the history of the removal of both of his honored parents, which left him at the head of a large and dependent family. In the discipline of poverty and self-denial, his noble nature took its firm root, and while struggling for those he loved, though scarcely grown to man's estate, he revealed a character of uncommon strength. In youth, he began to think of others before the claims of self were ever allowed, and then was laid the foundation of that beautiful trait which time only deepened and perfected. Feeling a great desire to enter the legal profession, a desire stimulated by acquaintance with several prominent lawyers, and fostered by writing for some time in the clerk's office in Warrenton, he availed himself of an opportunity to attend Judge Tucker's Law School, at Winchester, Va., where he graduated with honor. His first appearance at the Bar was in Luray, Page county, Va. Here, before he was twenty-one, he was made Commonwealth's Attorney, and secured many friends by his marked ability, genial manners and industrious habits. The proceeds of his labors were gladly and proudly divided with his brothers and

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sisters, several of whom he educated, and all of whom he assisted by his growing influence. At this time, he stored his mind with a general culture, that was a source of unceasing pleasure, and of which the engrossing cares of heavy professional labors in after years somewhat precluded the pursuit. His knowledge of the political and military history of his country was accurate and extensive, and to the last, few fresh from academic shades could compete with him in familiarity with polite literature. Every step in his life now, was a progress, and every blow removed some obstacle to his advancement. On the 13th of April, 1836, he married Miss Sarah G. Vowell, of Alexandria, Va., a union singularly blessed, and which lasted over forty years. Feeling a strong desire to try his fortunes in the West, after his marriage Mr. Smith crossed the Alleghanies and made his home in Louisville, Ky. In this prosperous city, he met with much success, and there began to reap a harvest of applause from his peculiar talent for public speaking. The spirit of politics then ran high in the West, and Mr. Smith was invited to address the people at Lexington and neighboring cities upon the issues of the day. The intoxicating cup of popular approval was offered to his lips, and a brilliant career seemed opening before him. But, circumstances in which the affections weighed more than personal ambition now controlled his life, and just at the threshold of this new and tempting arena, he turned aside and journeyed back to Old Virginia. This seemed to be the pivotal period of his life, and his election was but an illustration of that unselfishness which had ever marked his nature. The most influential citizens of Louisville urgently desired that he should represent them in Congress, and there is little doubt, if he had remained among them, that he would have taken a leading part in Kentucky politics. About 1840, he left Louisville, and cast his lot in the city of Alexandria. It would be impossible to follow step by step, the incidents of his career, or tell how every year brought higher trusts, weightier responsibilities, and wider influence. He took an active interest in the internal improvements of his State, was mainly instrumental in the retrocession of Alexandria to Virginia, represented the city soon after in the Virginia House of Delegates, and whilst there served upon some of its most important committees. For many years he was active and prominent in the municipal affairs of Alexandria, serving in both branches of the Council, and as Attorney for the city. In all good works that called for public spirit he was found, as well as in those more hidden acts of charity where his left hand knew not what his right hand did.

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The increase of his influence kept pace with the growth of his mind and the development of his character. He was diligent in his calling, and faithful to the interests entrusted to him. His professional bearing was manly and elevated, and he blended the dignity of mature life with the ardor and energy of youth. He always had the attention of the court and the ear of the jury; his addresses to them were simple and direct, presenting the strong points of a case in a strong way, appealing to the reason and conscience, and not to the passions and prejudices of men. He was a safe counsellor and a powerful advocate, thorough in the preparation of causes, and judicious in their management. His legal learning was accurate and perfectly at command, and he had made himself familiar with many of the most difficult branches of the law. The uniform respect and courtesy with which he treated the Bench and the Bar never varied through a practice of half a century, and the consideration which he showed to others was always extended by them in large measure to himself. He was warm and glowing in his friendships, but, for his brother lawyers, he felt the power of the mystic tie that held them votaries at a common altar. None with whom he was associated can forget the peculiar power and richness of his voice, the eloquence with which he could assert, the fancy with which he could illustrate, the earnestness with which he could plead, the grace with which he could differ, the generosity with which he could yield.

One of his brother lawyers thus speaks of him:

"As the associate and competitor of Walter Jones, James Carlisle, Joseph H. Bradley, Philip R. Fendall, Henry Winter Davis and others, he was distinguished for his manly graces, professional devotion, subtle reasoning and persuasive eloquence." The current of his life had flowed in even channels until the year 1861, when the cloud of war broke over this then unhappy country. Mr. Smith was opposed to secession, and cast his vote against the candidate who represented this doctrine in the Virginia Convention of 1861. This body, however, passed the Ordinance of Secession, and the Old Dominion united her fortunes with her sister States of the South. When it became evident that war could not be avoided, Mr. Smith joined heart and hand with his own people, and, like a wise man, accepted the inevitable. He left his home in Alexandria in May, 1861, which was soon occupied as a U. S. Hospital, and retained as such until the close of the war. His large family he maintained within the Confederate lines in Virginia, and though years and delicate health

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prevented an active participation in the war, he sent three sons to represent him in the army, and by every means in his power aided the great cause. Through all the trying scenes of those trying days, Mr. Smith bore himself with Christian fortitude. In Richmond he practised his profession, never resting from incessant toil. Returning to Alexandria in 1865, he found much of his property destroyed, and all that was left confiscated.

When Richmond was burned, he lost his Law Library, but, now, new books supplied the places of the old, and with a mind undismayed by the surrounding chaos, he again put his shoulder to the wheel, and spent the last twelve years of his life in unremitting labor. To the hour of his death, he was engaged in many and complicated cases before the highest tribunals in the land.

Mr. Smith had always been a firm believer in the Christian religion, and long before he united himself with the church, his life had been an exemplification of its holy doctrines. An extract from his will here verifies his living profession of faith.

"To my beloved children I urgently recommend the Divine Precepts contained in the Holy Scriptures as the only safe rules for their conduct, to guide and sustain them amidst the cares and trials of Time, and to secure for them hereafter a blissful Immortality."

For a year or two previous to his final summons, Mr. Smith had been more or less delicate. In patient endurance he bore the Cross laid upon him, cheering and consoling all around, but, on the 10th of May, 1877, as the gates of the morning were rolling back

"God's finger touched him, and he slept."

In the unimpaired possession of all his faculties, with a mind undimmed by the Shadow of Death, and a body unmarred by the external ravages of disease (for the hand of the destroyer had worked subtly and unseen), the thread of life was cut, and his emancipated spirit gathered forever into the bosom of his Father and his God. Such an end is like that strange mid-summer's day, where sunset melts into sunrise, and the last ray of evening is caught up and appears once more as the first beam of the new morning.

We now pass to the consideration of some of those traits which made Mr. Smith so beloved and honored as a man. Endowed by Nature with a fine physique, his noble presence,

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his lofty form, his handsome face and "good grey head" form a picture of dignified manhood which still lingers in the recollection of many who will read these lines. It was a temple worthy of the soul which it enshrined. He was loyal and chivalrous, gentle and strong, modest and humble, tender and true, whose highest virtues were known only to his wife, his children, and the suffering; who omitted not "the weightier matters of the law, judgment, mercy and faith."

In his habits he was singularly temperate, eschewing all forms of tobacco, and never taking any stimulant unless forced upon him by medical advice. He strongly counselled abstinence from "the wine cup," and through all the changes and chances of earth, was seen "Wearing the white flower of a blameless life."

He had an exquisite preception of the beauties of external nature, and a soul attuned to her most mysterious harmonies. He understood the voice of creation, and beheld Infinite power and Infinite love on every hand in this fair world.

He was sober and vigilant, one

> "Who never sold the truth to serve the hour,
> Nor palter'd with Eternal God for power;"

but steadfast, unwearied, ever the willing bondman of Duty, he passed through life leaving a trail of light through all his ways.

Such is a brief sketch of one who had nearly measured the allotted span of three-score years and ten; who preserved through all the vicissitudes of fortune a loving heart and stainless honor, who died in the fear of God and in the faith of Christ, leaving to his State the record of a zealous patriot, a pure and successful lawyer, and to his children as a precious heritage, the example of a Christian and a gentleman.

> "Accipe fraterno multum manantia fletu,
> Atque in perpetuum frater ave atque vale."

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UNITED STATES SUPREME COURT ABSTRACT.

EXEMPTION FROM TAXATION—IMPAIRING OBLIGATION OF CONTRACTS—JURISDICTION.

An act of the Illinois Legislature, passed in 1855, declared that all the property of the Northwestern University should be forever free from taxation of all kinds. A subsequent statute of 1872, conforming taxation to the new Constitution of 1870, limited this exemption to land and other property in immediate use by the school, as it was construed by the assessors and by the Supreme Court of the State. *Held*, that the latter act impaired the obligation of the contract of exemption found in the act of 1855. That whether the act of 1855 was a valid contract, or was void by reason of conflict with the State Constitution under which it was made, is a question on which this court can review the judgment of the Supreme Court of the State. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken*, 1 Wall., 144; *Delmas* v. *Insurance Co.*, 14 id., 668. That lots and land and other property of the University, the annual profits of which, by way of rents or otherwise, are devoted to the object of the institution as a school, could, within the meaning of the Constitution of 1848, be exempt from taxation by the Legislature, and the power of exemption was not limited to real estate occupied or in immediate use by the University. In error to Supreme Court of Illinois. Judgment reversed. *The Northwestern University, plaintiff in error* v. *People ex rel Miller.* Opinion by Miller J.

TAXATION OF STEAMBOATS BY MUNICIPAL CORPORATIONS.

While State authorities cannot impose a tonnage tax upon vessels of ten or more tons burden, duly enrolled and licensed and engaged upon navigable waters, yet the State may impose a tax upon such vessels as upon other property in the State; and municipal corporations may also tax such vessels for municipal purposes, provided the owner thereof reside in the municipality, and the assessment be made against the owner. Passenger Cases, 7 How., 479; Cooley's Const. Lim., 606; Cooley's Tax, 61. Plaintiff in error was the owner of steamboats above ten tons burden, which were duly enrolled and licensed and engaged in commerce between the port of Wheeling and other ports on the Ohio river. Plaintiff's

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principal office was at Wheeling. The defendant, the city of Wheeling, assessed an annual tax against the plaintiff upon the appraised value of said steamboats the same as upon other property, which tax plaintiff paid under protest and involuntarily. This action was to recover the money so paid on the ground that said steamboats were not taxable by the State or municipal authorities. *Held*, that plaintiff was not entitled to recover; the tax was not a tonnage tax and was assessed as upon other property and was valid. Error to the Supreme Court of Appeals of West Virginia. *The Wheeling, Parkersburg and Cincinnati Trans. Co.* v. *City of Wheeling.* Opinion by Clifford J.

JURISDICTION OF APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA—REPEAL.

The Act of Congress of February 25, 1879, "to create an additional associate justice of the Supreme Court of the District of Columbia," etc., repeals, by implication, section 847 of the Revised Statutes, allowing appeals to the United States Supreme Court from judgments of the Supreme Court of the District, where the matter in dispute is $1,000 or upward; and under said act of 1879, section 4, judgments of the Supreme Court of the District can only be reviewed by the United States Supreme Court where the matter in dispute exceeds $2,500. And this appeal applies to actions pending when the act was passed. On the last point the court said: "It is well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. *United States* v. *Boisdore's heirs*, 8 How., 121; *McNulty* v. *Batty*, 10 id., 79; *Norris* v. *Crocker*, 13 id., 440; *Insurance Co.* v. *Ritchie*, 5 Wall., 544; *Ex parte McCardle*, 7 id., 514; *The Assessors* v. *Osbornes*, 9 id., 575; *United States* v. *Tynen*, 11 id., 95." "A party to a suit has no vested right to an appeal or writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, the proceedings under an appeal or writ stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal, and gave us the authority to re-examine, reverse or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or writ already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in

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dispute is less than the present jurisdictional amount. The appeal or writ remains in full force, but we dismiss the suit because our jurisdiction is gone." *Baltimore and Potomac Railroad Co.* v. *Grant.* Opinion by Waite C. J.

MUNICIPAL BONDS—ERRORS IN FORM.

A statute authorizing the issue of municipal bonds in aid of railroads, provided that they should be made payable to the *President and Directors of the Railroad company "and their successors and assigns."* The bonds issued under the act, and in controversy in this action, were made payable to the *railroad company "or bearer."* It was contended that the bonds were not valid because not in the form prescribed by the statute. *Held*, that the error in the form did not affect the validity of the bonds. The court said: "The statutory requirement in this particular is only directory. *Indianapolis Railroad Co.* v. *Horst*, 93 U. S., 291; *Township of Rock Creek* v. *Strong*, 96 id., 277. The defect is one of form and not of substance. The irregularity was committed by the servants of the county, and the county is estopped to take advantage of it. *Bargate* v. *Shortridge*, 5 Clark's H. L., 297. The recital in the bonds of conformity to the statutes is also conclusive. A buyer was not bound to look further. Bigelow on Estoppel, 266; *Knox* v. *Aspinwall*, 21 How., 545; *Moran* v. *The Commissioners*, 2 Black, 722. No place of payment of the bonds being designated by the statute, it was competent for the supervisors to make them payable in New York. *Moyer* v. *Muscatine*, 1 Wall., 384. The law of the place of performance governed the construction and effect of the contract. *Brabston* v. *Gibson*, 9 How., 263; *Cook* v. *Moffat*, 5 id., 295. By the law of New York, such bonds may be assigned in blank, and any holder can fill the blank with his own name or otherwise. In the meantime, after such assignment in blank, they pass by delivery from hand to hand and have all the properties of commercial paper. *Hubbard* v. *The N. Y. and H. R. R. Co.*, 36 Barb., 286. The result is, therefore, the same that it would have been if they had been drawn in literal conformity to the statute." In error to the U. S. Dist. Court, for N. D. Miss. *Board of Supervisors* v. *Galbraith.* Opinion by Swayne J.

SUBMISSION TO VOTE OF ELECTORS—AUTHORITY NOT EXHAUSTED BY ONE SUBMISSION.

A statute authorized the officers of counties to subscribe

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for stock in railroads, and to issue bonds in payment therefor, "provided, that an election shall be held in the county," and a majority of the qualified voters voted in favor of the subscription. In an action on bonds issued under this statute, it appeared that the proposition for subscription was twice submitted to the voters; the first time it was rejected; the second time it was approved. *Held*, that the power to submit was not exhausted by the first submission, and that the second submission was valid. Ib.

CONSTITUTIONAL LAW—RESTRICTION ON LEGISLATION—EFFECT ON PRIOR STATUTE.

The Constitution of Mississippi, ratified December 1, 1869, declares: "Section 14. The Legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto." *Held*, that this did not abrogate a prior statute authorizing counties to become stockholders in, or to lend their credit to railroad companies upon the assent of a majority of the electors; and that bonds issued under said statute after the ratification of said Constitution were valid. *County of Henry* v. *Nicolay*, 95 U. S., 619; *The County of Callaway* v. *Foster*, 93 id., 567; *County of Scotland* v. *Thomas*, 94 id., 682; *County of Macon* v. *Shores*, not yet reported. See also *The State* v. *Macon County Court*, 41 Mo., 453; *State* v. *Green County et al.*, 54 id., 540; *Cass* v. *Dillon*, 2 Ohio St., 607. Ib.

VALIDITY—EFFECT OF DECISION INVALIDATING AFTER ISSUE OF BONDS—PRELIMINARY PROCEEDINGS.

A statute authorized towns to issue bonds in aid of a railroad upon the order of the county judge, founded on a petition of a majority of the tax payers representing a majority of the taxable property of the town. A petition of a majority of the tax payers and property owners of the town of Orleans, in the county of Jefferson, was presented to the county judge in favor of issuing the bonds of the town in aid of a certain railroad. At the hearing before the county judge some of the tax payers who had signed the petition desired to withdraw their names, leaving thereby less than a majority, but the county judge refused this request, ordered that

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the bonds be issued, and appointed, under the statute, three commissioners to execute and deliver them. Thereupon the case was removed into the Supreme Court by writ of *certiorari*, after which the bonds were issued and disposed of. The Supreme Court affirmed the judgment of the county judge, but the Court of Appeals reversed the judgment and order, on the ground that the county judge had erred in refusing to allow the signers to the petition to withdraw their names, and ordered the county judge to dismiss the application to bond. *People ex rel. Irwin* v. *Sawyer*, 52 N. Y., 296. The bonds already issued when this decision was made showed no defect upon their face. They purported to be issued by virtue of certain specified acts of the Legislature, and set forth that the "commissioners, under the acts above referred to, for the town of Orleans, * * * upon the faith and credit, and on behalf of said town, and confirmed by a majority of the tax payers, representing a majority of the taxable property of the same, according to said acts, for value received, do hereby promise," etc. In an action on the interest coupons on such bonds by a holder for value and without notice. *Held*, that the bonds were valid as to such holder, and the town liable for the interest. The court said: "When the county judge appointed the commissioners to issue the bonds, it was made their duty to proceed 'with all reasonable dispatch.' They were not parties to the proceedings upon the *certiorari*, and hence were not directly affected by them. The same remarks apply to the corporation that received the bonds in payment for its stock. It is expressly provided by statute that in case of disagreement of the commissioners touching the issuing of the bonds, the Supreme Court may decide and direct what shall be done, and that "said court * * * shall have power at any time, by injunction, to prevent the issue of said bonds, or any part thereof, on notice and for good cause shown; and any judge of said court may grant a temporary injunction until such motion can be heard." Laws of 1871, vol. 2, p. 2119, chap. 935, sec. 5. In this case a preliminary injunction might and should have been procured forbidding the commissioners to issue the bonds, and the railroad company, if it received them, from parting with them until the case made by the certiorari was finally brought to a close. This would have involved only an ordinary exercise of equity jurisdiction. *Illinois* v. *Delafield*, 8 Paige, 527; S. C., on appeal, 6 Hill, 160. The omission was gross *laches*. This negligence is the source of all the difficulties of the plaintiff in error touching the bonds. The loss, if any

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shall ensue, will be due, not to the law or its administration, but to the supineness of the town and the contestants. *County of Ray* v. *Van Syckle*, 96 U. S., 675. Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him, and not upon the other party. *Hern* v. *Nichols*, 1 Salk., 289; *Merchants' Bank* v. *The State Bank*, 10 Wall., 646. The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray* v. *Lardner*, 2 Wall., 110. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities, and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. *Mercer County* v. *Hacket*, 1 Wall., 83; *San Antonio* v. *Mehaffy*, 96 U. S., 312; *County of Moultrie* v. *Savings Bank*, 92 id., 631; *Moran* v. *The Commissioners*, 2 Black, 722; *Knox* v. *Aspinwall*, 21 How., 539; *Royal British Bank* v. *Turquand*, 6 Ellis & B., 327. A corporation is liable for the acts of its servants while engaged in the business of their employment, to the same extent that individuals are liable under like circumstances. *Philadelphia and Wilmington R. R. Co.* v. *Quigley*, 21 How., 209; *Green* v. *London Omnibus Co.*, 7 C. B. (N. S.), 290; *Life and Fire Ins. Co.* v. *Mechanics' Fire Ins. Co.*, 7 Wend., 31. The doctrine of *lis pendens* has no application to commercial securities. *Murray* v. *Lylburn*, 2 Johns. Ch. 441; *Kieffer* v. *Ehler*, 18 Penn. St., 388; *Stone* v. *Elliot*, 11 Ohio St, 252; *Mims* v. *West*, 38 Ga., 18; *Leitch* v. *West*, 48 N. Y., 585; *County of Warren* v. *Marcy*, not yet reported. See in the case last named Mr. Justice Bradley's full examination of the subject. The county judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed by a higher court. *Lynde* v. *The County of Winnebago*, 16 Wall., 6; *Township of Rock Creek* v. *Strong*, 96 U. S., 271. The plaintiff had no notice, actual or constructive, of the proceedings in the case subsequent to the first judgment, and is in no wise affected by them. *The County of Warren* v. *Marcy* is, in effect, decisive of the case in hand. There the board of supervisors claimed to be authorized by a popular vote to subscribe for the stock of a railroad company, and to pay in county bonds to be issued by themselves.

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A tax payer filed a bill in the County Circuit Court, and procured a preliminary injunction prohibiting the issue of the bonds. Before the final hearing, this injunction was dissolved; at the final hearing, the bill was dismissed. There had been no injunction in force after the preliminary injunction was disposed of. The complainant appealed to the Supreme Court of the State. There, in due time, the decree of the lower court was reversed, and the case was remanded with directions to enter a decree in conformity to the prayer of the bill. But between the time of the dissolution of the preliminary injunction and the final hearing in the court below, the supervisors subscribed for the stock and issued the bonds. The same question arose as to the bonds there as here. This court held that in the hands of a *bona fide* holder they were free from objection and could be enforced. Our examination of this case with respect to the bonds here in question constrains us to come to the same conclusion. There is no difference between the two cases in any material point. In error to the United States Circuit Court, Northern District, New York. Judgment affirmed. *Town of Orleans* v. *Platt.* Opinion by Swayne J.—*Albany Law Journal.*

SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

REYNOLD'S EX'OR *v.* CALLAWAY'S EX OR.

JANUARY TERM, 1879.

R's executor brought an action of debt upon a bond against the executor of C. C. was one of four obligors on the bond—all of whom were dead but T., and T. was a discharged bankrupt. The only issue in the case was on the plea of payment. HELD:

1. That T. having been released from the payment by his discharge in bankruptcy, was a competent witness at common law for the defendant, to prove payment of the debt.
2. The statute, Code of 1873, §§ 21, 22, was intended to remove incompetency in certain cases, and not to create it in any case; and T. being a competent witness at common law, is not rendered incompetent by the statute. And this especially since the act of April 2, 1877, Sess. Acts of 1876-77, ch. 256, amending the former act, which,

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though passed after the suit was brought, was in force at the time of the trial, and, therefore, governs the case.

The case is stated by Judge MONCURE in his opinion.

Haymond for the plaintiff in error.

J. A. Early for the defendant in error.

MONCURE P. delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit Court of Franklin county, rendered on the 16th day of August, 1876, in an action of debt brought by Stephen Watts, executor of Charles B. Reynolds, deceased, against George E. Dennis, executor of James S. Callaway, deceased. The action was brought on a single bill obligatory for the sum of four hundred and forty-six dollars and forty-five cents, dated the 30th day of March, 1853, executed by the said James S. Callaway and Peter G. Price, Peter H. Callaway and Thomas Callaway as joint obligors, and payable on demand to the said Charles B. Reynolds. The action was tried on a single issue, joined on a plea of payment by the defendant's said testator. On the said trial, the jury found a verdict for the defendant, and the court rendered judgment on the said verdict accordingly.

Two bills of exceptions to rulings of the court on the trial of the action were made parts of the record, on motions of the plaintiff; but it is necessary to notice here only the first of them, which is in these words:

"Be it remembered, that at the trial of this cause, the defendant offered to examine Thomas Callaway as a witness in his behalf, to which the plaintiff, by counsel, objected, on the ground that said Callaway was not a competent witness—he being one of the obligors to the bond in the declaration mentioned, and the other obligors and the obligee being dead —the said T. C. Callaway having been discharged in bankruptcy; but the court overruled said objection, and permitted the said witness to testify. To which ruling of the court, the plaintiff, by his counsel, excepted, and prayed that this, his bill of exceptions, be signed, sealed, and made a part of the record, which is accordingly done."

The plaintiff applied to a judge of this court for a writ of error and *supersedeas*, which were accordingly awarded.

The only assignment of error in the said judgment, made by the said plaintiff, by counsel, is:

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"That the said Circuit Court erred in its ruling that Thomas Callaway, the only surviving party to the bond sued on—which bond was the subject of investigation in said action—was competent to testify in behalf of the defendant, whose interest was adverse to that of the plaintiff, whose testator was the obligee to said bond. (See sections 21 and 22, chapter 172, Code of 1873.)"

It was admitted on the trial that the said Thomas Callaway, whose testimony tended to prove that the debt sued for had been paid more than fifteen years before the action was brought, had been discharged in bankruptcy before he gave his testimony. He was, therefore, released by his said discharge from any liability for the said debt, and was, on common law principles, a competent witness in the said action to prove the payment of the said debt. It is not pretended, and was not on the trial of the action, so far as the record shows, that the debt was not such a one as was released by the said discharge in bankruptcy, and it must be presumed that it was, in the absence of evidence to the contrary. That a discharge in bankruptcy removes the incompetency of a person as a witness in such a case, on common law principles, is well settled by authority, as is clearly shown in the books referred to by the learned counsel for the defendant in error. 1st Phillips on Evidence, page 133, Cowen & Hill's edition; 1st Greenleaf on Evidence, sec. 430; *Murray* v. *Judah*, 6 Cow. R., 484.

Then, Thomas Callaway, having clearly been a competent witness on the trial of the action, according to the principles of the common law, the only remaining question is, Did the statute referred to in the assignment of error render him incompetent?

That statute was enacted to remove incompetency in certain cases, and not to create it in any case. The sections and chapter referred to are §§ 21 and 22 of ch. 172.

Section 21, in very broad terms, removes incompetency by declaring that "no witness shall be incompetent to testify because of interest; and in all actions, suits, or other proceedings of a civil nature, at law or in equity, before any court, or before a justice of the peace, commissioner, or other person having authority by law, or by consent of parties, to hear evidence, the parties thereto, and those on whose behalf such action, suit or proceeding is prosecuted or defended, shall, if otherwise competent to testify, and subject to the rules of evidence and practice applicable to other witnesses, be competent to give evidence on their own behalf, and shall be

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competent and compellable to attend and give evidence on behalf of any other party to such action, suit or proceeding, except as hereafter provided."

Certainly, there is nothing in that section which can create incompetency in any case. Its only purpose is, to remove incompetency in certain cases where it existed. Then the question is, Whether there be anything in the next section which could render incompetent a witness who was thus made competent by principles of the common law?

Section 22 was obviously and professedly intended only to enumerate and define the exceptions contemplated and referred to in section 21, and not to create incompetency in any case where it did not exist at common law. Its language is: "Nothing in the preceding section shall be construed to alter the rules of law now in force in respect to the competency of husband and wife as witnesses for or against each other, during the coverture or after its termination; nor in respect to attesting witnesses to wills, deeds or other instruments; and where one of the original parties to the contract, or other transaction which is the subject of the investigation, is dead, or insane, or incompetent to testify by reason of infamy or other legal cause, the other party shall not be admitted to testify in his own favor, or in favor of any other party having an interest adverse to that of the party so incapable of testifying, unless he shall be first called to testify in behalf of such last mentioned party; and where one of the parties is an executor, administrator, curator or committee, or other person representing a dead peason, an insane person, or a convict in the penitentiary, the other party shall not be admitted to testify in his own favor, unless the contract, or other transaction in issue, or subject of investigation, was originally made or had with a person who is living and competent to testify, except as to such things as have been done since the powers of such fiduciary were assumed."

It is plain that neither this section nor the next preceding was intended to apply to a person offered as a witness in a cause who had no interest in the subject in controversy in the cause, and was, therefore, not incompetent to testify because of interest. As before stated, section 21 is a general provision removing the incompetency of a witness to testify "because of interest," but containing an exception in these words, "except as hereafter provided;" and section 22 embraces the exceptions thus referred to in section 21. These two sections are to be construed with that view, if the words therein used will reasonably admit of that construction, as

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we think they will. The words, "the other party shall not be admitted to testify in his own favor," in section 22, plainly indicate that the party here referred to is a person having an interest in the subject of controversy. How else could he be admitted to testify *in his own favor?* But this meaning is rendered still more plain by the words which immediately follow the words last quoted from the same section: "Or in favor of any *other* party having *an interest* adverse to that of the party so incapable of testifying," &c. The words "other" and "interest" in this sentence, show that the true construction of the words "in his favor," is as aforesaid.

See what is said by Judge Burks in delivering the opinion of this court in the case of *Borst* v. *Nalle and als.*, 28 Gratt., 423, 434, referred to by the counsel of the defendant in error in this case.

But if there could have been any reasonable ground for doubting that such was the true construction of section 22 as it stands in the Code of 1873, the question is conclusively settled by the act approved April 2, 1877, entitled "an act to amend and re-enact section 22, chapter 172, Code of 1873, in relation to parties to suits testifying in certain cases." Acts of Assembly, 1876–77, p. 265, chap. 256. That act concludes with a proviso in these words: "Provided, however, that no witness who would have been competent to testify as the law stood before the passage of this and the preceding section, shall be rendered incompetent hereby."

This act was in force from its passage, which was before the trial of the action in this case; and, therefore, the act governs the case.

This act was passed after the decision of this court in *Borst* v. *Nalle and als.*, *supra*, and, no doubt, in consequence of what was said by the court in that case—at least, the proviso aforesaid was adopted in consequence of what was so said.

We have examined the two cases referred to by the learned counsel for the plaintiff in error—*Mason and als.* v. *Wood*, 27 Gratt., 783, and *Grigsby and als* v. *Simpson, ass'nee, &c.*, 28 Id., 348—but they do not affect the views above presented. We, therefore, deem it unnecessary to comment upon them.

We are, therefore, of opinion, that there is no error in the judgment of the Circuit Court, and that the same ought to be affirmed.

JUDGMENT AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

WATKINS AND ALS. *v.* YOUNG AND ALS.

NOVEMBER TERM, 1878.

1. If a gift unexplained, in the lifetime of a father who dies intestate, to one of his children, is to be presumed in law to be an advancement, this presumption may be repelled by evidence.
2. Whether a gift by a father in his lifetime to a child, is an absolute gift, or an advancement, depends upon the intention of the father; and his statements or declarations made at the time of the gift, or subsequently, are competent evidence to shew what was his intention in making the gift. In this case, the evidence is conclusive to prove it was an absolute gift, and not an advancement.
3. The only issue in the cause being whether the gift of the father was intended to be absolute or an advancement, and all the evidence having been taken with reference to that issue, it was proper for the court to decide it without a reference to a commissioner to inquire and report upon the question.

The case is fully stated by Judge CHRISTIAN in his opinion.

S. F. Beach for the appellants.

Claughton and *Stuart* for the appellees.

CHRISTIAN J. This is an appeal from a decree of the Corporation Court of Alexandria. The object of the suit was to compel the appellee, Mrs. Virginia Young, to bring into hotchpot an alleged advancement made to her by her father, John T. Evans, in his lifetime, of the sum of about fourteen thousand dollars. John T. Evans died intestate in the year 1875, seized and possessed of real estate of considerable value, and of a large personal estate, amounting to, at least, one thousand dollars. He left surviving him three children—Mary C., who intermarried with D. S. Watkins; and Maria, who intermarried with Johnee Ellis, and the appellee here, Mrs. Virginia Young. The bill was filed by Watkins and wife and Ellis and wife, in which they allege that the said John T. Evans, during his lifetime, made large advances out of his personal estate, to his said daughter, Virginia Young; that on the 20th of February, 1872, he gave to her fifty shares of the surplus stock of the Citizens National Bank of Alexandria, and on the 1st March, 1872, he gave to her eighty-

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five shares of the capital stock of the First National Bank of Alexandria; that the value of the Citizens National Bank stock, at the date of said gift, was not less than five thousand dollars, and the value of the First National Bank stock, at the date of said gift, was not less than ten thousand dollars; and that this property was given to and received by the said Virginia Young by way of advancement to her.

The bill, after alleging that the debts of the decedent are small and few, and that the personal estate is now ready for distribution, prays that a distribution of said personal estate may be made, and that the said Virginia Young may be required to bring into hotchpot the advancements made to her as aforesaid; and there is a prayer for general relief; and that the defendants, Evans' administrator, and the said Virginia Young, may answer all the allegations of the bill on their several corporal oaths.

This bill was filed on 20th October, 1876, and on the 6th December, 1876, Mrs. Young filed her sworn answers, responding to the allegations of the plaintiff's bill as follows:

This respondent, for answer to the complainant's bill, or to so much thereof as she is advised it is material for her to answer, answers and says as follows:

1st. This respondent denies the truth of the allegations in said bill contained, to wit: That the respondent ever received an advancement from her late father during his lifetime.

2d. The respondent admits that her late father, during his lifetime, did assign to her fifty shares of the capital stock of the Citizens National Bank of Alexandria, Virginia, and eighty-five shares of the capital stock of the First National Bank of Alexandria, Virginia, and that she has, from the date of said assignment, held the certificates of said stock as her own absolute property.

3d. But this respondent saith that such assignment was not an advancement, but that it was made upon a good and meritorious consideration, recognized and acknowledged by her late father, and that the said assignment, when made to the respondent, was so done as an absolute gift, in fulfilment of his repeated promises, based upon the good and meritorious consideration aforesaid.

And this defendant having fully answered the said bill of complaint, prays to be hence dismissed with her reasonable costs in this behalf sustained. And she will ever pray, &c.

To this answer the plaintiffs excepted, because it does not

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set forth the facts which constitute the good and meritorious consideration—upon which it is said, the certificate of stock in the bill mentioned were assigned to her.

This exception was sustained by the court, and it was ordered "that the defendant, Virginia Young, on or before the first day of the next term, do answer and set forth the facts which constitute the good and meritorious consideration upon which the certificates of stock are alleged to have been assigned to her."

In obedience to this order of the court, Mrs. Young filed her amended answer, in which, after repeating what she had affirmed in her original answer, declares:

"This defendant further answers and says: That there were divers good reasons for this gift from her late father, and that the defendant should have this gift without any reference to the distribution of her father's estate at the time of his death.

This defendant was a dutiful and faithful child, whose conduct and deportment was a comfort and consolation to her father, and in this particular there was a difference between her and the other children.

The defendant further says, that she was living in the country comfortably, when her late father told her that if she would break up housekeeping and come to the city of Alexandria and take care of his father-in-law, who was imbecile from old age, and Miss Carrie Hewitt, who was insane, that he would reward her well. At his request, and upon this assurance, the defendant broke up her housekeeping in Fairfax county, at great inconvenience and loss, and came to Alexandria, and nursed and cared for the imbecile old gentleman and the insane lady for more than two years. The defendant states these facts in order to show that there were good and sufficient reasons for the declarations made by her late father at the time of the assignment and delivery of the stock; that he assigned it to her absolutely, and not by way of an advancement. And the defendant says that the stock given to her by her father was intended by him, and so declared at the time, to be an absolute gift, and not by way of advancement."

To this amended answer, the plaintiff filed a general replication, and the whole issue made by the pleading and passed upon by the court below was, whether the stock transferred and assigned to Mrs. Young by her father in his lifetime,

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was intended as an advancement to her, for which she was to account in the distribution of his estate, or whether it was an absolute gift to her. Upon this issue, all the depositions were taken, and the case coming on to be heard on the bill, amended answer and depositions, with certain admitted statements of the cashier of the Citizens National Bank, and the cashier of the First National Bank of Alexandria, read as evidence by agreement of counsel, the said Corporation Court was of opinion that the transfer of stock to the defendant, Virginia Young, in the bill and proceedings mentioned, was not by way of advancement, but was an absolute gift to her; and the plaintiff's bill was accordingly dismissed.

From this decree, an appeal was allowed by one of the judges of this court.

I am of opinion that there is no error in this decree.

Questions of advancement are always questions *of intention*, and the difficulties of solving them are generally found in the kind of evidence by which such intention is to be proved.

In some of the States it is held, that a gift of any considerable amount is *prima facie* an advancement, and is to be treated, in case the party to whom the advancement was made comes in for a distributive share, as a debt due from him to the estate. *Grattan* v. *Grattan et als.*, 18 Ill. R., 170; 11 John R., 91; 16 Mass. R., 200. In other States, it has been held, that the mere gift, unexplained by father to child, does not make even a *prima facie* case in favor of an advancement; but that there must be evidence of intention, to treat it as an advancement, beyond the unexplained act. The mere gift furnishes no *prima facie* case of an intention to constitute an advancement. *Johnson* v. *Belden*, 20 Conn. R., 322; *Hatch* v. *Straight*, 3 Conn. R., 31; 2 Pich. R., 337; 10 Paige's Ch. R., 618.

But whatever conflict may seem to exist on this question, all the cases agree, that a gift in the lifetime of the intestate unexplained, is only *a presumption* in favor of an advancement, and makes only a *prima facie* case, which, with the legal presumption, may be rebutted by evidence.

In the case before us, it is clearly proved by disinterested and unimpeached witnesses, that the gift by her father to Mrs. Young, was not made by way of advancement, but as an absolute gift, independent of her right to share in the distribution of his estate. It is proved that he had a motive for making this discrimination in favor of this daughter. He was a man of wealth—his personal estate being worth, at least, one hundred thousand dollars. She was a widow, while his

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other two daughters were married. *She* was evidently his favorite child. He said of her to one witness: "She has done a great deal for me; indeed, she has done more than any one could have done for me, and is the only child I have that has given me any comfort." Surely the father had a right to dispose of his own as he thought proper; and the gift of $13,500, as he estimates the value of the stock assigned to his widowed daughter, was not, out of personal estate worth $100,000, an unreasonable gift to a dutiful and favorite daughter, who he declares was the only child he had who had given him any comfort. He repeatedly declared that the gift was *independent* of what Mrs. Young would be entitled to at his death. This declaration was made certainly to three witnesses, who are disinterested and unimpeached. It is well settled that the declarations of the decedent made at the time and subsequent to the gift, may be given as evidence to shew that the gift was not made as an advancement, but as an absolute gift, and *vice versa*. Whether the gift was an advancement or an absolute gift being a question of intention, the declarations of the donor, made at the time or subsequently, is competent evidence to show such intention. 19 Maury R., 332; 23 Penn. St R., 85; 29 Ind. R., 249; 20 Cowen R., 322; 16 Geo. R, 16; 23 Cowen R., 516; 16 Mass. R., 108; 4 Abbott's P. R, 1; 2 Phil. Ev.; Cowen & Hill's Notes, Ed. 1859, p. 705.

But the evidence further conclusively shews, not only that the decedent recognized Mrs. Young as a faithful, dutiful daughter, in whom alone (as he expressed it) of all his children he had any comfort; and, therefore, designed to give to her a larger portion of his estate than the other children, but it is proved that there were special considerations which induced him to make her this gift, by way of compensation for services rendered. In her answer, Mrs. Young says (and it is uncontradicted by a single witness, except as to the precise period during which services were rendered to Miss Carrie Hewitt), "that she was living in the country comfortably, when her late father told her that if she would break up housekeeping and come to the city of Alexandria, and take care of his father-in-law, who was imbecile from old age, and Miss Carrie Hewitt, who was insane, that he would reward her well. At his request and upon this assurance, she broke up her housekeeping in Fairfax county, at great inconvenience and loss, and came to Alexandria and nursed and cared for the imbecile old gentleman and the insane lady for more than two years."

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It is proved, beyond all question or doubt, that her father recognized these services which she engaged to perform, and did perform up to the death of the parties named, as in part, if not in full, consideration of his act in assigning to her the stock referred to. One witness (Mrs. Mary E. Williams) says: "I had a conversation with him (Mr. Evans) in reference to the stock. He said he had given it to her (Mrs. Young) for her services. To use his own words, that he had paid her for waiting on Carrie Hewitt and grandfather (that was Mr. Blue), who was living at that time. He said he had given it to her to pay her for her services, and that it was to be independent of anything she would get at his death."

To another witness (Miss Jane Smith), Evans said, speaking of this gift to Mrs. Young, "She left her home and came and attended to mine, attended to Miss Carrie, and she is so kind to Grandpa Blue, that I gave her this bank stock for services she rendered to them. She has done a great deal for me; indeed, she has done more than any one could have done for me, and is the only child I have that has given me any comfort." I said, "Mr. Evans, how much have you given Mrs. Young?" He said, "he had given her so much of one portion (of stock) and so much of another portion—the whole amounting to thirteen thousand five hundred dollars: *that* (he said) I have given her in her own name, independent of what she shall have at my death; that is her money, and she can do as she pleases with it. She earned it and I have paid her."

To another witness (Miss Lizzie Cannon), speaking of the gift to Mrs. Young, Evans said: "She is a good, deserving girl, and she has earned it; he also said this was to be independent of what she would have when he died; he also said he had made it over in her name for spending money, to do as she liked with; he told me this was for services rendered him in taking care of Miss Carrie and Grandpa Blue, and that he wanted Mrs. Young to remain with him as long as he lived, for he could not get along without her."

This positive evidence of these witnesses is confirmed (if confirmation were necessary) by the statements admitted, by agreement of counsel, of the cashiers of the Citizens Bank and First National Bank of Alexandria, shewing that the stocks held by Evans in said banks, respectively, had been transferred on the books by him to Mrs. Virginia Young, and the dividends paid to her—one of them stating that at the time of the transfer in the Citizens Bank, Evans remarked, "he had given the stock to Jenny," meaning his daughter, Mrs. Young.

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To the sworn answer of Mrs. Young, sustained by the evidence of these five witnesses, so positive and conclusive, we have offered but the testimony of *one* witness, and he is the son of one of the plaintiffs, who has the deepest interest in proving that this gift of between thirteen and fourteen thousand dollars was intended as an advancement. He testifies to transactions and declarations occurring when he was a mere boy, and altogether, if the utmost credit is given to his evidence, it cannot outweigh the testimony of five witnesses, and the sworn answer of Mrs. Young, to all of which it is a positive contradiction. The answer is sustained by the overwhelming proof in the cause, and cannot be overthrown by the vague and uncertain statements of a single witness; and must therefore stand as true.

It has been urged, however, that the amount given was altogether disproportionate to the services rendered—that the insane lady died a few months after the services began, and that the imbecile old man known as Grandpa Blue, lived only two years after Mrs. Young's services commenced.

But surely it is not for this court to place any limit upon the liberality or generosity of a father of affluent means and large wealth, towards a loved and favorite daughter, of whom he said, "she was the only child who had given him any comfort." It is not for us to say *what* compensation is just and fair. He had a right to fix that compensation. He was dealing with his own property, and with his own favorite child, towards whom he had a right to be liberal and generous. But considering his estate and the circumstances of the case, it was not an unreasonable gift to his daughter. His personal estate alone was valued at at least one hundred thousand dollars. It was held in Pennsylvania, that a gift to a son (where the three other children were married daughters) of $2,500, out of an estate valued at $25,000, was not an extravagant provision for the son. 23 Penn. St. R., 87, Lawson's Appeal. Surely thirteen or fourteen thousand, under the circumstances of this case, was not an extravagant or unreasonable allowance. It is true the insane lady whom Mrs. Young left her home to attend and nurse, together with the imbecile old man, died very soon after her services commenced. But she might have lived for many years, no one could tell how long. Mr. Blue, the imbecile father-in-law, in his dotage, blind and helpless, and who had to be attended to as a child, did live for two years. Was the compensation unreasonable under the circumstances? But who shall limit the compensation which a father chose to give of his own, to

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his own child? If he chose to be generous and liberal towards his own favorite child, who has authority to gainsay or limit such generosity?

Certainly this court has no such authority. I fully concur with the court below in the opinion expressed in its decree, "that the transfer of the stock of the First National Bank of Alexandria, and of the stock of the Citizens National Bank of Alexandria, in the bill and proceedings mentioned to the defendant, Virginia Young, was not by way of advancement to her," for which she has to account to the other heirs in the distribution of her father's estate, and that the court below was right in dismissing the plaintiffs' bill.

It has been suggested, though not stated as ground of error in the petition of appeal, that the decree was premature, and that the matter ought to have been referred to a commissioner of the court for inquiry and account. I can conceive of no reason why an account should have been ordered in this case. There was but one issue, and that distinctly made by the bill, the amended answer, and replications thereto; and that single issue was whether the assignment of the stock in the bill and proceedings mentioned was an advancement to Mrs. Young, or an absolute gift to her by way of compensation for services rendered. All the depositions were taken with reference to this issue. Nobody asked for an account, but this sole question was submitted to the court and decided.

This court has held in *Lee County* v. *Fulkerson*, 21 Gratt., 182, that a court of equity will not decree an account for the purpose of furnishing evidence in support of the allegations of a bill.

Judge Staples, delivering the unanimous opinion of the court in that case, said; "This court has repeatedly decided that an account should not be ordered in any case unless shown to be proper and necessary by the pleadings and proofs in the cause."

Surely it cannot be said that there is anything in the pleadings and proofs *in this cause* to make an account proper and necessary. In 2 Rob. Pract. (old), p. 359, the learned author says: "In Virginia, nothing in chancery practice has been productive of so much mischief as orders of account unwisely made. Cases have frequently arisen in which if a particular point were determined one way, an account would be proper; if determined the other way, an account would not be required. In such cases, one court has often directed an account before it decided the point, upon the decision of which, the propriety of taking the account depended. After much

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time consumed, and much money expended in obtaining the account, there would be a decree in the cause, ascertaining that the account which had been ordered, was wholly unnecessary. The Court of Appeals has discountenanced such practice."

I think the case before us is exactly a case in which such a practice ought to be discountenanced, especially where no account is asked by any party to the cause, but where all parties submit their case to be determined upon the pleadings and proofs. To re-open it now and send the case back for an account by a commissioner, would be to encourage a mischievous practice, which has so repeatedly been discountenanced and reprobated by this court.

Upon the whole case, I am of opinion that there is no error in the decree of the Corporation Court of the city of Alexandria, and that the same ought to be affirmed.

The other judges concurred in the opinion of *Christian J.*

DECREE AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

WINE *v.* MARKWOOD AND ALS.

NOVEMBER TERM, 1878.

1. Pelter, by his will, gave to his four sons, George, Joseph, James and Samuel, each a parcel of land, to George and Joseph in fee, and to the other two each devise is, except as to the land devised, the same, and is as follows:

4th. I will and bequeath to my son George the use and benefit of the home place, which I now occupy, containing about 300 acres, during his natural life. He then says:

Should my sons George, Joseph, James and Samuel, or either of them, die without issue, I direct that what has been bequeathed to them shall be equally divided between the surviving brothers, James and Samuel, for their use and benefit during their natural life. HELD:

   1. That Samuel took but a life estate in the land devised to him.
   2. The term issue in the limitations over, under the Virginia Statutes, means issue living at the death of the first taker, or born within ten months thereafter.
   3. If Samuel has issue living at his death, or born within ten months thereafter, his issue will take the land devised to George by implication.

2. Samuel sells in fee simple a part of the land devised to him. The purchaser must elect to give up the land, or take such title as George can give him to it.

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This case was heard at Staunton, but was decided at Richmond. It was a suit in equity in the Circuit Court of Augusta county, brought in February, 1875, by John Wine against R. M. Markwood, John Landes and Sampson Pelter, to enforce a judgment which the plaintiff as assignee of Pelter had recovered against Markwood and Landes. The bill alleged that the plaintiff's debt was given for part of the purchase-money of a tract of twenty-two acres of land sold by Pelter to Markwood; that a vendor's lien was reserved in the contract, and that Pelter was ready to convey the land to Markwood upon payment of the purchase-money. And the prayer was for the sale of the land and payment of the plaintiff's debt; and for general relief.

Markwood answered, admitting the purchase of the land from Pelter, and that plaintiff's debt was for part of the purchase-money. He says he is ready to pay all the purchase-money due on the land on getting a good title to it; but since making the first payment, he has been advised that Pelter cannot make a good title in fee simple to the land. That it is a part of the land devised to said Pelter by his father Sampson Pelter, and that said defendant, Pelter, did not take a fee simple title under the will.

The case turns upon the construction of the will of Sampson Pelter, deceased; and that, or so much of it as is material to the question in issue, is given in the opinion of the court.

The cause came on to be heard on the 20th of June, 1878, when the court held that Sampson Pelter, Jr., was only vested with a life estate in the land sold to Markwood; and that the plaintiff was therefore not entitled to a specific performance of the contract of sale at the time of the decree; but that Markwood was entitled to an election to perform or disclaim the contract. And it was ordered that Markwood should, within sixty days from the entry of the decree, fill in the papers of the cause, his election in writing to take the title of the said Sampson Pelter, Jr., and perform the contract or to disclaim it. And if he should disclaim the contract, certain accounts were ordered. And Wine thereupon applied to a judge of this court for an appeal; which was answered.

J. M. Quarles for the appellant.

There was no counsel for the appellee.

Moncure P. delivered the opinion of the court.

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This case involves a question as to the construction of the will of Sampson Pelter, deceased, who died in December, 1865, leaving a will bearing date the 24th day of November, 1856, which was recorded on the 26th day of March, 1866, in the County Court of Augusta county, in which county he resided at the time of his death. The question is, whether Sampson Pelter, Jr., son of the said testator, was entitled under the said will, to a fee simple estate, or only to a life estate, in the land given him by his father by the said will. The court below, in the decree appealed from, decided that he was only entitled to a life estate in the said land under the said will. Is that decision correct, or is it erroneous?

It seems that the testator had four sons and one daughter, and devised his land in several portions to his four sons, giving to his daughter a nominal legacy only. The portions of the will which seem to be material to be stated are as follows:

"I Sampson Pelter," &c., "do make this my last will and testament," &c.

"1st. I will and bequeath to my son George, the 'Awd Farm,'" &c.

"2d. I will and bequeath to my son Joseph, the Old Thomas Farm," &c.

"3d. I will and bequeath to my son James, the use and benefit of the farm on South river, known as the Tonas or Croft Place," &c., "during his natural life."

"4th. I will and bequeath to my son Samuel (that is Sampson), the use and benefit of the home place, which I now occupy, containing about 300 acres, during his natural life. I will and bequeath to my daughter Nancy Uremer, the sum of five dollars."

Then follow various other provisions of the will, none of which are material to be stated here except the following, viz.:

"Should my son George, James, Joseph and Samuel, or either of them, die without *ishue* (issue), I direct that what has been bequeathed to them shall be equally divided between the surviving brothers, James and Samuel, for their use and benefit during their natural life."

Thus we see that by the first and second clauses of the will, an estate in fee simple is given to each of the sons, George and Joseph, while by the third and fourth clauses, an estate for life only is given to each of the sons, James and Samuel, or Sampson; and that by the subsequent provision before stated of the will, there is a limitation over of the portion of each at his death, on the contingency of his dying without *ishue* (issue).

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An estate in fee simple is given to each of the sons, George and Joseph as aforesaid, although the gift to them is without any words of limitation thereto annexed, it being provided by law that "where any real estate is conveyed, devised or granted to any person without any words of limitation, such devise, conveyance or grant shall be construed to pass the fee simple, or other the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance or grant." Code, p. 889, ch. 112, sec. 8.

In this case it seems the testator owned the absolute fee simple estate in the lands devised by him to his sons, George and Joseph respectively; and therefore his devise of the said lands to them was of the said fee simple estate therein, subject only to the limitation over contained in the will as aforesaid, on the contingency of their dying without issue respectively, which means a dying without issue living at the time of the death of the first taker, or born to him within ten months thereafter. It being further provided by law that "every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring, or descendant, or other relative, shall be construed a limitation to take effect when such person shall die not having such heir or issue, &c., as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." Id., sec. 10. The intention of such limitation is not, in this case, otherwise declared.

But the devise of the testator to his two sons James and Sampson respectively, was expressly of the use and enjoyment of the land for their natural life only, and not in fee simple, and there is nothing in any other part of the will which enlarges this life estate into a fee simple estate or any estate larger than a life estate. For the contingent limitation to the surviving brothers in the event of the death of his four sons, or either of them, without issue as aforesaid, is expressly declared, as to James and Samuel, or Sampson, to be "for their use and benefit during their natural life" only. If the word issue in this case had been intended to mean issue indefinitely, as of no time, instead of issue living at the death of the first taker, as under the statute aforesaid, even then the life estate of the first taker would not have been enlarged by the effect of the limitation over into an estate of fee sim-

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ple. It being further provided by law that "where any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs or the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body." Id., sec. 11.

The court is therefore of opinion that Sampson Pelter, Jr., was entitled under the said will only to a life estate in the land therein devised to him

But another question is raised in the argument of the learned counsel for the appellant in this case, whether, at the death of the said Sampson Pelter, leaving issue living at his death, such issue would be entitled under the said will to the land given thereby to the said Sampson for life, or whether George Pelter would be entitled to it as residuary devisee under the will; the said counsel contending that the said George Pelter would be so entitled, and not such issue of the said Sampson Pelter.

The court is of opinion that such issue would be so entitled, and not the said George Pelter.

The residuary devise under which it is contended that the said George Pelter would be so entitled is in these words:

"The balance of my estate, of whatever character or kind it may be, at the expiration of the ten years before mentioned, I will and bequeath to my son George."

This clause was not intended to embrace any interest in any of the lands devised to the testator's four sons respectively by the first four clauses of the will. After making these devises, the testator, by his will, creates a trust for the purpose of paying his debts, by directing that his son George shall have the full possession, use and benefit of all the estate, real and personal, of which he may die possessed, except certain of the farms devised to some of his sons as designated in the will; and he directs that all his personal property shall be inventoried and valued by five disinterested freeholders, and at the expiration of the said term of ten years, shall be accounted for and disposed of as thereinafter named, except what may perish or naturally decay and wear out. He then directs that his executor shall sell, at public sale, all the personal estate that may be left after the expiration of the ten years, except his slaves, which "shall be valued as the personal property above named, by five disinterested freeholders and equally divided between George, Joseph, James and Samuel. James and Samuel only to have the use and benefit of said slaves during their natural life"—except John,

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Junius and Abraham, whom he, in effect, emancipates, and in whose favor he creates a trust.

Then immediately follows the residuary clause hereinbefore inserted.

The testator then expresses a desire and wish that his son George should never let his daughter Nancy Uremer "suffer or want for the necessaries of life while he may live." After which, immediately follows the clause hereinbefore inserted, in these words:

"Should my son George, James, Joseph and Samuel, or either of them, die without issue, I direct that what has been bequeathed to them shall be equally divided between the surviving brothers, James and Samuel, for their use and benefit during their natural life." And then follow several other clauses which need not be inserted or stated here.

Now it is expressly declared by the clause twice hereinbefore inserted, that in the event of the death of either of the four sons of the testator without issue, that is, issue living at such son's death, the estate given by the will to him "shall be equally divided between the surviving brothers. In that event, therefore, there can be no doubt or difficulty. The language of the will is express, and the meaning is plain."

But who will be entitled to the estate given to Samuel (or Sampson) Pelter in the event of his death leaving issue then living? Will such issue be entitled, or will George Pelter, as residuary devisee, be entitled, or will the heirs at law of the testator be entitled? Clearly, we think, such issue will be entitled by plain implication of the will. Can there be a doubt that the testator so intended? And is not such intention sufficiently expressed, or at least implied, in the will? Why did the testator give the portion of his son Sampson to his surviving brothers only in the event of his dying without issue? Why, but because in the only other possible event, to wit.: the death of his said son leaving issue living at such death, he intended that such issue should have the said portion? There is no real or necessary conflict between such intention and the preceding clause containing the residuary devise to George Pelter as aforesaid. They are rendered perfectly consistent by the context.

It would make no difference in the result of this suit if, in the event of the death of Sampson Pelter, leaving issue living at his death, the heirs at law of the testator should be entitled to the said portion, instead of such issue, under the will; for such issue would be a part of the said heirs at law.

The learned counsel for the appellant, in his argument of

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this case, referred to a great many books and cases in support of his views, which we do not consider it necessary to review in this opinion. They would, no doubt, be conclusive in his favor, if the case had occurred before the revision of our statute law in 1819; but as it occurred after the said law was then amended, embracing in the amendments sections 9 and 10, chap. 112, p. 889, of the Code before referred to, we think the law is clearly the other way. Before those amendments were made, a devise to A for life, and if he died without issue then to B, created an estate tail in A, under the rule in *Shelley's Case*, and the issue of A was thus provided for. But when, by one of those amendments, it was declared, that "every limitation in any deed or will contingent upon the dying of any person without heirs," &c., shall be construed a limitation to take effect when such person shall die not having such heir, &c., as the case may be, living at the time of his death, or born to him within ten months thereafter; the issue of A living at the time of his death, or born to him within ten months thereafter, would be wholly unprovided for, unless they can be considered as tenants in remainder at the death of A, by implication of the will; and such would seem to be its plain implication in such a case. There is no decision of this court to the contrary; and although some of the decisions cited by the learned counsel for the appellant, may seem to be to the contrary; yet such decisions, if there be any such, are not binding authority upon this court, and do not, in our opinion, expound the law correctly.

We are, therefore, of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

DECREE AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

JORDAN *v.* EVE, TRUSTEE, &C.

NOVEMBER TERM, 1878.

1. E. sells to J. a tract of land through which a public highway runs, and conveys the land to J. with a covenant against incumbrances. The public highway is not an incumbrance which is included in the covenant, and for which J. is entitled to compensation.
2. The land was conveyed by H. to E., and the deed was recorded on the 31st of December, 1866. At that time, there were judgments docketed against H. to the amount of $9,845; but nearly all of them were against H. as surety, and the principals in two amounting to more than $6.000, were good for the money. H. had land in the county after the conveyance to E., valued at $140,000. Upon a bill by E. against J. to subject the land under his vendor's lien for the payment of $4,800 of the purchase-money then due. HELD:
   The court may decree a sale of the land, reserving the power to dispose of the proceeds of sale so as to protect the purchaser.

By deed bearing date the 4th of October, 1866, and duly recorded on the 31st of December, 1866, M. G. Harman and wife conveyed to Robert C. Eve, a certain tract of land in the county of Augusta, on both sides of the McAdam road, stated to contain four hundred and twenty-nine acres and three roods—it being the same land granted to the said M. G. Harman by Ro. P. Harnsberger and wife, by deed bearing date the 22d of February, 1862. The consideration expressed in the deed was their love and affection for their daughter, Willie H. Eve, and her husband, the said Robert C. Eve; and it was upon trust for the use and benefit of these parties during their joint lives, but free from any incumbrance or charge of the said Robert C. Eve; and upon the death of either, for the joint benefit of the survivor and the children of Willie H. Eve, during the life of the survivor, and then to the right heirs of said Willie H. Eve. And Robert C. Eve, was empowered, with the consent of said M. G. Harman, to sell the property and re-invest upon the same trusts.

In 1872, Eve sold and conveyed to the Valley Railroad Company so much of said land as is occupied by the said railroad track, measuring fifty feet on either side from the centre line of said track, and containing about seven acres.

On the 28th of October, 1874, Eve made a contract with

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William Jordan to sell him the said tract of land, then stated to be four hundred and twenty-two acres; for which Jordan was to convey to Eve another tract of land called the Bagby farm, a certain lot in Staunton, and execute to him his notes for $10,210, in five equal instalments, with six *per cent.* interest from date, payable annually. And Eve and wife executed a deed, in which M. G. Harman joined, conveying the land to Jordan, and reserving a lien upon the land; and Jordan conveyed the Bagby farm and the Staunton lot to Eve, and executed to him his five bonds, each for $2,042, at one, two, three, four and five years, bearing interest payable annually. The deed from Eve to Jordan, though delivered, has not been put upon record, and is not in the record.

In October, 1876, Eve, as trustee, instituted a suit in equity in the Circuit Court of Augusta county against Jordan, and after setting out in his bill the foregoing facts, he stated that Jordan's first bond, and the one year's interest on all of them, had been long since due, and the second bond and the interest on the other three would be soon due; and he prayed that his lien upon the land might be enforced by a sale thereof, and from the proceeds of sale, the amount due him might be paid, and provision made for the payments that were to fall due, and for general relief.

Jordan answered the bill. He says he bought the land at $55 per acre, and it was represented by Harman, who, as agent of Eve, made the contract, that there were four hundred and twenty-two acres in the tract, and the amount of purchase-money was fixed on that basis; that he has discovered that this quantity was what was contained in the tract before the sale to the railroad company, and he insists he is entitled to an abatement for so much of the land as had been previously sold by Eve to the railroad company.

He further says, that the deed from Harnsberger and wife to Harman acknowledges the receipt of one-third of the purchase-money in cash, and two-thirds in due paper, and reserves a lien on the land; that there were a number of these bonds transferred to Harnsberger, and he believes the most of them are still unpaid. And he asks that an account may be ordered to ascertain how much of said four hundred and twenty-two acres of land has been heretofore conveyed to the Valley Railroad Company, and the relative value thereof as compared with the residue of the tract; and to ascertain whether any, and if so, which, of the claims assigned by Harman to Harnsberger still remain unpaid.

In November, 1876, the court made a decree referring the

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cause to Master Commissioner, J. W. G. Smith, with directions to take an account showing—

1. Whether there is any lien on the said land on account of the lien reserved in the deed therefor from Harnsberger to Harman, and if any such liens, the amount and extent thereof.

2. Whether there is any deficiency in quantity of land sold by Eve to Jordan: and if there is a deficiency in quantity, he will ascertain the extent thereof, and the abatement to be made in the purchase-money by reason of such deficiency.

3. Any other matters deemed pertinent by himself, or required by the parties to be so stated. And the commissioner was authorized to require the county surveyor to make such surveys of the land, &c.

In February, 1877, Commissioner Smith returned his report. On the first subject, he says that Harnsberger's lien on the land was duly released by deed of record in the clerk's office of County Court of Augusta.

On the second subject, he says he directed the county surveyor to make a survey showing what deficiency there was, first, by reason of the conveyance by Eve to the Valley Railroad Company; and second, by reason of a portion of the land being occupied by the Valley pike. Upon this survey, and evidence taken before him, he reports that, in respect to the railroad, Jordan is short in land to the amount of one acre, one rood and 5-45 poles, which, at $55 per acre, would be $70.60, for which Jordan would be entitled to credit as of October 29th, 1874.

That Jordan likewise claims credit for the value of the land occupied by the Valley pike or McAdam road; and the commissioner, not undertaking to decide the question of law, reports that if Jordan is entitled to this credit, then he is additionally short of land on this account to the extent of four acres, one rood and twenty-one poles, which, at $55 per acre, is $240.

Under the third head, the commissioner says, he deemed it pertinent and he was requested by Jordan to inquire into all judgments or other liens binding on said land as belonging to M. G. Harman at the date of the recordation of the deed from Harman and wife to Eve, trustee—viz., December 31st, 1866. Up to this date, he found, upon examination, twenty judgments against Harman, regularly docketed. Of these, there were twelve marked on the docket satisfied, or for benefit of said Harman. He makes a statement of each of the eight not so marked—the whole amount of which,

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with interest up to March 1st, 1877, is $9,845.85. Of these, however, they are in nearly, if not quite, all cases in which Harman was a surety, and one for $5,188.39, the commissioner says, if not already paid, certainly will be paid out of the assets of J. M. McCue, the principal in the debt, and of another for $922.05, the owner states in his deposition the principal on the debt, is, he believed, good for the money, and he has no idea that Harman will have to pay the money. These two judgments, amounting to $6,110.44, the commissioner deducts from the $9,845.85, leaving only $3,785.40 as lien indebtedness on the land.

The commissioner further reports that he has been called upon by the plaintiff's counsel to state specially what real estate and its value said M. G. Harman owned on the 31st of December, 1866, other than that conveyed to Eve, trustee. And he finds, that exclusive of the land bought by Jordan of Eve's trustee, the said M. G. Harman stood assessed on the commissioner's books of December 31, 1866, with real property in Augusta county of the value of $122,201.56. And it was proved that he had in the city of Staunton real estate valued at $20,000.

It appears from the assessor's land books that for the years 1867 to 1872, Eve, trustee, is assessed with four hundred and twenty-nine and three-quarters acres of land; and for 1873, he is assessed with four hundred and sixteen acres (thirteen acres having been transferred to Valley Railroad Company, as per note on assessor's books).

Jordan excepted to the report, first, because he should have been allowed a deduction for six acres sold to the railroad company, instead of one acre and a fraction allowed by the commissioner; and for the bed of the McAdam road four acres—making in all ten acres.

2. That the plaintiff sold to Jordan four hundred and twenty-two acres of land, the title good, and free from all incumbrance. The commissioner reports judgments against M. G. Harman prior to his conveyance to the plaintiff, amounting to $9,845.84, which now stand liens upon the land; and it was the duty of the plaintiff to remove them before he can demand the payment of the purchase-money.

3. The McAdam road is merely an easement; still it is an incumbrance, and should be removed by the plaintiff, or Jordan compensated for it.

The cause came on to be heard on the 16th of June, 1877, when the court overruled all the exceptions of defendant, and confirmed the report of the commissioner, and declaring

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that the court proposed to see to the proper disbursement of of the purchase-money due from Jordan; that Jordan should pay to the general receiver of the court the purchase-money then due—viz., $4,819.12, with interest on $4,084 from the 29th of October, 1874, subject to a credit of $70.60 as of that date, for the deficiency on the land, within ninety days from the rising of the court. And if not paid, commissioners named were appointed to sell the land on terms stated in the decree. And Jordan thereupon applied to this court for an appeal, which was allowed.

HELD as stated in the head-notes.

D. & A. H. Fultz for the appellant.

G. M. Cochran, Jr., for the appellees.

STAPLES J. delivered the opinion of the court.

DECREE AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

WARWICK *v.* WARWICK AND ALS.

December 5.

D. and J. in 1858 sold and conveyed to W. a tract of land for $42,500, payable in fifteen years, with interest, payable annually: and on the same day W. conveyed the land and another tract called R. in trust to secure the payment of the debt, and it was provided in the deed, that when $15,000 of the principal of the debt was paid, the lien on R. should cease and be released. In 1862, W. having ascertained that J., the holder of his bond, would receive Confederate money in payment of his debt, sold land he held as trustee of his wife and children, and paid J. $21,000. One payment of $2,900 was made by W. on the 2d of May, 1863, on the principal of the debt, out of the trust fund of his wife and children. Between the recording of the deed of trust and said payment by W., four judgments had been recovered against W. HELD:

1. For the payment of the principal of the debt made by W. out of the trust fund of his wife and children, there is an implied trust in their favor on the tract called R.
2. This implied trust refers back to the date of the trust deed to secure the payment of the debt, and has priority over the judgment creditors, though the judgments were recovered before the money was paid.

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3. The trust extends to the interest as well as the principal of the payment made out of the trust fund, and the interest commences from the time of the payment.
4. Though the payment by W. was made in Confederate money, yet it having been received by J. at par for his good debt, the payment is not to be scaled.
5. W. is not a competent witness to prove his payments of the debt made out of the trust fund of his wife and children. And this though the objection to his competency was not made until four questions had been put to him on his examination in chief.

This case was heard at Staunton but was decided at Richmond. By deed bearing date the 22d of Nov., 1858, Daniel and James Warwick, in consideration of the sum of $42,500, payable in fifteen years, with interest, payable annually from its date, conveyed to Jacob Warwick a tract of land lying in the counties of Amherst and Nelson, and containing sixteen hundred and seventy-two acres. And by deed of the same date, Jacob Warwick, and Ellen, his wife, conveyed this land and another tract of eight hundred and fifty acres lying on Rockfish river in the county of Nelson, to Henry Loving, Robert A. Coghill and N. F. Cabell, in trust to secure said debt. And it was provided in this deed, that the land on Rockfish was to constitute a security to the extent only of $15,000 of the said principal sum of $42,500, and when that amount of said principal sum was paid, the lien of the deed was to cease as to said tract of land, and should be released. Both of these deeds were admitted to record on the 28th of February, 1859. The bond recited in this deed was for $42,500, and by a subsequent arrangement, bonds were given for the interest, payable as it should fall due. This bond and some of the bonds for interest were assigned to John M. Warwick, of Lynchburg.

In July or August, 1862, William Massie, of Nelson county, the father of Mrs. Jacob Warwick, departed this life, leaving a will and a number of codicils, which, in the last named month, were duly admitted to probate, and Mrs. Massie, his widow, qualified as his executrix.

By his will, William Massie gave to Jacob Warwick, in trust for his daughter Ellen, the wife of Jacob Warwick and her children, one-eleventh of his estate, the same to be divided among the children at the death of Mrs. Jacob Warwick. And he made a like bequest upon the same trusts to Joseph Ligon, who had married his daughter Virginia.

Soon after the death of Wm. Massie, a suit in equity was instituted for the administration and division of the estate, and commissioners were appointed to divide the real estate

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among the devisees. Whilst the matter was before these commissioners, they suggested to Ligon and Jacob Warwick that one of them should purchase the share of the other; and Jacob Warwick professed his willingness to sell, if John M. Warwick, who held his bond, would receive Confederate money in payment on the bond. The division was postponed for some two days to enable him to ascertain this fact, and when the commissioners met again, Jacob Warwick expressed his willingness to sell his share of the land directed to be divided, and a contract was made between said Warwick and Ligon for the sale of said interest to Ligon, in consideration of the addition of $3,000 to the valuation put upon it by the commissioners; making the price amount to about $20,000. The commissioners reported their decision to the court; but owing to the condition of the country during the war, the report was not acted on by the court until 1866, when a decree was made by which it was ascertained that Ligon had paid to Jacob Warwick $15,455.98, and that there was yet due from Ligon to said Warwick $6,000, as of the 1st day of January, 1867.

In August, 1870, Jacob Warwick, for himself, and as trustee for his wife and children, filed his bill in the Circuit Court of Nelson county, in which, after setting out the foregoing facts, he alleged that from the money he had received from Ligon, he had paid to John M. Warwick more than $15,000, for which the Rockfish land was bound for his debt to Warwick; and he insisted that the trust money having been applied to discharge that lien, his wife and children were entitled to be substituted to it for the money so paid. He states a number of judgments which had been recovered against him, constituting liens upon all his property, so that he could not dispose of it for his relief; and he, therefore, after giving a statement of all his property, asks that all his lien creditors be made parties to the suit, their rights ascertained, and his property sold for their payment.

John M. Warwick, the trustee in the deed, Mrs. Warwick and her children, all of whom, but one, were infants, under the age of twenty-one, a number of his judgment creditors, and others, were parties to the bill.

In September, 1870, the court referred the cause to a commissioner, with directions to take five different accounts; but the only questions before this court refer to the second and fifth. The second was an account of the trust fund belonging under the will of William Massie, deceased, to Mrs.

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Ellen Warwick and her children, which was used by the plaintiff in paying off, in part, the Warwick debt secured by the deed of trust aforesaid. 5th. An account of all liens, whether by deed of trust, judgments, decrees or otherwise, on the real estate of Jacob Warwick, or the proceeds of any sale or sales thereof made by him, and the order of priority among them, either generally, or with reference to any part of said property or proceeds.

The commissioner made his report, but it is only necessary to state such facts as concern this case. It appears from the report that Jacob Warwick paid of the principal of his debt in April, 1863, $11,000, and in May following, $9,000. He claimed to have paid more in paying the whole amount of the bonds given for the interest after these payments reducing the principal were made.

To prove how much of the trust fund in his hands Warwick had applied to pay the principal of his bond, he was introduced as a witness in behalf of his wife and children, before the commissioner; but after the fourth question had been put to him the counsel for his creditors objected to the reading of his evidence in behalf of his wife. This objection the commissioner was of opinion was well founded, and excluded it from his consideration on ascertaining the amount of the trust fund he had applied to the payment of the principal debt; and excluding this testimony, the other evidence he held showed but one payment of that fund. That was a payment of $2,900 made May 2, 1863, upon which the commissioner only allows interest from the 12th of September, 1873—the time when the other land embraced in the deed of trust was sold.

The commissioner reported numerous judgments, and to a large amount, recovered against Jacob Warwick; but none of these judgments were rendered before the beginning of the year 1861, and only four of them before May 2, 1863, but these four amounted to $9,407.29.

Mrs. Jacob Warwick excepted to the report for the rejection of the evidence of Jacob Warwick; and also to the sum of $3,164.86 allowed by the commissioner as having been paid out of the trust fund, which she insisted should have been $17,400. The judgment creditors insisted that the $2,900 allowed by the commissioner as aforesaid having been paid in Confederate money should have been scaled.

The cause came on to be heard on the 5th of July, 1875, when the court overruled the exceptions, and held that the

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sum of $2,900, with interest from the 12th of September, 1873, should be a lien on the Rockfish tract of land. But the court held further, that the four judgments recovered before that money was paid by Jacob Warwick to John M. Warwick, constituted prior liens on said land, and were to be first paid out of its proceeds. And thereupon Mrs. Warwick, by her next friend, obtained an appeal to this court.

D. Fultz for the appellant.

R. Whitehead and *F. P. Fitzpatrick* for the appellees.

HELD as stated in the head-notes.

MONCURE P. delivered the opinion of the court.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

STAUNTON.

LONG *v.* RYAN AND AL.

SEPTEMBER TERM, 1878.

1. There is a wide distinction between domicile and a residence. To constitute a domicile, two things must concur: First, residence; second, the intention to remain there for an unlimited time. Residence is to have a permanent abode for the time being, as contra-distinguished from a mere temporary locality of existence.
2. What is the meaning of the word residence as used in any particular statute, must be decided upon its particular circumstances. The word is often used to express a different meaning according to the subject-matter.
3. The word residence, in the statute, in relation to attachments, is to be construed as meaning the act of abiding or dwelling in a place for some continuance of time.
4. While, on the one hand, the casual or temporary sojourns of a person in the State, whether on business or pleasure, does not make him a resident of the State, within the meaning of the attachment law, especially if his personal domicile is elsewhere. So, on the other hand, it is not essential that he should come into the State, with the intention to remain here permanently, to constitute him a resident.

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5. R., domiciled in Washington, obtains a contract upon the W. & S. Railroad to construct three sections of the road, and he may be employed to build culverts and bridges in such time as the engineer of the road may fix. He rents out his house in Washington, removes his family to a place on the route of the road, and keeps house. Before the work is finished, or the time for completing it has arrived, an attachment is sued out against his effects. HELD: He was a resident of the State, and the attachment quashed.

In June, 1869, R. H. Long brought an action of *assumpsit* in the Circuit Court of Frederick county, against P. M. Ryan, to recover the sum of $621.67, with interest on $470.35, a part thereof, from June 14th, 1869; and at the same time, he sued out an attachment against the estate and debts of Ryan as an absent defendant. This attachment was served on the Winchester and Strasburg Railroad Company as garnishee. It is unnecessary to state the proceedings in the cause, as the only question considered by this court was, Whether at the time of the suing out of the attachment Ryan was a non-resident of the State in the meaning of the statute. The court below dismissed the attachment, and Long obtained a writ of error and *supersedeas*. The facts are stated by Judge *Staples* in his opinion.

E. P. Dandridge, and *Barton & Boyd* for the appellant.

A. R. Pendleton and *Andrew Hunter* for the appellee.

STAPLES J.—The books abound with discussions and decisions upon the subject of domicile, habitancy and residence. In *Thorndike* v. *The City of Boston*, 1 Metc. R., 242, Shaw C. J. said, "that the questions of residence, inhabitancy, or domicile, for although not in all respects precisely the same, they are nearly so, and depend much upon the same evidence, are attended with more difficulty than almost any other which are presented for adjudication."

There is, however, a wide distinction between domicile and residence, recognized by the most approved authorities everywhere. Domicile is defined to be a *residence* at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. To constitute a domicile, two things must concur. First, residence; second, the intention to remain there. *Pitson, trustee* v. *Bushong*, 29 Gratt., 229; *Mitchell* v. *United States*, 21 Wall. U. S. R., 350. Domicile, therefore, means more than residence. A man may be a resident of a particular locality without having his domicile there. He can have but one

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domicile at one and the same time, at least for the same purpose, although he may have several residences. According to the most approved writers and lexicographers, residence is defined to be the place of abode; a dwelling, a habitation, the act of abiding or dwelling in a place for some continuance of time. To reside in a place is to abide, to sojourn, to dwell there permanently, or for a length of time. It is to have a permanent abode for the time being as *contra*-distinguished from a mere temporary locality of existence. *In the matter of Wrigby*, 8 Wand. R., 134, 140; 1 Amer. Lead. Cases, 899, 903.

Notwithstanding these definitions, it is extremely difficult to say what is meant by the word residence as used in particular statutes, or to lay down any particular rules on the subject. All the authorities agree that each case must be decided on its own particular circumstances; and that general definitions are calculated to perplex and mislead.

It is apparent that the word residence, like that of domicile, is often used to express different meanings, according to the subject-matter. In statutes relating to taxation, settlements, right of suffrage and qualification for office, it may have a very different construction from that which belongs to it in the statutes relating to attachments. In the latter, actual residence is contemplated, as distinguished from legal residence. The word is to be construed in its popular sense, according to the definition already given, as the act of abiding or dwelling in a place for some continuance of time. *Crawford* v. *Nelson*, 4 Barb. R., 504, 523; *Ghann* v. *Gibbens*, 1 Brad. R., 69, 84; Drake on Attachment, sec. 61, 62.

While on the one hand the casual or temporary sojourn of a person in this State, whether on business or pleasure, does not make him a resident of this State within the meaning of the attachment laws, especially if his personal domicile be elsewhere; on the other hand, it is not essential he should come into this State with the intention to remain here permanently to constitute him a resident. *In the matter of Fitzgerald*, 2 Caine's R., 318; *Jackson* v. *Perry*, 13 Monr. R., 231; *Raine* v. *Taylor*, 10 Lous. R., 726.

Whatever doubt or ambiguity there may have been in former laws on the subject, it is clear that since the revisal of 1849, a party cannot be proceeded against under the foreign attachment law, unless he be actually a non-resident of the State at the time. *Kelso* v. *Blackburn*, 3 Leigh, 299. Daniel on Attachments, page 245. The question is not as to he place of his domicile, but his place of abode, his dwelling

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place. This branch of the attachment law is based upon the idea that a debtor is living—dwelling beyond the limits of the State, but has effects or debts due him within the State. As he cannot be served with process, there is no mode of reaching his property according to the course of the common law. Or if coming into the State temporarily on business or pleasure, he should be served with process, he may, at any time, depart, taking with him his effects, before execution can be had against him. When, however, the debtor is within the State, amenable to process, and doing business here, the proceeding against him by foreign attachment ought to be carefully watched by the courts; because the proceeding is not merely ruinous to the debtor, but tends to give one creditor undue preference over the others. This is no hardship upon the creditor, because if after suit brought and process served, the debtor attempts to remove his effects, the most ample remedy is afforded the creditor by the second and third sections of chap. 151, Code of 1860; which authorizes attachments where the debtor intends to remove, or is removing his effects out of the State. The provisions of those two sections relieve us of the necessity of giving any strained construction to the first section of the same chapter, where the proceeding is against one within the State, and amenable to process here.

Applying these principles to the case in hand, I think the Circuit Court did not err in holding that the defendant, Ryan, was, at the time of suing out the attachment, a resident of the State of Virginia, and that the attachment against him was sued out on a false suggestion. The defendant having demurred to the plaintiff's evidence, upon familiar principles must be held to have waived all evidence on his part which conflicts with that of the plaintiff, and to admit all inferences of fact that may be fairly deduced from that of his adversary. *Trout* v. *Va. and Tenn. R. R. Co.*, 23 Gratt., 619; Barton's Law Prac., 222. Looking, then, to the testimony of the plaintiff. and such of the defendant's as is not in conflict with it, it appears that Ryan had his domicile and residence in Washington city from 1855 to 1868. In December, 1868, he obtained a contract from the Winchester and Strasburg Railroad Company to construct three sections of their road in this State—the work to be completed by the 1st of September, 1869. The defendant, however, agreed to do any additional work in the way of masonry, bridges, culverts and the like, the company might require, within such extended time as the chief engineer might allow. The defendant

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commenced his work on the 1st of January, 1869, and proceeded with it until arrested by the attachments against him. In April, he brought his family to Newtown, Va., consisting of his wife, two daughters and two sons. Another daughter was left in Washington, being an employee in the Treasury Department. Shortly after the removal of the family to Virginia, the house in Washington, belonging to the wife, was rented out. The two sons worked with the father on the railroad, and the two daughters assisted the mother in keeping a boarding-house in Newtown. In the month of June, while the defendant was thus engaged, these attachments were sued out and levied upon his effects, and his work arrested and never resumed.

It was proved that during the time the defendant was engaged in his work, he always claimed Washington city as his place of residence, and declared he intended to return to that place so soon as his contract was completed, unless he could get work elsewhere, and that he expected to get a contract on a Pennsylvania or a Maryland road. These are substantially the facts about which there is no controversy.

In the first place, I cannot think that the declarations of the defendant so much relied on are entitled to much consideration. Such declarations are not of much weight, unless they accompany and are explanatory of acts done at the time. They are often loosely and carelessly made, and as often misunderstood or misconstrued by the hearer. It is very probable the defendant did consider Washington city as his domicile, as his wife's property was there; for he might have a domicile in Washington and still be a resident of Virginia.

As already stated, the house in Washington had been rented, and the family brought to Virginia with all the means of the defendant. It was impossible to say how long he would remain in Virginia, for, although he was under obligation to complete his work by the 1st of September, 1869, it was by no means certain he would do so; and, at all events, he had undertaken to do other work if required by the company, which would extend his contract indefinitely. It seems that the excavation on section eight, part of defendant's work, was not completed until April, 1870. So that the stay of the defendant in the State was wholly uncertain and indefinite. His family were here, his business and means were here, his dwelling was here, and I think it is impossible to resist the conclusion that his residence for the time being was here.

From the earliest period, the proceedings by attachment

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has been carefully watched by the courts. *Barnett* v. *Daniell*, 3 Call., 415.

In *Mantz* v. *Henley*, 2 Hen. & Mun., 308, Judge Fleming said, "that the attachment law, though sound in principle, and salutary in operation when properly administered, had been, in the course of his experience and observation, oftener perverted and more abused than any law in our whole statutory Code; that instead of promoting justice, it was often made the engine of injustice and oppression; and that being a summary proceeding unknown to the common law, the strict letter of the statute ought to be adhered to in all cases." The same view was taken by Judge Carr in *Jones & Ford* v. *Anderson*, 7 Leigh, 309. In *Claflin & Co.* v. *Steinbock & Co.*, 18 Gratt., 842, Judge Joynes said: "This extraordinary remedy is not only harsh towards the defendant himself, but its operation is harsh towards the other creditors of the defendant, over whom the attachment creditors obtain priority. It is susceptible of great abuse, and has often been greatly abused. It is, therefore, closely watched, and will never be sustained unless all the requirements of the law have been complied with." Daniel on Attachments, 24–25. The wisdom of these remarks is, I think, shown in the present case. Whether the defendant would in any event have completed his contract, is a mere matter of conjecture. One thing is certain, his work was suspended, and his business destroyed by the levy of these attachments. There was no difficulty at any time in serving him with process, and as little difficulty in obtaining judgment and execution while he was in the State. If he had attempted to remove his effects, the remedy of the plaintiff was ample under the second and third sections already adverted to. For these reasons, I think the judgment of the Circuit Court should be affirmed.

The other Judges concurred in the opinion of STAPLES J.

JUDGMENT AFFIRMED.

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SUPREME COURT OF APPEALS OF WEST VA.

WHEELING.

BOWYER *v.* SEYMOUR, ET ALS.

SPECIAL TERM, 1878.

1. A lease contains these words, viz.: "And said party of the second part agrees to receive, or pay for the same, in the first year, the amount of two thousand tons. Payment for the same, and for all coal and iron ore received, shall be made on the 1st day of May and 1st day of November in each and every year, said payment to commence on the 1st day of November, 1872. A failure to make such payment within sixty days after such payment is due, shall be considered an abandonment of this lease. HELD:
   That the words "shall be considered as an abandonment," &c., as employed in the lease, must be considered in a legal aspect as amounting to no more than the equivalent of the words "shall be considered forfeited," or the words "shall be considered void:" and the effect of the covenant or condition declaring that "a failure to make such payment within sixty days after such payment is due, shall be considered an abandonment of this lease," is to make the lease void at the option of the lessor only in cases where the covenant or condition is intended for his benefit, and he actually avails himself of his privilege.
2. Where the tenant fails to comply with said covenant or condition in said lease, and the landlord demands payment at the time, place, and in the manner prescribed by the common law, and payment of the note is not made in proper time, he can, at his option, so enter upon the leased premises, or such part thereof as can be entered upon by him.
3. But if the landlord in such case does not re-enter in fact, he may bring his action of ejectment under the 16th section of chapter 93 of the Code; and when in such case his declaration in ejectment is served on the tenant in possession, when there shall be such tenant, or if the possession be vacant, by affixing the declaration upon the chief door of any messuage, or any other conspicuous place on the premises, which service shall be in lieu of a demand and re-entry, and upon proof in the court, by affidavit in case of judgment by default, or upon proof on the trial that the note claimed was due, and no sufficient distress was upon the premises, "he shall recover and have execution for such lands," subject, of course, to the provisions of the 17th section, &c., of said chapter 93 of the Code of this State of 1868.
4. But if the landlord in such case, instead of availing himself of the action of ejectment under said 16th section of said chapter 93, brings an action of unlawful detainer, he cannot sustain such action, if at all, unless he proves not only a demand for the rent due at the time, place, and in the manner prescribed by the common law in such case, but must also, where a re entry can be made on the leased premises, or any part thereof, prove such re-entry or its equivalent before the commencement of his action.
5. Generally, where the court below excludes evidence adduced by a party from a jury, or refuses to admit evidence offered by a party, and such party excepts to such action of the court, the Appellate Court will not reverse the judgment of the court below for such action, unless it can

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be seen from the record that the evidence, so excluded or rejected, was relevant to the issue, and that such party may have been prejudiced by the exclusion of such evidence.

This is a case of unlawful detainer, commenced and prosecuted by John Bowyer in the Circuit Court of the county of Putnam against the defendants, to recover possession of the tract of land described in the summons issued in the cause. The proceeding is based upon chapter 89 of the Code of 1868 of this State. The summons in the case was issued in pursuance of provisions of said chapter of the Code on the 15th day of August, 1873; and was made returnable to the first day of the next October term of Circuit Court of said county of Putnam, and was against Jesse F. Tainter, Seymour Seymour and Edward Burkley. The summons was returned, duly executed upon Seymour Seymour and Edward Burkley, and "not found" as to Jesse F. Tainter.

At the October term, 1873, of said Circuit Court of said county of Putnam, and on the 23d day of October, 1873, came before said court "the plaintiff, by his attorney, and the defendants, S. Seymour and Edward Burkley, by their attorneys; and thereupon the said defendants, for plea in this behalf, say they are not guilty of unlawfully withholding the premises in controversy in this cause; and of this they put themselves upon the country; and the plaintiff doth the like;" and issue was thereupon joined, and thereupon came a jury of twelve good and lawful men, who were well and truly sworn to try whether the defendants unlawfully withhold the possession of the premises in controversy in this cause, and after hearing the evidence offered, returned their verdict to the court that the defendants, "Edward Burkley and Seymour Seymour, were not guilty."

Afterwards, on the 25th day of October, 1873, the plaintiff moved the court to set aside the verdict of the jury rendered in the cause and award him a new trial, on the ground that the court erred in excluding the proof, as set out in the bill of exceptions filed in the cause, which motion the court overruled.

Afterwards, at a Circuit Court, held for the said county on the 23d day of April, 1874, it appears that the said parties again appeared in court in the cause, and the court rendered judgment on the verdict of the jury in favor of the defendants against the plaintiff, and for the costs of the suit.

It further appears, that on the said 25th day of October, 1873, the plaintiff tendered a bill of exceptions to the opin-

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ion and ruling of the court, made during the trial of the cause, by which bill of exceptions it appears, that the plaintiff, to support the issue on his part, first introduced, with objection, a contract, which is in these words:

"This indenture, made this 29th day of April, A. D., 1872, by and between John Bowyer, of Winfield, Putnam county, State of West Virginia, party to the first part, and Seymour Seymour, of the city of New York, and State of New York, party of the second part, witnesseth:

"That for and in consideration of $1 in hand paid, receipt whereof is hereby acknowledged, and for the further consideration herinafter named, to be kept and performed by said party of the second part, the said party of the first part doth lease unto the said party of the second part all the mineral, coal and iron ore underlying the lands of the said John Bowyer, lying in said county of Putnam, said lands being bounded as follows:

"On the north by the land of Lewis Summers and heirs of William Gillespie; on the east by lands of L. Summers aforesaid; on the south by lands of heirs of W. Erwin, W. W. Love and S. McGuire; on the west by lands of Lewis Vintroux's heirs, being the Coal branch survey, containing five hundred and sixty acres; the Horse creek survey, containing six hundred and forty-eight acres, and a certain survey adjoining, containing one hundred and sixty-two acres—the whole containing thirteen hundred and seventy acres, more or less.

"In consideration of the said lease, the said S. Seymour agrees to proceed to operate for the mining of coal, and agrees to pay, for all coal mined and taken away from said lands, the sum of ten cents for each and every ton of twenty-two hundred and forty pounds, the amount of coal mined to be ascertained and determined by the weight-books kept by —— of the second part; and the party of first —— shall have access to the same at all reasonable times for the purpose of ascertaining amount of coal taken away. It is further agreed that if said second party should discover iron ore of sufficient quantity and quality to justify the mining thereof, they shall pay for each and every ton so mined the sum of ten cents—said ton to consist of twenty-two hundred and forty pounds.

"And said party of the second part agrees to mine or pay for the same, in the first year, the amount of two thousand tons. Payment for the same, and for all coal and iron ore mined, shall be made on the first day of May and the first

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day of November in each and every year—said payment to commence on the first day of November, 1872. A failure to make such payment within sixty days after such payment is due, shall be considered an abandonment of this lease. And should such party of second part cease operations for mining on said property for a period of twelve months, such cessation of operations shall be deemed an abandonment of said lease; or a failure to commence operations in good faith for a like period of twelve months from date hereof, shall be considered an abandonment hereof.

"And said party of the first part agrees to, and does grant, to party of second part, the right to erect buildings for use of mines, and for the necessary operations of mining, and the right to build and make roads and railroads for the transportation and working of said coal, and the right to cut and use timber for the use of the mines, and for building cabins for the use of the miners; and no timber shall be carried away, but shall be used on the premises; also, the right to use and occupy all the buildings upon the said lands. If the party of the second part should elect to give up this lease, he shall, upon giving sixty days' notice, have the right to remove all machinery and improvements that may have been made, excepting such cabins and buildings made from lumber cut on land as aforesaid, which, in case of abandonment, shall be left on the land.

"It is further agreed, that after the first year as aforesaid, the said second party shall mine or pay for four thousand tons yearly—payments to be made semi-annually as aforesaid. And it is mutually agreed, that neither party shall erect, or allow to be erected, any buildings for the purpose of the sale of intoxicating liquors; and further, that nothing herein shall prevent the party of the first part from drilling and boring for oil or salt water, and working the same; providing he shall not interfere with the operations for mining. The erasure and alteration on line 23, folio 2, and the erasure on line 8, folio 4, were made before signing. As witness our hands and seals this twenty-ninth day of April, 1872.

"JOHN BOWYER, [Seal.]
"SEYMOUR SEYMOUR, [Seal.]

"Witness—WM. M. SMITH,
J. H. HARMAN."

Which was duly admitted to record in the clerk's office of the County Court of Putnam county.

"Plaintiff then proved by a witness, Jerome T. Bowyer,

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that the land mentioned in said summons was the same as that mentioned in the contract, and that it was in Putnam county, and that the defendants took possession of the land under said contract, and were in possession of said same, when this action was brought; also, that the money mentioned in said contract, to be paid by said Seymour to John Bowyer on the 1st day of November, 1872, had not yet been paid; that in April, 1873, said witness, as agent for plaintiff, called the attention of said Seymour to the fact that said money was due and had not been paid, and read the said contract to him, and told him it was 'abandoned;' that Seymour replied, that it does read that way, but you will not hold me to it; to which witness replied, that said contract was now at an end; and they proposed to let it remain so. Plaintiff also proved that said Seymour had repeatedly since asked to fix the matter up by a new contract, which plaintiff had always refused to do, and then rested his case; and the defendants introduced no evidence at all. And thereupon the defendants asked the court to exclude all of the above parol proof relating to the abandonment or forfeiture of said contract, which motion was resisted by plaintiff, and the same being argued and considered by the court was sustained, and all of said proof excluded from the jury. To which opinion and ruling of the court the defendant excepted, and prays that the same may be signed, sealed and saved to him, which is here done, and made a part of the record of this cause."

To the said final judgment, rendered in this cause by said Circuit Court on the 23d day of April, 1874, the plaintiff hath obtained from this court a *supersedeas* upon his petition and assignment therein of error.

The errors assigned by the plaintiff in the said judgment are as follows: "1st. The court erred in excluding from the jury the evidence, set out in the bill of exceptions, in regard to the abandonment of the lease, which lease is fully set out in said bill of exceptions. 2d. The court erred for the reasons aforesaid in refusing to set aside the verdict and award a new trial.

W. Mollohan for the plaintiff in error.

Smith & Knight for the defendants in error.

HELD as stated in the head-notes.

HAYMOND J. delivered the opinion of the court, in which the other judges concurred. JUDGMENT AFFIRMED.

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SPECIAL COURT OF APPEALS OF VIRGINIA.

HUME'S EX'ORS *v.* TALIAFERRO.

A testator dying prior to the late war, directed, by his will, among other things, that two of his old slaves should be supported, during their respective lives, out of his estate. On a bill being filed during the war, by the executors, for a construction of the said will, the court directed an amount sufficient for the support of said slaves to be invested in *eight per cent.* Confederate bonds for that purpose, which became worthless by the results of the war. On a bill filed by one of the slaves after the war (the other having died during the war), to hold the estate liable for his support—HELD:

He having been made free, his *status* completely changed by the war, and being incapable of taking any benefit or legacy while a slave, is not now entitled to hold the estate of the testator (his former owner) liable for his support.

From the Circuit Court of Culpeper county.

The facts are stated in the opinion of the Court.

James W. Green for the appellants.

James L. Kemper for the appellee.

WINGFIELD P.—Charles Hume, by his will, dated in 1857, provided that all of his estate (except two old negroes, "Hay and Charles") should be sold, and in the sale of the tract of land on which he lived, called the "home tract," a home should be reserved for the two old negroes; that the said Hay and Charles "should have a home on the said tract of land for life; that they should be supported out of his estate, and that his executors should have charge of them;" and by other provisions of the will, the testator gave the proceeds arising from such sales (after the payment of his debts and personal expenses) to his sister, Mrs. Sparks, and his niece, Mrs. Tatum, in equal portions for life with remainder to their issue respectively.

It appears that after the death of the testator, his executors, pursuant to the will, sold his estates as they were directed by him, including the "home house tract of land" mentioned above, which was sold to one John P. Aylor, and conveyed to him by the deed of the said executors, dated 1st October, 1860, with the following reservations and provisions, viz.: "That two acres of the said land" (on which the executors had caused a house to be erected for them) "is reserved for the benefit of said slaves during their joint and several lives, and to be kept under a good fence for the said period by the said

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John P. Aylor, his heirs and assigns, and also subject to this further incumbrance. That the said Aylor, his heirs and assigns are to provide the said Hay and Charles, on said two acre lot, with firewood during their joint and several lives, and after the death of the longest liver of them, the said two acre lot to go to the said John P. Aylor, his heirs or assigns, free from incumbrance."

After this, in 1861, the executors filed their bill in the Circuit Court of Madison county for a construction of the will, and for the advice and direction of the court as to the proper course to be pursued by them in the administration of their testator's estate, and as to the further provisions proper to be made for the support of the two old negroes. The legatees (other than the two negroes) were made parties. The negroes were not made parties, because they were slaves and could not be litigants in court; and a decree was made in it directing the executors to invest $2,500 in Confederate States 8 per cent. bonds for the use and support of the negro Hay (Charles having died in the meantime), and file them in the papers of the cause; and it appears that the executors with the $2,500 purchased such 8 per cent. bonds to the amount of $3,500, and filed them as directed by the decree. The case remained in this situation, without any further steps, and the negro Hay was supported by the testator's estate, until the close of the late war between the Confederate States and the United States, by the results of which, the said Hay became free, and the bonds in which the money had been so invested for his support, became worthless. After this, the executors, in 1867, filed an amended bill, to which Hay, now called "Hay Taliaferro," was made a party, in which they charged that Hay was no longer a slave, subject to their control, charge or supervision, and to their discretion and judgment as to the manner and means of his support, as the testator intended he should be, and that he had no further claims against the estate of their testator, and no right to claim a further appropriation from it, because the provision theretofore made for his support, while a slave, had, by the results of the war, been lost to him. But the court overruled this defence of the executors, and held that notwithstanding provision had been made for his support while a slave by the former decree of the court, that the provision in the will for his support was personal to the said Hay, and as that provision, therefore, made for his support had failed and proved anavailing, he was still entitled to a further provision out of the estate of the testator; and a commissioner was directed

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to ascertain and state how, with the least burden to the testator's estate, his support could be provided for, and the probable amount of it, and what amount should be contributed by the legatees for that purpose. While the commissioner was proceeding to execute this order, the said Hay Taliaferro made a proposition to the executors that if they would make certain repairs to the house and enclosures on the lot, furnish him with firewood, &c, a suit of clothes, allow his son and daughter to live with him on the lot of land, and pay him $25 a year, and furnish him with medical attendance when necessary, he would be satisfied, and take it in satisfaction of all claims against the estate of the testator. This was approved by the commissioner, reported to and ratified and confirmed by the court. The repairs, &c., made, and the clothing furnished, and $25 paid.

About a year after this, Hay Taliaferro filed a petition, saying that he did not understand the proposition when it was made and acceded to; that the sum to be paid annually was not sufficient for his support; that his children refused to live with him on said lot, and that he could not live there by himself, and so the arrangement had failed, and asked the court to set aside the agreement, and to make him a further allowance. To this petition the executors filed their answer, and again insisted that their testator's estate was no longer liable for the support of the said Hay after he became free; but their defence was again overruled, and a commissioner was directed to make a further inquiry, and report what would be a proper sum to be paid for his support.

Under this order, the commissioner took the depositions of a number of witnesses (most of whom proved that Hay was able to support himself), and reported that Hay was about 65 years of age, was as active as most persons at that age, was a shoemaker, cooper, ploughmaker, blacksmith, &c., and if he would work according to his ability, it would go very far towards making a comfortable support for him; and that $60, with the use of the house and lot and firewood, would be a proper allowance for his support, including medical attendance.

And the cause coming on to be finally heard, the court set aside the agreement between Hay and the executors (at the same time exonerating the executors from any blame in relation to its procurement), and decided that under the will of the testator, Hay Taliaferro was entitled to a full and complete support out of the estate of the said Charles Hume, without any reference to his ability or inability to support

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himself in whole or in part (except so far as he might be able to make the home provided for him contribute to that purpose), and that this support must embrace everything necessary to keep him in that degree of comfort which would free him from want, and that to this extent his claims upon the estate were prior and paramount to those of the other legatees; and disapproved of the amount reported by the commissioner, and appointed a commissioner to have the wants of the said Hay immediately supplied, and directed him to call on the executors for the sums necessary for that purpose, and finally decreed that the remaining executor (the other one having been removed) should pay to this commissioner, for the support of Hay Taliaferro, the sum of $100, and thereafter quarterly, at the end of every three months, a sum not exceeding $50, and in case of a failure in the payment of any of the instalments, executions therefor should be issued against the executor, to be levied *de bonis propriis.*

The first question that presents itself in the consideration of the case is, "What was the intention of the testator in making the provision he did in his will for the two slaves mentioned in it. To solve this properly, it is necessary not only to look at the terms of the will, but to the condition of the parties, and the relative duties of the said testator in relation to his infirm or superannuated slaves, and to the public at the time of making his will. As the law then stood, it was the duty of a master to provide for the maintenance and support of his infirm or superannuated slaves, and to prevent them from becoming chargeable to the public, and if he failed to do so of his own accord, he could be compelled to do it. In view of this duty imposed upon him by the law, and of the fact that the two slaves were likely to become chargeable for their support, the testator, when he came to make his will, chose to provide in his own way, and in the mode he thought most proper and judicious for the discharge of this obligation, imposed upon him by the laws of the land, and did so, by providing that they should have a home on his land, have a support from his estate, and be under the charge and care of his executors as long as they lived (the necessary amount for the purpose, and the mode and means of providing the same to be, of course, at the discretion, judgment and direction of his executors)—and there is nothing appearing as to what was the intention of the testator in relation to these negroes other than is shown by the provisions of the will above quoted. The close of the war found Hay Taliaferro a slave, living in the home provided for him on the

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testator's land, supported by the means provided for that purpose, out of his estate, and subject to the control and management of his executors, and by the results of that war, he became immediately free, and all power and authority of the executor over him, and all directions of theirs in relation to the amount necessary, and the manner and mode of raising and applying the same, immediately ceased. And so the same event that made him free destroyed the means that had been provided for his support as a slave. And his *status* being now changed from that of a slave to a freeman, he has become entitled (if his necessities require it) to a support at the public charge, as any other free pauper would be, and has no claim upon any individual for a support of his former condition as a slave (although the individual may have been his former master). If there had been no will in this case, no one would have questioned the fact that the master's estate would cease to be liable for the support of his slave as soon as he became free; and where the same thing was provided to be done in a particular way by will, it would likewise cease when the means failed, unless it was shown that the testator intended it should be continued in any event. There is nothing in the will to show such a purpose on the part of the testator here, but the plain import of the terms used go to show that the testator intended to discharge his duty to the public by providing for the support of his superannuated slaves in the way he thought most expedient, and that he never contemplated anything else, or their having any other *status* but that of slaves. And I wholly dissent from the proposition that he intended to prefer these negroes to his own race and blood, and that he intended that they should be supported in idleness in preference to and in prejudice of the rights of his own sister and neice. There is nothing in the will, nor in the natural motives and feelings which usually prompt the action of human beings to justify such a conclusion.

After the provision that had been made for his support as a slave had been destroyed by the same act that made him free, Hay Taliaferro had no right to go back on his former master's estate for a support as a freeman, because his support as a slave had been provided for, and that provision had been lost in the act of his becoming free. But when he accepted freedom, he was bound to take its abundant evils along with the good growing out of it (if indeed it can be said that any good flowed to him from it).

The will of the testator did not give anything to, or confer

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any right upon, the slaves, but gave directions to, and power and right to the executors to take charge of them and have them supported in a particular way when it became necessary and according to the exigency of their necessities. But if it had been intended to be, and had been in form, a legacy to the slaves, it would have been void for want of capacity in them as slaves to take. (See *Wynn* v. *Carroll*, 2 Gratt., 227; *Sawney* v. *Carter*, 6 Rand., 173; and *Stevenson* v. *Singleton*, 1 Leigh, 72.) And an after acquired power to take would not give validity to a bequest that was void at the time the will took effect by the death of the testator. (*Trustee of Philadelphia Baptist Association* v. *Hart*, 4 Wharton, 1.) And if the bequest had not already been satisfied by the investment in the Confederate bonds, the object of it could not have been carried into effect as a charity; because the English statute of charitable uses has been abolished in Virginia, and courts of equity here have no jurisdiction over the subject, or power to decree the execution of charities. (See *Gallego's ex'ors* v. *Attorney General*, 3 Leigh, 450; *Brook* v. *Sackett*, 13 Gratt., 301; and *Seaburn's ex'ors* v. *Seaburn*, *&c.*, 15 Gratt., 423.)

I think, therefore, that the decrees in question, so far as they subject the estate of the said Charles Hume, deceased, to a new or further charge for the support of Hay Taliaferro, were not warranted by the circumstances of the case. But as the use of the house and lot, with a right to firewood, were reserved for his benefit for life, he is entitled to have the same as long as he lives as part of the provision made for his use while a slave, which still remains, and has not been annihilated by the event that made him free, and with this exception, I think the decrees appealed from should be reversed.

Barton and McLaughlin JJs. concurred.

DECREES REVERSED.

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SUPREME COURT OF ILLINOIS.

WHITE *v.* PEOPLE.

ERROR TO THE CRIMINAL COURT OF COOK COUNTY.

A party in a criminal case has a right to defend by counsel, and to insist that such counsel should have a reasonable opportunity to discuss both the facts and the law of the case to the jury.

A *nisi prius* court can limit the arguments of counsel within reasonable bounds, but the restriction must be reasonable and allow the prisoner the benefit of a complete discussion of all the matters of law and evidence embraced in the case.

At the March Term, 1878, of the Criminal Court of Cook county, plaintiffs in error, George White and Emma White, were tried before a jury upon an indictment for larceny. The trial resulted in a verdict of guilty against them both, and they were sentenced to imprisonment in the penitentiary, the former for a term of four years and the latter for a term of two years.

It appears from the bill of exceptions taken on the trial, that four witnesses were examined in chief by the prosecution; that plaintiffs in error examined three witnesses on their behalf, and the prosecution then introduced two witnesses in rebuttal. It further appears therefrom when the evidence was closed the court ordered and directed that the attorneys for the people, and for plaintiffs in error, be each limited in the time of their respective argument to the jury to the space of five minutes; that the attorney for plaintiffs in error desired to make an argument to the jury in behalf of his clients, and stated to the court such a limitation gave him a length of time wholly insufficient in which to make his proposed argument, and unless the court allowed him further time, he must decline addressing the jury at all; but the court adhered to and refused to change said order, and plaintiffs in error then and there excepted to the action of the court in ordering such limitation of time, and in refusing to extend the same; and thereupon their counsel declined making any attempt to address the jury.

The opinion of the court was delivered by BAKER J.

This record presents a grave and important question that is now for the first time submitted to this court for decision. The first clause of the ninth section of article two of the Con-

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stitution of the State provides that in all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel. The right of trial by jury is guaranteed by the fifth section of the same article of the Constitution; and section 431 of the Criminal Code makes the jury in all criminal cases judges of both the law and the fact. In *Meredeth* v. *People*, 84 Ill., 480, this court said: "The argument of a cause is as much a part of the trial as the hearing of evidence. It is a right in his defense secured by the law of the land of which a citizen cannot be deprived. In *Word's Case*, 3 Leigh, 744, a criminal case where the evidence was all on the side of the Commonwealth, and was unimpeached, and the trial court was of the opinion that the testimony was clear and distinct as to the fact charged, and that it could not be varied by argument of counsel, it was held by the general court of Virginia that it was not in the discretion of the court to prevent the counsel of the accused from arguing the question of fact before the jury, and that it was the right of every party accused with crime to be heard by counsel on his whole case.

The plaintiffs in error had an undoubted right, under the very bill of rights itself, and by the law of the land, to defend by counsel, and to insist that such counsel should have reasonable opportunity to discuss before the jury both the fact and the law of the case. This was a constitutional and substantial right, of which no court could properly deprive them. It was not a mere empty and nominal right to have an argument made in their behalf that would necessarily be but a brief and idle form; to have a discussion of the law and the evidence that was confined within a space of time so short as to be wholly inadequate to afford any opportunity to examine or discuss either the law or the evidence involved. Surely this was not the right deemed by the people of sufficient importance to be incorporated into the fundamental law of the land.

The indictment was for a felony; the value of the property alleged to be stolen was found by the jury to be $125, and on the trial quite a number of witnesses were examined. The evidence was to some extent conflicting, and much of it was of a circumstantial character, and several issues, both of law and of fact, were involved in the case. The questions, of either kind, were to be determined by the jury. We can readily see it was entirely impossible for counsel to intelligently discuss either branch of the case in the brief space of five minutes. The right of argument is only valuable as it

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will afford an occasion to impress and influence the tribunal to which it is made.

This can only be done by a process of reasoning—by a presentation of points and considerations addressed to the understanding and experience. The limitation of five minutes was a virtual denial of the right of the accused to be heard by counsel. The fraction of time to which counsel was restricted was unreasonably short, and wholly insufficient to enable him, be he ever so terse, to discuss the case with a reasonable hope of any probable, if even possible, effect upon the determination of the issues.

In *People* v. *Keenan*, 13 Cal., 581, the defendant was tried upon an indictment for murder, and the trial court limited his counsel to a speech of an hour and a half, and to this action of the court an exception was taken; at the expiration of the hour and a half, the prisoner's counsel applied for an extension of the time, so as to enable him to finish his argument to the jury, but his application was refused, and he again excepted. The case was one depending on circumstantial testimony. The Supreme Court reversed the judgment of conviction, on account of such limitations of the time allowed for argument, and they say: "It is impossible to deny that if the constitutional privilege of being heard by counsel be allowed at all, it must be so admitted as that the prisoner may have the benefit of a complete discussion of all the matters of law and evidence embraced by the case."

In the case at bar, we hold that it was error in the court below to limit the counsel of plaintiffs in error to an argument of five minutes; such restriction was, under the circumstances of the case, unreasonable, and substantially a denial of a constitutional right. At the same time, we fully recognize the fact that a *nisi prius* court must necessarily have and exercise a large discretionary power in matters of this sort; it can limit the arguments of counsel within reasonable bounds, otherwise the business of the court might be seriously impeded, and to great public detriment. But the restriction must always be a reasonable restriction; and what is reasonable must be determined from the character and circumstances of the case on trial. The limitation should not, in any criminal prosecution, be such as would deprive the prisoner of the right given him by the law to make his defense before the jury, and to be heard by his counsel on his whole case.

For the error indicated, the judgment of the Criminal Court is reversed, and the cause remanded for a new trial.

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PARTNERSHIP CREDITORS.

The Supreme Court of the United States, in the case of *Case receiver*, v. *Beauregard*, appeal from the U. S. Circuit Court for the District of Louisiana, have decided that partnership creditors have a standing in equity to enforce the application of partnership property to the payment of partnership debts only so long as the property remains in the firm; after it has been conveyed in good faith and for a good consideration to one of the partners or to third persons, the creditors have no such right. *Ex parte Ruffin*, 6 Vesey, 119; *Kimball* v. *Thompson*, 13 Metc., 288; *Allen* v. *Centre Valley Company*, 21 Conn., 130; *Ladd* v. *Griswold*, 4 Gilm., 25; *Smith* v. *Edwards*, 7 Humph., 106; *Robb* v. *Mudge*, 14 Gray., 534; *Baker's Appeal*, 21 Penn. St., 76. Individual partners have the right as between themselves to have firm property applied to the payment of firm debts, and this right inures to the benefit of the firm creditors, but exists and can be enforced by the individual partner. It is practically a subrogation to the equity of the individual partner to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. *Rice* v. *Barnard*, 20 Vt., 479; *Appeal of the York County Bank*, 32 Penn. St., 401. But so long as the equity of the partners remains in him, so long as he retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce through it the application of these assets primarily to the payment of the debts due them whenever the property comes under its administration. It is, however, indispensable to such relief when the creditors are simple contract creditors that the partnership property should be within the control of the court, and in course of administration brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode.—*Washington Law Reporter.*

MISCELLANY.

SUPREME COURT OF APPEALS OF VIRGINIA.—This Court has adjourned till July 10th, when it meets in Wytheville. During the last winter it disposed of fifteen cases on the Commonwealth's docket, twenty-seven cases on the privileged docket, and seventy-eight cases on the argument docket—making all together one hundred and twenty cases; in addition to which there were 49 motions disposed of. We believe the amount of work done this winter

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larger than that ever before done by the Court, and we are delighted to say that we never saw the members of the Court in better condition. On this the State should be congratulated.

The next docket will contain 7 privileged cases, and 154 cases now on the argument docket, besides such as have matured, or may mature, for the year ending about middle of September next.

"THERE IS NOTHING NEW UNDER THE SUN."—The *North American Review* for October, 1840, p. 313, contains a well-written, descriptive and argumentative article, upholding the authenticity of that most interesting relic of high antiquity, the "Egyptian Deed." The following note from the eleventh edition of "Kent's Commentaries" is a consise summary of the article:

"In the *North American Review* for October, 1840, p. 313, there is given a copy of an Egyptian deed in the Greek language, and under seal, *with a certificate of registry in a public office annexed*, and executed in the year 106, B. C., or more than a century before the Christian era. It was written on papyrus, and found deposited, in good preservation, in a tomb in Upper Egypt, by the side of a mummy (probably that of Nechutes, the purchaser), and contains the sale of a piece of land in the city of Thebes. It has the brevity and simplicity of the Saxon deeds, so much commended by Spelman. It gives the names and titles of the sovereigns in whose time the instrument was executed, viz., Cleopatra, Ptolemy, her son, surnamed Alexander. It describes with precision the ages, stature and complexion, by way of identity, of each of the contracting parties; as, for instance, Pamonthes, one of the male grantors, aged about forty-five, of middle stature, dark complexion, handsome person, bald, round-faced, and straight-nosed. Semmuthis, one of the female grantors, aged about twenty-two years, of middle size, yellow complexion, round faced, flat-nosed, and of quiet demeanor.' It then goes on to state that the four grantors (two brothers and two sisters) have sold out the piece of land belonging to them in the southern part of the Memnonia, eight thousand cubits of vacant ground, one-fourth part of the whole. The bounds 'are on the south by the Royal street; on the north and east by the land of Pamonthes, and Boker of Hermis, his brother, and the common land of the city; on the west by the house of Tephis, the son of Chalomn; a canal running through the middle, leading from the river. These are the abutters on all sides. Nechutes the Less, the son of Asos, aged about forty years, of middle stature, yellow complexion, cheerful countenance, long face and straight nose, with a scar upon the middle of his forehead, has bought the same for one talent of brass money; the vendors being the actual salesman and warrantors of the sale. Nechutes, the purchaser, has accepted the same."

The learned annotator adds: "There seems to be no doubt of the authenticity and age of the instrument in the minds of the distinguished German, French and English scholars and profound antiquaries, who have studied the subject, or by the learned author of the article in the *North American Review*, and it is one of the most curious and interesting legal documents that has been rescued from the ruins of remote antiquity."

It will be noticed that this ancient deed, executed over a century before the birth of Christ, contains a certificate of its registry in a public office. History ever repeats itself, and assimilates all like principles, notwithstanding long intervals of disuse. The practice in this respect in the nineteenth century adopts and re-affirms a practice conceived and prevalent in the dreamy days of the Egyptian Commonwealth, where history dwindles into fable and shadow.—*From Registration of Written Instruments, &c., by Samuel D. Sewards, L.L. D., New York*, 1872.

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A BISHOP AND THE BENCH.—The Bishop of Oxford has addressed to the Archdeacon of Berkshire a letter, entitled "May or Must," on the recent case in which his lordship appeared in person in the English Queen's Bench Division. In it his lordship says: "I shall not trouble you with a record of my personal experience as a suitor in a court of law. If it were my business to write, after the style of our forefathers, an account of a stranger's visit to the temple of justice, I should have to say that I observed the manners and customs not without surprise. It might have been expected that its venerable guardians would listen unmoved to the suitors' addresses; and that it would be impossible to penetrate within the veil of dignified reserve which concealed the bias of their minds. On the contrary, vivacity and candour were the characteristics which I chiefly admired in the sages of the law. I noticed their benevolent desire to instruct the advocates, and to convince them of their errors—a benevolence which led them even to sacrifice the opportunity of informing themselves more fully about a branch of jurisprudence naturally unfamiliar to them. They gave no countenance to the idle hopes of success which advocates on the opposite side might have entertained; nor did they encourage the vanity which makes a fond speaker anxious to present his argument in a connected form. In all seriousness I must record my impression—an impression not peculiar to myself—that it was almost impossible to present a connected argument under the constant shower of interruptions from the bench to which each speaker, on one side at least, was subject."—*Irish Law Times.*

BOOK NOTICES.

THE AMERICAN DECISIONS, containing all the cases of general value and authority decided in the courts of the several States, from the earliest issue of the State Reports to the year 1869. Compiled and annotated by John Proffatt, L.L. B., author of "A Treatise on Jury Trial," etc. Vol. VIII. San Francisco: A. L. Bancroft & Co., Law Book Publishers, Booksellers and Stationers. 1879. Through J. W. Randolph & English, Publishers, Richmond, Va.

The cases re-reported in this volume will be found originally reported in 1 N. H.; 15, 16 Mass.; 3 Conn.; 15 to 17 Johns.; 3, 4 Johns. Ch.; 2 Southard; 3, 4 Serg. & Rawle; 6 Munford.

We have commended, in the highest terms, every volume of this most excellent series. We see nothing in the eighth volume to induce us to withdraw one word of what we have said so often before as to the utility of the work, and the ability and discretion with which each number has been edited. We hope this enterprise will meet with the encouragement that it deserves.

GENERAL INDEX TO THE ENGLISH COMMON LAW REPORTS SUPPLEMENT, Vols. LXXXIV to CXVIII inclusive. Vol. III. By Samuel W. Pennybacker, E. Greenough Platt, and Samuel S. Hollingsworth, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnston & Co., 1879. Through J. W. Randolph & English, Richmond, Va.

We have received this valuable work. Its general arrangement reflects credit on the editors, and the work of the publishers is well done.

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THE

VIRGINIA LAW JOURNAL.

JUNE, 1879.

WHO MAY HOLD COUNTY COURTS IN CERTAIN CASES.

Having just read the article in your May number, 1879, pointing out an inaccuracy in the Code of 1873, touching the "Poor Man's Law," we beg leave to call attention to what we conceive to be one, of a similar character, in regard to who is authorized to hold County Courts in certain cases. The Code of 1873, ch. 154, § 14, p. 1031, reads, "If any judge of a county court be unable or fail to attend a regular term of his court, or be prevented from sitting during the whole term,* or if, from death or other cause, there be no judge of such county, any other county judge may hold said court, either for the whole term or any part thereof." On the margin, opposite this section, there is a reference to Acts '69–'70, ch. 38, § 5, p. 36, *and* ch. 177, § 1–2, p. 256.

At the foot of the page responding to the above asterisk, the compiler has this note:

"The words 'or be so situated in respect to any cause pending in said court as, in his opinion, to make it improper for him to try it,' are omitted, a different provision therefor having been made in the next succeeding section by an act passed subsequently.—Acts 1870–71, ch. 9, p. 8. This last act confines the provision to 'civil causes.'"

If this be the law, when the Judge is "so situated in respect to any cause pending in said court as, in his opinion, to make it improper for him to try it," the parties on each side of the controversy, in order to retain the court's jurisdiction, are dependent upon the consent of their adversary in the selection of a member of the bar practising in said court to try the case; as provided in Acts '70–'71, c. 9, § 1, p. 8, or § 15, ch. 154, p. 1031, V. C., 1873. And furthermore, upon the con-

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sent of the judge. If they cannot agree as to whom they will have to sit from among the members of the bar, and obtain the consent of the judge to such arrangement, the wheels of justice are locked in that court, and they must stop. The only recourse in such a case is a removal of the cause to the Circuit Court of the same county, or to the County Court of some other county, as contemplated in § 1, ch. 170, pp. 1102–3, V. C., 1873.

By the compiler's construction, the words "or be so situated in respect to any cause pending in said court as, in his opinion, to make it improper for him to try it, any other county judge may hold said court," &c., in § 5, ch. 38, p. 36, Acts '69–'70, are made to be repealed by § 1, ch. 9, p. 8, Acts '70–'71 (same as § 15 of ch. 154 of the Code) containing the provision for a selected lawyer's trying the case in the above contingency.

In this we think the compiler of the Code is clearly mistaken, for the following considerations: The act passed 22d December, 1870 (the last act above referred to), is, in terms, an amendment of an act passed 21st February, 1867, and the effect of the amendment was simply to extend to the county and corporation courts the provision for a member of the bar sitting in a case which then existed only in respect to the circuit courts; it does not refer to the act passed 2d April, 1870 (the former of the above acts), much less repeal it or amend it, or any part of it. But it may be said that it does this by implication, under the doctrine that where statutes differ, or are inconsistent, an old statute gives place to a new one—Min. Inst. (2d ed.), vol. 1, p. 40; but an equally authoritative rule of construction is that the whole law must be construed together *ut res magis valeat quam pereat*, that, if possible, it may all stand; and surely the act of 22d December, 1870, is consistent with the act of 2d April, 1870, and so plainly consistent that it does not need any argumentative construction to render it so. Thus, when the contingency of the judge's disqualification happens, the parties may (with the consent of the judge) select a member of the bar to sit; but suppose they could not *agree*, which would most likely always be the case, if by non-agreement delay would be produced (an end too often sought for and too often accorded to the defendant in the administration of justice by the courts any how), then the recourse would promptly be to the act of the 2d April, 1870, viz.: to the calling in of another county judge; otherwise of necessity there would follow a continuance or a removal to the circuit court, or a removal to another county,

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which steps would all be costly, and some of them, most probably, highly inconvenient.

In conclusion, we submit if the codifier is right in § 14, ch. 154, and his note thereto, why is it that his same reasoning does not prevail as to the circuit courts, as to which, it will be observed that he retains both provisions, viz.: the selection of a member of the bar practising in the court (§ 15, ch. 154), and the holding of the court by a judge of another circuit (§ 24, ch. 155, Code 1873).

Such an insidious error is calculated to mislead the most wary of the profession, and oftimes to do great injury to litigants. As an instance, we need but to cite that marvel of accuracy, Prof. Jno. B. Minor, who, in his *Institutes*, vol. IV, part I, p. 218, follows the Code, which, we must remember, is not of itself *law*, it never having been adopted by the Legislature, instead of following a maxim which, for years, he has fondly taught so many of the profession in Virginia and beyond, who delight to do him honor, *petere fontes quam sectari rivulos.*

Richmond, Va., May, 1879. JACKSON GUY.

THE EFFECT OF THE DEATH OF THE DRAWER OF A CHECK.

We conceive that most, if not all, of the principal writers on Bills and Notes, have fallen into a capital error respecting the effect of the death of the drawer of a check, and we propose to cite their views, show the fallacy upon which they are based, and trace the source of their error.

1. In *Edwards on Bills*, p. 546, it is said: "A draft that has not been accepted, and a bank check, should not be paid after notice from the drawer countermanding the authority, *nor after the death of the drawer, which is a revocation of the authority.* But if the bank pay without knowledge of the drawer's death, it seems that the money cannot be recovered back, and there is no reasonable ground for holding the payment invalid."

Byles cautiously says: "*It seems* that the death of the drawer of a check is a countermand of the banker's authority to pay; but that if the banker do pay the check before notice of the death, the payment is good." *Byles on Bills* (5th Am. Ed. by Sharswood) [*25], 101.

Parsons says: "A bank should not pay a check * * after

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the death of the drawer; but if the bank pays the check after the death, and before notice of the death, it is said to be a good payment."—2 *Parsons*, N. and B., 81, 82.

Chitty thus states his view: "It appears to have been considered that if the holder of a check, immediately after the death of the drawer, and before the banker is apprised of it, receive the amount, he will not be liable to refund, though, in general, the death of a party is a countermand of a bare authority."—*Chitty on Bills* (13 Am. Ed.) [*429], 484.

Morse, in his work on *Banking*, follows and elaborates the statement that after the drawer's death the bank should not pay the check, and questions whether or not such a payment would be good at law, where it had no notice of the death, though (curiously enough!) he thinks that nevertheless it would be good *in equity*.

He says: "The death of the drawer before presentment of the check operates as an absolute revocation of the power of the bank to pay upon his check. At the instant of his death, the title to his balance vests in his legal representatives, and his own order is no longer competent to withdraw any part of that which is no longer his own property."

And again: "It has been laid down in the text-books quite generally, that if the payment be made by the bank in ignorance of the death of the drawer, the bank will be protected. Doubtless this would be so held in equity, if not in law. But it must be acknowledged that the cited case of *Tate* v. *Hilbert*, which the text-books all rely upon as their sole authority for the statement, does not touch upon the point, and furnishes no basis for considering that the rule has the support of a single adjudicated case."

3. The leading case cited by all of the commentators for the doctrines which have been enunciated in the foregoing quotations, is that of *Tate* v. *Hilbert*, reported in 2 Vesey, Jr., 111, and decided by Lord Chancellor Loughborough, in 1793. Let us see what that case determines, and whether or not it justifies the inferences that have been drawn from it. In that case it appeared that Mark Bell, an old and infirm man, gave to Mary Tate a check payable to bearer for £200, and to Jane Tate, his promissory note for £1,000. They were his relatives, and after his death they filed bills in chancery, claiming the amounts as dispositions in the nature of *donationes mortis causa*. The bill of Mary Tate asked that the check for £200 be paid either out of £800 cash belonging to Mark Bell, in his banker's hands at the time of his de-

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cease, and admitted by the executor to have been possessed by him, or out of his general assets.

It was decided—

(1) That these were not gifts *mortis causa*. The Lord Chancellor said: "He (the deceased) meant what he did for these plaintiffs as *immediate* gifts. Therefore, I can make no more of this. * * Being a gift, it cannot be sued for as a legacy." And again, as to the check: "The difficulty upon it is that it cannot be *donatio mortis causa* because it was to take effect *immediately*, and not to wait upon the death."

(2) The Lord Chancellor asked whether any hope was entertained that they could recover at law upon the draft on the banker? The Attorney-General for the plaintiff admitted that he knew of none; but as to the note, "they had opinions of common lawyers in favor of an action." So, the decision that the check and the note were not good gifts *mortis causa*, and the concession that action against the executor could not be maintained on the check, constitute the main elements of the case. But the Lord Chancellor used expressions in his opinions from which the text-writers have deduced the doctrines stated in the passages heretofore quoted.

He said as to the check-holder, Mary Tate: "If she had paid this away, either for a valuable consideration, or in discharge of a debt of her own, it would have been good; *or even if she had received it immediately after the death of the testator before the banker was apprized of it, I am* inclined to think no court would have taken it from her.

All this is *obiter dictum*, and not authoritative as an adjudication. Besides, it is a mere cautious statement of what the Lord Chancellor conceived to be clear; and it is not to be inferred, necessarily, nor, as we think, at all, that because the check-holder could have retained the funds if paid her after the drawer's death, and before the banker was apprized of it, that the banker would not have been justified in making the payment if he had been apprized. The right of the check-holder without consideration to retain the funds is one thing; and the right of the banker, who is not bound to inquire into the consideration, to pay them, is another and very different thing—a thing totally disconnected with, and by no means inferential from the first. Yet the text-writers have made the illogical inference which their language discloses. Because the banker would have been justified in making payment, when he had no notice of the death, it does not follow necessarily that he would not have been jus-

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tified if he did have such notice. As to that circumstance, the Lord Chancellor simply withheld his opinion, after already going further than was needful to the decision of the case.

5. We think we have shown that the case generally cited for the doctrine that after the death of the drawer of a check the bank should not pay it, is not an adjudication to that effect. Let us now examine the question on principle. What is a check? What does it import? What is its effect?

Byles defines a check to be "an inland bill of exchange drawn on a banker, payable to bearer on demand."—*Byles on Bills* [*13]. Edwards says it is "a bill of exchange payable on demand."—*Edwards on Bills*, 396. Sir G. Jessel, Master of the Rolls, calls a check "a bill of exchange payable at a banker's."—*Hopkinson* v. *Forster*, 18 Eq. Cas. L. R., 74 (1874). "Checks are bills, or rather bill is the genus, and check is a species," is the expression used in a New York case often cited.—*Harker* v. *Anderson*, 21 Wend., 372.

"It is perfectly correct to say that it is a bill with some peculiarities, or a species of bill."—*Daniel on Negotiable Instruments*, § 1,567. Without pausing to define a check here, suffice to say that it certainly is a species of bill of exchange. This being true, what is there about it which makes the death of its drawer have a different effect from that resulting from the death of the drawer of any other bill of exchange? Nothing that we can discover.

"If a person draw a bill of exchange on another, and deliver it to the payee for a sufficient consideration, and the drawer then dies, it should seem that, this having been an appropriation of a particular fund for the benefit of the payee, the death would be no revocation of the request to accept, and that the drawee may accept and pay."—*Chitty on Bills* (13th Am. Ed.) [*287], 325. "The death of the drawer," says Parsons, "is no objection whatever to an ordinary acceptance by the drawee, *whether with or without knowledge*, for the death is no revocation of the bill, if it has passed into the hands of a holder for value.—1 Parsons, N. and B., 287.

This learned writer saw the conflict between the statements of the text-writers, and that there was no difference between the right to accept the bill and to pay the check. And in a note to his text (1 vol. 287, note 6), after quoting Chitty's words above used, and those of Byles, to the effect that "the death of the drawer of a check is a countermand of the banker's authority to pay it," he well says "the two propositions are irreconcilable."

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When we look closer into the nature of the instrument, we think it is still clearer that the death of the drawer of the check does not affect the banker's right to pay it.

6. A check is a negotiable instrument; and like all negotiable instruments, carries the presumption that it was given to the payee for value. "The natural inference from the giving a check is that it was given in payment of a debt due the payee from the drawer, or that the payee gave cash for it when it was drawn."—*Daniel on Negotiable Instruments*, § 1,646, and cases cited.

This being so, the payee may sue the drawer, if it be not paid, or his executor if he be dead; and any person may buy the check, or take it from the payee in discharge of a debt. In the hands of a *bona fide* holder, who acquires it from the payee in due course of business, defenses which are available between immediate parties are excluded; and if a third party may acquire it, and recover upon it, against the drawer, would it not be curious and illogical to hold that the bank, under the like circumstances, should not pay it." It has never been intimated that a third party cannot acquire a check without inquiry after the drawer's death. Why, then, may not the banker pay it?

7. It has been urged that the death of the drawer is "a revocation of the banker's authority to pay the check," as if it were an instrument to be governed by the law of agency. And in *Thomson on Bills*, p. 244, it is said, respecting the view taken by the English text-writers: "It (the check) seems to be considered as a kind of mandate. In Scotland, such a check, being an assignment of the funds in the banker's hands, might be completed by presentment to him, even after the drawer's death."

It is an entire misconception of the nature of a check, as we think, to look upon it as a mere mandate. It imports that the payee has given value for the right to draw the funds from the banker, and to hold that it is a mere mandate to the banker to pay the amount it calls for, is to lose sight of its higher and more comprehensive character, that of a negotiable instrument, employed as a necessary instrument of commerce, circulating from hand to hand, almost as freely as money, and is to allow the greater to be swallowed up in the less.

If it is to be regarded as an authority to the banker to pay the amount, it ought also to be regarded as an authority to the payee, or other holder, to receive the amount. Being presumably given to the payee for value, the authority to

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him to receive the amount is presumably an authority coupled with an interest. Then it is a double mandate. In so far as it is an authority coupled with an interest, it is irrevocable. No citation of authority is needful for this universally recognized doctrine. If the banker's authority to pay be revoked by the drawer's death, we are driven to this paradoxical conclusion: that an authority coupled with an interest may be practically revoked and annulled by the revocation of another authority not coupled with an interest; and the law would appear in this state of self-stultification, that the authority to collect the amount continues, and is irrevocable, while the authority to pay, which is necessary to its exercise, ceases by revocation! Is not this *reductio ad absurdum?*

8. According to the view which we have elsewhere taken of a check, it operates as an assignment of the fund upon which it is drawn, as between the drawer and the payee, or holder, and the assignment binds the bank as soon as it is notified thereof by the presentment of the check. See *Daniel on Negotiable Instruments*, § 1,643. But we acknowledge that this is not the predominant view, and that the numerical weight of authority is against it. Be this as it may, it is universally conceded that the check operates as an assignment of the fund *pro tanto*, as soon as the bank consents to it, by certification or payment.

This being the case—the assignment depending not upon the drawer, who has, by the act of drawing, given his consent, and not upon the act of the banker—we cannot see how the death of the party who has consented can annul the right of another to acquiesce and concur in his act.

Professor Parsons, in a note to his text, takes this view. Says he: "The right on the part of the drawee to complete the assignment would seem to be a privilege of his own, and it is somewhat difficult to see how the death of the drawer can affect it. The drawer has given the holder a written instrument authorizing the latter to apply to the drawee for the assignment of certain funds. The holder of the bill who has received it for a sufficient consideration has an interest in this authority—not merely in the proceeds of the bill, but in the bill itself; and the rule is that an authority coupled with an interest is irrevocable."—2 *Parsons N. and B.*, 287 note. This language is used in respect to an ordinary bill; but the author evidently regards it as equally applicable to a check.

9. We concede that if the check were a gift to the payee,

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and the banker knew that fact, the death of the drawer would operate as a revocation of the banker's authority to pay it. In such a case, the authority to the donee to collect, as well as that of the banker to pay, is not coupled with such an interest as to continue them in force. "If it had been a check drawn by Hampton Elliott, and he had died before the check was presented, *and the check was a donation*, the check would have been worthless, because by the demise of the donor, his mandate to his agent, the bank, was revoked," is the language of the Supreme Court of Louisiana, in *Burke* v. *Bishop*, 27 La. An., 465 (1875.) In such a case, all that is said in *Tate* v. *Hilbert* would apply. But the banker is not to presume that a check is a donation. To require such a presumption on his part is to make him presume what in ninety-nine cases out of a hundred is not the fact, is to make him presume contrary to what a purchaser may presume; is to except a check from the universally accepted rule of the law merchant that negotiable instruments import value; and is to attach one presumption to the check while the drawer is alive, and another to the same paper upon his demise.

10. In the case of *Cutts* v. *Perkins*, 12 Mass., 206, a master of a ship in London bound to the United States, having goods on board consigned to a Boston merchant, and being indebted to a London merchant, drew a bill on the consignee in favor of the London merchant for the amount of the freight money. Before the bill was presented the master died, and it was contended that his death operated as a revocation of the bill. Putnam J., delivering the opinion of the court, said: "Upon the delivery of a bill of exchange to the payee, the liability of the drawer becomes complete. Some writers have holden that where the endorsement was intended as a mere authority to enable one to receive the money for the use of the endorser, the death of the endorser should operate as a revocation of the authority. But the law is clearly otherwise, *when the authority is coupled with an interest*, and in such case the death of the drawer will not be a revocation of the request on the drawee to accept."

This case, as we think, correctly states the law. If the death of the drawer revokes the drawee's right to accept and pay the bill, then an endorser's death must also revoke it, for he is regarded as a new drawer, and thus confusion and uncertainty are introduced into the law merchant in respect to instruments which of all others should be most sure and stable.

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In *Billing* v. *De Vaux*, 3 Man. & Gr., 565, a bill drawn in favor of the plaintiffs was accepted by letter after the drawer's death. The payee sued the acceptor, and he was held liable. Tindal C. J. said: "I am not aware of any principle of law by which, upon the death of the drawer of the bill, the right and liabilities of the parties thereto were at all varied." Coltman J. said: "The other circumstance relied on is that Mersing, the drawer, was dead at the time the letter was written to him, and therefore that it is to be considered as mere waste paper. Possibly that might be the case *were the effects confined to the parties themselves.* But here the bill had been put in circulation." The bill was in the hands of the payee.

Maule J. said: "The letter (of acceptance) operates for the benefit of Mersing's (the drawer's) estate, for his death could not vary the rights and liabilities of third parties."

We think this case direct authority as against the inferences which have been drawn from *Tate* v. *Hilbert.* Rights accrue upon the delivery of a bill or check to the payee. They are not varied by the subsequent death of the drawer. The drawee of the bill may accept and pay it; the drawee of the check may also honor it; for it is presumably given for consideration, and its payment operates for the benefit of the estate of the deceased, which, upon its dishonor, would be bound for its payment out of general assets.

It is to be hoped that the erroneous doctrines of the text-writers may soon be brushed away, and that the clear principles which apply to this important question may be universally recognized and adopted.

JOHN W. DANIEL.

Banker's Magazine. *Lynchburg, Va.*

SUPREME COURT OF THE UNITED STATES.

DENVER ET AL *v.* ROANE, EX'OR.

1. A bill in equity may be maintained by the personal representatives of a deceased partner against the survivors, to compel an account, so far as possible, and for a discovery of property which came into their hands. Such a bill is plainly within the province of a court of equity, and it is quite competent for a court to enforce the fulfillment of a contract, so far as possible, when the decree is made.

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2. Where a partner repudiates a case, and the remaining partners continue it to completion, he can have no claim to any fees arising therefrom after such abandonment.
3. The same principles of law which apply to the modes of settlement of commercial partnerships are applicable to the settlements of partnerships between lawyers, and claim agents.
4. If there is an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labors for the benefit of the concern, he must do so without compensation, unless there is an express stipulation for compensation.

Appeal from the Supreme Court of the District of Columbia.

Mr. Justice STRONG delivered the opinion of the court.

The bill filed in this case was not an ordinary bill for the settlement of partnership accounts. James Hughes, the complainant's testator, and James W. Denver and Charles F. Peck were in partnership as attorneys and counsellors at law from 1866 until the 18th of March, 1869. On that day it was agreed between them, virtually, that the general partnership should terminate; that thereafter no new business should be received in partnership, and that any coming to the firm through the mails should be equitably divided. The agreement, however, contained a stipulation that the business of the firm theretofore received, and then in hand, should be closed up as rapidly as possible by the members of the firm "*as partners, under their original terms of association, and in the firm name.*"

Soon after, on the 13th of August, 1869, a further agreement was made to the effect that, in case of the death of any one of the partners, his heirs or personal representatives, or their duly authorized agent, should receive one-third of the fees in cases nearly finished, and twenty-five per cent. in other partnership cases. Denver acceded to this second agreement, with the understanding that, before any such provision should be made, at any time, all partnership obligations should be first satisfied, proposing no new terms, only stating the legal effect. We think this was a closed contract.

It is upon these two agreements the bill is founded. Mr. Hughes died on the 21st of October, 1873, and the executor of his will has brought the present suit for a discovery, and to recover from the surviving partners the share of the testator in the fees received by them out of the partnership business which remained unfinished when the general partnership was dissolved. A decree having been entered against the defendants in the court below, they have appealed to this

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court, and have assigned numerous errors. Of most of them it will be necessary to say but little, and, indeed, in regard to most of them there has been hardly any controversy between the parties during the argument.

It is first insisted by the appellant that the court below had no competency or jurisdiction to entertain a bill for such relief as is prayed for, nor to give such a decree as the court gave, whereby it attempts to settle and close the affairs of a partnership by decreeing specific sums as legally due, and if so, demandable at law, and providing for the further continuance of the partnership and collection by virtue of its decree of other like sums until the business of the partnership may end. Such is the first assignment of error. The objection misapprehends the nature of the case made by the bill, overlooks the facts, and does not state accurately the decree. That a bill in equity may be maintained by the personal representatives of a deceased partner against the survivors, to compel an account, so far as an account is possible, and for a discovery of the partnership property which came to their hands, is undeniable, and such was the object of the present bill. When the firm was dissolved in March, 1869, for general purposes, the agreement of dissolution stipulated that, as to the business then in hand, the members of the firm should continue partners, and should close it up. What that business was, the present defendants only could know, after the death of Hughes, for it was then left in their hands, and they only could know what fees had been received on account of it. A bill for discovery, as well as for distribution of the fees received, was, therefore, plainly within the province of a court of equity. And as the partners had agreed, as they did by the agreement of August, 1869, to divide those fees in certain proportions, it was quite competent for the court to enforce fulfillment of the contract, so far as was possible, when the decree was made. The court did not attempt to make a complete settlement of the affairs of the partnership. In the nature of the case, that was impossible. Some of the partnership business remained unfinished, and fees, uncertain in amount, were yet to be collected. But, so far as fees had been collected, the right to immediate distribution was complete. The agreement did not contemplate that all the fees collected might be held by the surviving partners until all the partnership business should be brought to an end, and it was, therefore, quite proper to reserve consideration of the fees yet to be received after they shall have been earned.

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An objection raised by several other assignments of error (particularly the 6th, 7th, 8th, 9th, 18th, and 19th), is, in substance, that the court erred in applying to a partnership between lawyers and claim agents the principles of the law of commercial partnerships, in regard to the modes of settlement of the same, after the death of a partner, and in regard to the neglect of the business of such a firm by a partner; that, by the decree, no compensation is allowed to the survivors for carrying on the unfinished business, but that they are required to continue it as well for themselves as for the benefit of the deceased partner's estate. We think these objections to the decree ought not to be sustained. We are not convinced that during his life Mr. Hughes (except, perhaps, in reference to a single case in charge of the firm) was guilty of such neglect, or violation of his duty to his partners, as should deprive him. or his personal representative, of a right to share in the profits of the partnership. In regard to the work done, and the fees received after his death, the parties, by their agreements, prescribed the rule for determining their rights as against each other. Having jointly undertaken the business entrusted to the partnership, all the parties were under obligations to conduct it to the end. This duty they owed to the clients, and to each other. And as to the unfinished business remaining with the firm on the 18th day of March, 1869, the duty continued. The agreement provided for that. Now, in reference to this duty, the law is clear. "As there is an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern, it follows that he must do it without any rewards or compensation, unless there be an express stipulation for compensation." Story on Partnership, § 182, § 331; *Colwell* v. *Lieber*, 7 Paige, 483. So it is held that where partnerships are equal, as was true in the present case, and there is no stipulation in the partnership agreement for compensation to a surviving partner for settling up the partnership business, he is entitled to no compensation. *Brown* v. *McFarlan*, 41 Penn. St., 129; *Beatty* v. *Wray*, 19 Penn. St., 518; *Johnson* v. *Hartshouse*, 52 N. Y., 173. This is the rule in regard to what are commonly called commercial partnerships, and the authorities cited refer to those. There may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor. No adjudicated cases, however, with

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which we are acquainted, recognize any such distinction. And in the present case, as we have said, the parties made arrangements for the work, and results of work after the death of any of their number. The agreement of August 15, 1869, provided that, in case of the death of any partner, one-third of the fees in cases nearly finished, and one-quarter of the fees in other partnership cases, should belong to the representatives of the decedent. Of course it was contemplated that the surviving partners should finish the work, and that no allowance should be made to them beyond the share of the fees specified in the agreement.

The most important objection to the decree which has been urged by the appellant is, that it adjudged to the complainant one-third of the fee collected by the defendants in the case of Gazaway B. Lamar against the United States, including the claim of D. A. Martin. That case was in charge of the firm before the agreement of March 18th, 1869, was made, and was commenced in 1868. It was, therefore, one of the cases within the purview of the agreement of August 13, 1869. Mr. Hughes' name appeared on the record as attorney and counsel with the appellants for the claimant. But on the 9th of January, 1873, he came into court and asked that his name be erased as such attorney, and that he have leave to withdraw his appearance and sever his connection with the case. His motion was allowed, and his appearance was then withdrawn. The appellants, however, went on with the case. Briefs were filed for the claimant on the 21st of March and the 22d of April, 1873; the case was argued on the 20th of May, and on the 2d of June next following the court entered a judgment for the claimant. An appeal was then taken to this court, which was subsequently dismissed. After the withdrawal of his appearance, and the severance of his connection with the cause, Mr. Hughes took no part in prosecuting the claim, neither in the Court of Claims nor in the Supreme Court, and he paid no attention to it. He quarreled with Mr. Lamar, and about the time he withdrew from the cause he denounced the claim privately to one of the judges of the Court of Claims as altogether without merit, and a fraudulent case, or words to that effect, and said that he had decided not to be involved in a case of so scandalous a character, and for so worthless or unworthy a client. In regard to the question of fees in the case, the judge testifies, "he declined to have any interest in the case, or to take fees, because he believed the case was a

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corrupt one, and not likely to succeed, and that he would not lose much by his withdrawal from the case."

The question presented by this state of facts is whether, inasmuch as the case was afterwards conducted by the appellants to final success, and they received a fee from Mr. Lamar, the claimant, Mr. Hughes, would be entitled to any part of the fee were he now living. If not, certainly the personal representative cannot be now. The recovery of the claim was undertaken by the firm without any agreement respecting fees. By undertaking it, the firm, and each member of it, assumed to conduct the case to a final conclusion, and with all fidelity to the client. Such was the contract of Mr. Hughes with Lamar, as completely as if he had been the sole attorney and counsel employed. And as the contract was entire, he could not have abandoned it after a partial performance, and still have held the other party bound. Much less could he have accompanied his abandonment by denouncing the honesty of the claim to one of the judges of the court, whose province it was to find the facts and adjudicate upon its merits, and yet claim compensation for services rendered. Such conduct on his part was not merely a renunciation of his engagement to the client—it was a flagrant breach of professional duty. It was not in his power to refuse performance of his part of the implied contract with Lamar, take action hostile to the claim, and still hold Lamar bound. Certainly he could not hold Lamar directly liable. And we do not perceive that, in equity, his situation was any better because he had contracted with the client jointly with his co-partners.

If, then, by abandoning the case and denouncing it as fraudulent, he lost all the right which he had against Lamar, how can he claim from his co-partners any of the compensation they obtained for conducting the case, after his abandonment, to final success? His action was a breach of his duty to those partners, as well as of his obligation to Lamar. By the agreement of co-partnership, he had undertaken to share in the labor, and to promote the common interests of the firm, and that was the foundation of his right to share in its earnings. It may be that mere neglect of his duty would not have extinguished that right, but a repudiation of his obligations, refusing to act as a partner, or to perform the functions of a partner, is quite a different thing. It may well be considered as a repudiation of the partnership. It was said in *Wilson* v. *Johnstone*, 16 Eq. Cas., 606, "He who acts so as to treat the articles as a nullity as regards his own obligations, cannot complain if they are so treated for all purposes." It

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may, therefore, very justly be held that, by his action, Mr. Hughes became a stranger to the case, and repudiated any relation he had previously held to it as a partner in the firm. The partnership ceased as respects that claim. The other partners who continued to attend to the case, could charge the client nothing for his services, for, as the contract was contingent on success, nothing was due to any partner until success was attained. They certainly could claim nothing for services rendered by him after he severed his connection with the case, for he rendered none, and if he had any just claim on a *quantum meruit* for services rendered before, it was against Lamar and not against his co-partners.

We think, therefore, the decree of the court below was erroneous, in so far as it allowed to the complainant any part of the fee collected from Lamar, or from Martin, who owned a part of what was recovered in the Lamar suit.

We discover no other fault in the decree; but for this, the case must be sent back for correction.

The decree of the Supreme Court of the District is reversed, and the record is remitted, with instructions to enter another decree in conformity with this opinion.

SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND AND DANVILLE RAILROAD CO. *v.* ANDERSON'S AD'MR.

MARCH TERM, 1879.

1. It is a well settled rule of law that no action can be maintained and no recovery had, for an injury caused by the *mutual fault* of both parties, when it can be shown that it would not have happened except for the culpable negligence of the party injured, *concurring* with that of the other party.
2. While it is true, however, that where the negligence of each party concurring with that of the other, is the proximate cause of an injury, neither can maintain an action against the other for such injury, because, among other reasons, the damages resulting from the injury cannot be apportioned, yet it is equally true, that a plaintiff may, under certain circumstances, be entitled to recover damages for an injury, although he may, by his own negligence, have contributed to produce it, unless but for that negligence, the injury could not have happened, or if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. So where the negligence of the plaintiff is proximate, and that of the defendant remote, no action can be maintained, and *vice versa*.

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3. On a demurrer to evidence, the demurrant must be considered as admitting the truth of his adversary's evidence and all just inferences which can be drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences, *it would seem*, from his own evidence (although not in conflict with his adversary's), which do not necessarily result therefrom.
4. For circumstances under which a railroad company will not be held liable for the killing, by one of its trains, of a person on its track, see opinion of *Burks J.*

From the Circuit Court of Prince Edward county.

The facts of the case are sufficiently stated in the opinion of the Court.

H. H. Marshall and W. W. Henry for the plaintiff in error.

Irving & McKinney, Fitzgerald, Guy & Gilliam for defendant in error.

BURKS J.—An action was brought in the court below, under the statute (Code of 1873, chap. 145, sections 7, 8, 9, 10), by the personal representative of W. W. Anderson, Sr., deceased, against the Richmond and Danville Railroad Company, to recover damages resulting from the death of said decedent, caused, as alleged, by the negligence of the said railroad company.

The plea was "not guilty." On the trial of the issue joined on that plea, the defendant demurred to the evidence. Upon the demurrer, the court rendered judgment in behalf of the plaintiff for the amount of damages conditionally assessed by the verdict of the jury. The judgment is to be now reviewed on a writ of error awarded by one of the judges of this court, on the application of the defendant.

Negligence is the gist of this action. If the injury, which resulted in the death of the plaintiff's intestate, was occasioned by the negligence of the defendant and solely by such negligence, there can be no doubt of the plaintiff's right to recover damages for the injury; but if there was negligence on the part of the defendant, and also on the part of the deceased, and the negligence of the latter contributed to the injury, the right of recovery depends upon the circumstances.

The *Richmond and Danville R. R. Co.* v. *Morris*, recently decided by this court, was a case, in which the plaintiff and defendant were mutually in fault, and the combined or concurring negligence of the parties was the proximate cause of the injury, for which the action was brought. The negli-

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gence of each party was proximate to the injury, both in the order of time and causation. The negligence of the conductor in putting the train in motion, immediately after he had awakened Morris the last time and told him to get off, and before he had time to get off, concurring with the negligence of Morris, after he had received the direction from the conductor, in walking to the rear of the train and jumping off while the train was backing, instead of stepping out upon the platform, as he might have done safely and conveniently, caused the injury complained of. This court did not undertake, in that case, to lay down the law on the subject of contributory negligence, further than was applicable to the particular case, as will appear by the following extract from the opinion of the court: "The reports are filled with cases expounding and illustrating the doctrine of contributory negligence, and there is more or less conflict in the decisions, under the diversity of circumstances in the cases. Attempt to reconcile them would be labor to no useful purpose. We shall make no such attempt. We think the law on the subject *applicable to such a state of facts as we have to deal with*, is correctly laid down by the Supreme Court of the United States in the recent case of *Railroad Company* v. *Jones*, 95 U. S. R. (5 Otto), 439."

The rule stated by Mr. Justice Swayne in the case in 5 Otto (which was approved by this court), so far as it relates to contributory negligence, is certainly the correct rule, if limited in its application to cases like the one then under consideration by this court, of mutual or concurring negligence. This rule, in its restricted form, is stated by Chief Justice Black in the extract which was taken from his opinion in *Railroad Company* v. *Aspell*, 23 Penn. St., 147, 149. "It has been a rule of law from time immemorial," he said, "and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the *mutual fault* of both parties. When it can be shown, that it would not have happened, except for the culpable negligence of the party injured *concurring* with that of the other party, no action can be maintained."

While it is true, however, that where the negligence of each party concurring with that of the other is the proximate cause of an injury, neither can maintain an action against the other for such injury, because, among other reasons, the damages resulting from the injury cannot be apportioned, yet, it is equally true, that a plaintiff may, under certain circumstances, be entitled to recover damages for an injury, al-

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though he may, by his own negligence, have contributed to produce it.

The rule as stated by Mr. Justice Swayne in *Railroad Co.* v. *Jones*, *supra*, approved by this court in *Railroad Co.* v. *Morris*, is taken almost literally from the opinion of Mr. Justice Wightman in *Tuff* v. *Warman*, 5 Q. B. N. S. (94 E. C. L. R.), 573. So much only was quoted from the opinion in the English case as was deemed applicable by the Supreme Court, and afterwards by this court, to the facts in the cases respectively, to which the rule was applied.

Reference to the case of *Tuff* v. *Warman* will show the rule, as extracted by the Supreme Court, and also a qualification of that rule, which was not noticed.

Mr. Justice Wightman, delivering the judgment of the court in the Exchequer Chamber, on an appeal from a decision of the Court of Common Pleas, said, "It appears to us, that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened."

The foregoing is what was quoted in *Railroad Co.* v. *Jones*, and *Railroad Co.* v. *Morris*, and was all sufficient for the purposes of these cases under the facts. But the English judge, in his opinion, adds this important qualification to what he had said: "Mere negligence or want of ordinary care or caution would not, however, disintitle him (the plaintiff) to recover, unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might, by exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

"This," he says, "appears to be the result deducible from the opinion of the judges in *Butterfield* v. *Forrester*, 11 East, 60; *Bridge* v. *The Grand Junction Railway Co.*, 3 M. & W., 246; *Davies* v. *Mann*, 10 M. & W., 538; *Dowell* v. *The General Steam Navigation Co.*, 5 E. & B., 206 (E. C. L. R., vol. 85)."

Such is the English rule; and it is said by Judge Cooley, in his recent treatise on Torts, that it has been accepted by

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the courts in this country with few exceptions. See Cooley on Torts, 675, and the great multitude of American cases cited in a note as following the English rule.

In a case decided by the House of Lords very recently (1876), on appeal from the Exchequer Chamber, the rule, in substantially the same form, or to the same effect, has been reiterated. Lord Penzance, in delivering the judgment, which was concurred in, said, "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care, which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." And his Lordship adds, "This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann* (10 M. & W., 546), supported in that of *Tuff* v. *Warman* (5 C. B. N. S, 573), and other cases, and has been universally applied in cases of this character without question." *Radley* v. *London and Northwestern Railway Co.*, 1 Appeal Cases (Law Reports, 1875–6), 754, 759.

Although there is some conflict in the American decisions, the weight of authority seems to be very decidedly in favor of the English rule, and the rule itself appears to me to be a just and reasonable one. It cannot be expected that the numerous American decisions on this subject could be examined within the limits of this opinion. I refer again to the cases cited in the note in Cooley on Torts *ubi supra*, and content myself with a notice of a few cases, cited in argument by the learned counsel for the defendant in error.

In the opinion of the court, delivered by Isham, J. in *Trow* v. *Vt. Central R. R. Co.*, 24 Verm., 487, 495, which seems to be a well considered case, and has been often cited with approbation in other cases, it is said, that when there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained, the words "proximate cause" being used in the opinion as indicating negligence occurring at the time the injury happened. In such case, no action can be sustained by either, for the reason, that as there can be no ap-

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portionment of damages, there can be no recovery. So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting of some other matter than what occurred at the time of the injury, in such case, no action can be maintained, for the same reason that the immediate cause was the act of the plaintiff. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled, says the judge, in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet, if at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, an action will lie for the injury. In support of these propositions, the following English authorities were cited: *Davies* v. *Mann*, 10 M. & W., 548; *Mayor of Colchester* v. *Brooke*, 53 E. C. L, 376; 3 M. & W., 244, and other cases.

In the case often cited of *Kernbacher* v. *The Cleveland, Columbus and Cincinnati R. R. Co.*, 3 Ohio St., 172, it is said, that the liability to make reparation for an injury by negligence, is founded upon an original moral duty enjoined upon every person, so to conduct himself or exercise his own rights, as not to injure another; that the mere fact that one person is in the wrong, does not necessarily discharge another from the due observance of proper care towards him, or the duty of so exercising his own rights as not to do him an unnecessary injury; and that the doctrine, that in the case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject, as appears from a review of the decisions both in England and in this country, to material qualifications, among which are the following: First, the injured party, although in the fault to some extent at the time, may, notwithstanding this, be entitled to reparation in damages for an injury, which he has used ordinary care to avoid. Second, when the negligence of the defendant in a suit upon such ground of action is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission not occurring at the time of the injury, the action is maintainable.

To the same effect are the following cases: *Northern Central Railway Co.* v. *The State*, use of Price and others, 29 Mo.,

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422; *Baltimore and Ohio R. R. Co.* v. *State*, use of Troiner and others, 33 Md., 542; *Brown* v. *The Hannibal and St. Joseph R. R. Co.*, 50 Mo., 561 (decided in 1872); *Central R. R. and Banking Co.* v. *Davis*, 19 Geo., 437; *Isbell* v. *New York and New Haven R. R. Co.*, 19 Conn., 393, 405; *Macon & W. R. R. Co.* v. *Davis, ad'mr*, 18 Geo., 679; *Herring* v. *Wil. & Raleigh R. R. Co.*, 10 Iredell (Law), 402; *Balt. and Ohio R. R. Co.* v. *Sherman's ad'mr*, and *same plaintiff* v. *Whittington's ad'mr*, recent decisions by this court, not yet reported, have an important bearing on the case now under consideration, as illustrating the doctrine of negligence as applied to railroad companies. See also what is said in Sherman & Redfield on Neg., sections 25, 494 (3d ed.); Wharton on Neg., section 388.

The judgment under review having been rendered on a demurrer to evidence and in favor of the demurree, I am not unmindful of the familiar rule applicable to such a case. The party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can properly be drawn therefrom by a jury, and as waiving all his own evidence which conflicts with that of his adversary, and all inferences, *it would seem*, from his own evidence (although not in conflict with his adversary's), which do not necessarily result therefrom. 4 Minor's Ins., Part I, 749, and cases there cited. Most of the Virginia cases on the subject are referred to in the opinion delivered by the President of this court in *Trant* v. *Va. and Tenn. R. R. Co.*, 23 Gratt., 619.

Judge Stanard, in his opinion delivered in *Ware* v. *Stephenson*, 10 Leigh, 161, approved by this court in the case last above named, speaking of the inferences which the court should draw from the evidence on demurrer, observed, that when the question is whether or no a fact ought to be taken as established by the evidence, either directly or inferentially, in favor of the demurree, he did not know a juster test than would be furnished by the inquiry, would the court set aside the verdict, had the jury, on the evidence, found the fact? If the verdict so finding the fact would not be set aside, such fact ought to be considered as established by the evidence demurred to.

The evidence demurred to in this case was introduced wholly by the plaintiff, except a brief statement made by a witness on being recalled by the defendant, after he had testified in behalf of the plaintiff. This statement is material, but not at all in conflict with the evidence introduced by the plaintiff.

It appears from the evidence, that on the third day of Oc-

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tober, 1874, the plaintiff's intestate, W. W. Anderson, Sr., received injuries by collision with a train of cars of the defendant, from the effects of which he died on the 5th of October (same month). The train by which he was struck was a passenger train, moving, at the time of the accident, westwardly, and approaching Greenbay Station in Prince Edward county. The point on the track at which he was struck was east of the station, and distant therefrom about a half mile. The schedule time for the arrival of the train at the station was 5 o'clock and 3 minutes P. M. The deceased resided about three miles from the station, which he visited frequently, and a mile and a half from the railroad track. There was a road which led from the station to the house where the deceased lived, but by going along the railroad track for about a mile and then diverging, the distance to his house would be from half-mile to three-quarters of a mile nearer. The railroad track was the way usually traveled by deceased in returning home from the station, and it was the habit of people to walk along the track at this point. There was no proof, however, that the deceased or any other person had license from the defendant to walk along the track at this place, or that the defendant had any knowledge that the track was so used.

On the day the accident occurred, the deceased was at the station. At what particular hour he arrived does not appear; but it does appear, very distinctly, that at ten minutes before 5 o'clock he left the station to return home. The time of his departure is accurately fixed by the testimony of the plaintiff, a son of the deceased. It is also sufficiently certain that he knew the schedule time for the arrival of the train at the station on that day. This would be inferred from the vicinity of his residence and his frequent visits to the station; but it is proved by two witnesses, that when he was about leaving the station on that day, the time for the arrival of the train was announced in his presence, or so near to him, that he might have heard what was said. With a knowledge, then, that the train would be due at the station in thirteen minutes, he got upon the track at the station and walked along it eastwardly in the direction from which the expected train would come; and which, if he kept on the track, he would necessarily meet, the train being on time, before he could reach the point at which he would leave the track for his home. He was seen by a witness at the station to walk along the track until he entered a cut in the road, which prevented the witness, in the position he occupied, from observing him

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any further. It appears that the road from the station to the point where the accident occurred, and for several hundred yards in that direction, is straight, the course being east and west, and that it runs mostly through cuts with banks, on either side, some four or five feet high, and that there are several intermediate crossings. There is no evidence that the deceased, after he entered the cut, about ten steps from the station, was seen by any person until he was discovered on the track by the engineer. The account given by the engineer is, that when the train was about half a mile distant from the station, and moving with a speed from 20 to 25 miles per hour, which was the usual speed, and, unimpeded, would have carried the train to the station at the exact time (5 o'clock and 3 minutes P. M.) fixed by the schedule for its arrival, he discovered a man lying on the track, with his back towards the advancing train, and about 75 or 100 yards from it; that he did all in his power to stop the train—blew "down brakes," sounded the alarm whistle, reversed the engine, and threw sand on the track; that he supposed he reduced the speed about one-half, but could not stop the train before it struck the man and knocked him from the track; that the sun was low and shone directly in his eyes; that when he first saw the man, the latter had his back towards him—his body, from the position in which it was lying, presenting the figure of the letter "U," so that he could see neither his hands nor his feet; that he (the engineer) raised up, and the top of the cab then protected his eyes from the sun, and he could then see more distinctly what the object was; that when he blew "down brakes," and also gave the alarm whistle, the man raised up, reclining on his elbow, faced the train, and then stretched himself out on the middle of the track, with his head towards the engine; and that after the alarm whistle was given, the man had sufficient time to have gotten off the track before the engine reached the spot where he was lying. It was further proved by the engineer, that reversing the engine is the last resort in stopping a train; that it injures the engine, and there is danger in upsetting the train; that the engine to which the cars were attached on that occasion was new—a good engine and in perfect order; that the train was not provided with the improved air-brakes; and that if it had been, he might have been able to stop the train a little quicker, but not soon enough to have prevented striking the man. Several engineers were examined as witnesses to shew the distance within which a train, moving with the speed at which the train on that occasion was running, might be

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stopped by the engineer in charge, and there is also evidence that the grade of the road, at the point where the accident occurred, is ascending; but it is perfectly manifest, and was not seriously questioned in argument, that the train, on the occasion when the accident occurred, could not have been stopped by the engineer, after he first saw the man on the track, before it came in contact with him.

If this were all the evidence in this case, there could not even be a pretext for recovery of damages for the injury complained of; for, up to this point in the evidence, whatever may be said of the conduct of the plaintiff's intestate, no negligence is proved on the part of the railroad company, or any of its agents or employees; and, as before stated, negligence is the gravamen of the action. In such a case, the law does not impute it. It lies on the party alleging it to prove it.

After the engineer saw the man on the track, he used all the means in his power, hazarding even the safety of the passengers, in suddenly reversing the engine, to avoid injuring him. He used all the care, skill and diligence which the situation demanded, but it was then clearly not in his power to prevent the accident.

But it was argued with much earnestness, that although it might be that the engineer did not see the deceased on the track until it was too late to avoid the collision, he might and ought to have seen him when it would have been in his power to stop the train and prevent the mischief, and that but for his negligence in not keeping a look out he could and would have seen him in ample time to have checked the speed of the train, and, if need be, to have stopped it entirely.

It was "the duty of the engineer to have watched ahead for objects on the track." He admits that in his testimony. It was probably a regulation of the railroad company. Whether it was or not, the law imposed the duty on the company as a carrier of persons. It was certainly a duty which the company owed to them, and if from a negligent failure to observe and perform it, an accident had occurred by which a passenger sustained injury, the company would have been liable for the damage to such passenger. Whether a railroad company owes this duty, under all circumstances, to persons wrongfully on its road, need not be decided in this case. Let it be conceded, however, that the defendant owed this duty to the deceased; the inquiry is, Was there neglect of that duty by the defendant's agents and servants, and was the accident which happened a consequence of that neglect?

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The engineer testified that he was at his post, but that he did not and could not see the deceased on the track in time to prevent the collision, because his vision was affected by the rays of the sun, which, at that hour of the day, shone directly in his face—the course of the road for some distance being east and west. On the other hand, several witnesses testified that the track at the point where the deceased was lying, and for several hundred yards eastward, within which distance, there is no doubt, the train could have been stopped by the engineer with convenience and safety, was shaded by the forest, and at that distance a man on the track could have been distinctly seen. All that may be true, and yet the statement of the engineer may also be true. It does not follow that because the track was shaded, as stated, the sun did not shine in the face of the engineer standing at his post. These witnesses did not pretend that they made their observations from every intermediate point in the road. Although the sun may not have shone in the engineer's face at one or more points, yet these would have been passed in an almost inconceivably short time—the train moving with a speed of 20 or 25 miles per hour, and thus the deceased, in the position he occupied, may have escaped the observation of the engineer, although on the look out for objects on the track, and therefore without fault on his part.

It must be observed, too, that the imputing negligence to the engineer in not seeing the deceased sooner, is based upon the assumption of the very important fact that the deceased was on the track when the train reached the first point, from which an object on the track could be seen. But no witness proves this fact, so essential to the theory of the imputed negligence. It is impossible to determine, from the evidence, whether the deceased was on the track or not when the train reached the first point from which, it is said, he could have been seen. The place where he was lying was near a cut in the road, and there was a ditch on either side of the track. According to the evidence, he could have stood on either side and escaped all harm from the passing train. It may be, that he tumbled upon the track just ahead of the advancing train. This is entirely consistent with the favorite theory of the counsel for the defendant in error, that he was neither drunk nor insane, nor voluntarily remaining on the track when the train came upon him, but that he had been suddenly smitten by some providential visitation, by which he was felled to the ground and rendered helpless. When he left the station, he was seen walking upon the track; when

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first discovered by the engineer, he was still upon the track, and in the situation which has already been described. Nothing further is known of his movements until he was seen by the engineer. His conduct, when he was aroused by the alarm whistle, was certainly very strange. Unexplained, it has the appearance of the conduct of a suicide or person of unsound mind. The evidence, however, would seem to forbid such a conclusion. He was a man advanced in life—sixty-one years of age—thrifty, possessed of a competent livelihood, free from debt, of good moral character, and happy in his family and social relations. He was never suspected of insanity by any who knew him.

It may be that he was intoxicated. It is true, that no witness testified to having seen him drink any intoxicating liquor while he was at the station on the day the accident occurred, and his son says that he was sober when he left the station. But, it was proved that there were two stores at the station, at both of which liquor was kept for sale. His son kept one of the stores. His father was not in his company during a part of the day. It may be, that he procured liquor from the other store, or some other place, without his son's knowledge. It was in proof, that while not a man of dissipated habits, he had been known to drink too freely, and, in fact, to get drunk. Possibly, he may have drank too much before he left the station—the effects not being visible to others—and he may have been thus overcome while walking down the track and have become stupefied. He wore a pair of tight shoes, and when found after the accident, he had on one shoe only. It was proved that on the preceding Sunday he walked in the same pair of shoes to a prayer meeting, and on the way, he took off his shoes and walked about three-quarters of a mile with his socks only on his feet. May it not be, that after walking a half mile on the track, he sat down, pulled off his shoe to relieve his foot, and while so situated, become stupefied and insensible to the dangers which threatened him? It must be confessed that these are all, more or less, conjectures. The real cause of his strange conduct will probably never be known with any degree of certainty; but there are two propositions which, in my judgment, are sufficiently established by the evidence.

First. But for the negligence or want of ordinary care and caution of the plaintiff's intestate, the misfortune—the loss of his life—could not have happened.

He was in fault in going upon the track of the railroad. The defendant was the owner in fee simple of the road, and

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entitled to the full, free, exclusive and uninterrupted use of it. This the deceased knew. He had no right to use the track at all as a way to reach his home, but he entered upon it on this occasion under circumstances which indicated that the use of it would be attended with rather more than ordinary peril. He did not attempt merely to cross the track when no train was near, nor to walk along it when no train was approaching; but, having the convenience of a road leading directly to his house, and with a full knowledge that the train would be due at the station in thirteen minutes according to the schedule time, he voluntarily and without license started upon the track in the direction from which the expected train was to come, and which, if it arrived at the usual time, he would almost necessarily meet before he reached the point at which he would leave the track for his home. But for this wrongful and incautious conduct on his part, the misfortune which befell him could not have happened.

Second. The defendant exercised ordinary care and caution, and yet could not, by the exercise of such care and caution, avoid the mischief which happened.

It is not necessary to recapitulate the evidence which establishes this proposition. It is sufficient to say, that the engineer did not see deceased on the track until it was too late, notwithstanding the prompt and energetic use of all the means in his power to avert the mischief which happened, and that he did not see him sooner was owing to causes from which no negligence in the defendant or its agents can be properly inferred.

If there had been no demurrer to the evidence in this case, and the jury had rendered a verdict for the plaintiff, it would have been the duty of the judge presiding at the trial to set aside the verdict, on the ground that the evidence was plainly insufficient to warrant it.

It follows that, in my opinion, the judgment of the Circuit Court is erroneous and should be reversed, and that final judgment should be rendered by this court on the demurrer to evidence in favor of the defendant (the plaintiff in error here.)

The other judges concurred.

JUDGMENT REVERSED.

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CIRCUIT COURT OF THE CITY OF RICHMOND.

May 10, 1879.

COMMONWEALTH *v.* BRADLEY T. JOHNSON ET ALS.

The State of Virginia guaranteed the payment of $500,000 of bonds issued by the Chesapeake and Ohio Canal Company, payable $200,000 in 1869, and $300,000 in 1883-4-5, with interest payable on January 1 and July 1 of each year until paid. All of these bonds were secured by a lien upon the tolls and revenues of the Canal Company, executed under authority of an act of the General Assembly of Maryland. The Canal Company failed in 1852 and afterwards to pay the interest, and the State of Virginia, prior to 1865, had paid, as guarantor of the Canal Company, large sums of money on account of such default.

The State of Virginia had also acquired, as assignee of one of her debtors, other debts due by the C. & O. Canal Company, for principal now due and interest past due, and claimed to be secured by a like lien on the tolls and revenues of the Canal Company.

Professing to act under authority of a joint resolution of the General Assembly of Virginia, passed February 26, 1867, requiring the Board of Public Works "to adopt such measures as in their judgment might be necessary and proper to realize the preferred liens of the State upon the tolls and revenues of the Chesapeake and Ohio Canal Company," the Board of Public Works employed the defendants as attorneys for the State. The contract contemplated not merely collection of money due to the State, but the protection of the State against her contingent liabilities for future default of the Canal Company. The compensation promised to counsel was a commission, not only upon the actual collections, but upon the liabilities of the State to become due. A final settlement with counsel was made by the Board of Public Works, in which counsel were allowed to retain, out of collections and claims in their hands, commissions upon liabilities of the Commonwealth which had not matured.

Subsequently, the House of Delegates of Virginia passed a resolution requesting the Governor to employ counsel to examine into these transactions, and to bring suit, if necessary, against the defendants. Under authority of this resolution, the Governor employed counsel, and upon their advice, by his instructions this suit was instituted. Before the suit was brought, one of the counsel became the Attorney-General of the State, and the bill was filed in the name of the Commonwealth by his associates in their individual name, and by himself officially as counsel p. q. The action of the Board of Public Works was impeached as *ultra vires*, and therefore not binding upon the Commonwealth, and the right of the counsel to retain the compensation allowed to them denied, because the action of the Board was unauthorized, and was induced by fraudulent misrepresentations upon their part. HELD:

1st. That the action of the Board of Public Works was within the scope of the duty devolved and the authority conferred upon them.

2d. That there was no fraud or misrepresentation upon the part of the defendants.

3d. That the action of the Board of Public Works was conclusive upon the State unless induced by fraud; and if so induced, could only be reviewed upon a bill filed in the name of the State under the authority of an act or joint resolution of the General Assembly.

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The case is fully stated in the head-notes, and by Judge WELLFORD in his opinion.

M. Boswell Seawell, *John Murray Forbes* and *Jas. G. Field*, Attorney-General, for the Commonwealth.

Charles Marshall and *Robert Ould* for defendants.

WELLFORD, J.—The starting point in this controversy is the date of the adoption by the General Assembly of Virginia of the joint resolution of February 26, 1867:

Be it resolved by the General Assembly of Virginia, That the Board of Public Works be and they are hereby authorized and directed to adopt such measures as in their judgment may be necessary and proper to realize the preferred liens of the State upon the tolls and revenues of the Chesapeake and Ohio Canal Company; and for that purpose to contract with counsel for the enforcement of said liens, in concert with other holders of similar liens: provided, however, that the compensation of such counsel shall be contingent only, and shall be paid by said Board only out of the proceeds to be realized from such proceedings, or the debts and liens secured thereby.

The day after this resolution was passed, the Board of Public Works made their original contract with the defendants, employing them as the attorneys for the State of date Feb. 27, 1867.

This contract was subsequently modified, and an amended contract executed upon the 5th day of March, 1867.

From time to time the defendants made report to the Board of Public Works of their action under the contract, and partial settlements were made prior to January 3, 1873. Upon that day a final settlement was had, and the accounts closed by a resolution of the Board. Under this final settlement, the defendants were permitted to retain, as their compensation for services rendered under the contract, large sums of money collected for the State from the Chesapeake and Ohio Canal Company, and claims of the State against the company, which at that time were yet unpaid.

The bill in this case is filed in the name of the State of Virginia, and claims that, by reason of this action of the Board of Public Works, the State has suffered great detriment; that she is not bound by the action of the Board in the premises, and has a right to require of the defendants a full accounting for all moneys received by them from the

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Canal Company, and all claims of hers placed under their control, and to a recovery from the defendants of a large balance of money in their hands to which she is entitled.

The action of the Board of Public Works, so far as it may be relied upon by the defendants, is repudiated for a double reason.

1st, That it was in excess of any authority conferred upon the Board to conclude the State

And 2d, That it was induced by fraud upon the part of the defendants.

All this may be true, and yet the bill must be dismissed, if, as is insisted by the defendants, the suit has been brought without the authority of law, and the State of Virginia, though nominally the complainant, is not before the court.

I propose to consider each of these questions in the order presented by counsel in the discussion of the case.

I. First, then, as to the question of *ultra vires*.

In construing the joint resolution referred to, we must primarily look to the subject matter of the legislation under the circumstances surrounding the General Assembly at the time.

What, then, was the interest of the State of Virginia in the Chesapeake and Ohio Canal Company?

The Chesapeake and Ohio Canal Company was incorporated by the General Assembly of Virginia, Jan. 27, 1824, and the Act of the Virginia Assembly was ratified and confirmed by the General Assembly of Maryland at its December Session, 1824, and by the Congress of the United States March 3, 1825. The company was formally organized June 20, 1828. Among the original stockholders were: The United States to the extent of $1,000,000; the city of Washington to the extent of $1,000,000; the State of Maryland to the extent of $500,000, and the cities of Alexandria and Georgetown each to the extent of $250,000. The State of Virginia, subsequently, by Act of Assembly of Feb. 20, 1833, subscribed $250,000 to the stock. These subscriptions, and some $600,000 in addition by private stockholders, and some $6,000,000 more of money contributed by the State of Maryland, were exhausted in making the canal navigable to Dam No. 6, a point some fifty miles east of Cumberland, and about $2,000,000 more was needed to complete it to that point, when it was hoped and believed that the coal beds of Western Maryland would supply tolls and revenues to some extent compensatory. The State of Maryland held a lien upon the revenues of the company, and was herself too much

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embarrassed at that time with her public debt, incurred in behalf of this company, the B. & O. R. R., and other works of internal improvement, to be able to render any further assistance. Under these circumstances, the General Assembly of Maryland, by an act passed March 10, 1845, agreed to waive the lien of the State, and authorized the Canal Company to issue to the extent of $1,700,000 bonds expressing upon their face that they were "preferred liens on the revenues of the company." These bonds were issued and made available by the company to a very large extent. But the Legislature of Virginia had to be appealed to for assistance, and in response to the appeal and representations of the company, as set out in the preamble of the act, upon the 8th March, 1847, authorized the Treasurer of the State to endorse upon $300,000 of these bonds the guarantee of the State of Virginia when the Board of Public Works should certify to him that it had been shown to their satisfaction that this $300,000 would ensure the completion of the canal to Cumberland; that the revenues of the company, after such completion, would be sufficient to pay the bonds principal and interest; and that prior to such completion, the company would pay the interest as it might accrue.—*Acts* '46–'7 p. —.

The Board of Public Works gave such certificate, and the guarantee of the State upon $300,000 of these bonds, known as preferred construction bonds, was endorsed.

But another difficulty now presented itself. The canal was complete to Cumberland, but to render it fully available, repairs of damages occasioned by use and freshets to the eastern portion of the canal had to be made, and money for that purpose had to be raised. The expedient to meet this difficulty was the issue by the company of bonds to the extent of $200,000, to be known as repair bonds, which the company was advised that, under the Act of Maryland of March 10, 1845, it could issue and secure, in preference to any other claims upon its accruing revenues and tolls. But the credit of the company was unavailing to negotiate these bonds, and the State of Virginia was again appealed to, and the appeal was again favorably responded to. The company presented to the General Assembly a memorial, the purport of which is set out in the act; and the General Assembly, March 15, 1849, *Acts Assembly*, '48–'9, p. —, authorized the Treasurer of the State to endorse upon these $200,000 of repair bonds the guarantee of the State, when the Board of Public Works should certify to him that certain terms and conditions recited in the act had been complied with to their satisfaction

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by the Chesapeake and Ohio Canal Company. The Board of Public Works gave such certificate, and the guarantee of the State was endorsed upon these $200,000 of repair bonds. The canal was completed to Cumberland in October, 1850. The interest upon the construction bonds was paid as it accrued up to and including January 1, 1852, and upon the repair bonds up to and including July 1, 1852. After these dates, no interest had been paid by the company when the joint resolution of February, 1867, was passed by the General Assembly of Virginia, and prior thereto, the State of Virginia had, as guarantor, paid large sums of money on account of this default of the canal company. Much of the interest which had been paid to the holders of the bonds prior to the acknowledged default of the company was still due by the company—the coupons having been paid for the company by advances of their bankers, Selden, Withers & Co., of Washington City. For these advances, Selden, Withers & Co. held certificates of the canal company bearing interest, and the original coupons were also in their possession. The canal company recognized S., W. & Co., not merely as creditors for this amount of money lent, but as the assignees of the original holders of the coupons, and as such entitled to all rights as lien holders, which these holders could have asserted had the coupons remained in their hands unpaid.

In the meantime, the Board of Public Works of Virginia had become the practical owners of all rights of Selden, Withers & Co. in the premises.

Selden, Withers & Co. had been the agents of the Board to negotiate the sale of bonds of the State of Virginia to the extent of five or six millions of dollars, and held in their hands, at the time of their failure, Virginia bonds to the extent of several hundred thousand dollars, for which they had made no returns. As a security for this indebtedness, the Board of Public Works had been compelled to accept claims of the house of S., W. & Co. against the Chesapeake and Ohio Canal Company, including this claim for advancements, made as above stated, to pay the coupons on the canal bonds of 1851 and 1852.

The State of Maryland, owning a large majority of the stock of the Chesapeake and Ohio Canal Company, had entire control of the corporation. Her pecuniary interest being postponed to that of the bondholders, the management of the work as a source of revenue became to her representatives a matter of comparative indifference, and the interests of the bondholders were in the custody of parties who had,

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practically, neither interest nor disposition to protect them. The corporation was, therefore, habitually openly and notoriously managed to subserve the interests of one or the other political party which might obtain control of the State. This condition of things naturally occasioned solicitude with the bondholders, and before the war efforts were made to obtain from the State of Maryland change in the organization and management of the company. The Legislature of Virginia, Jan. 26, 1860, *Acts*, '59–60, p. 693 and 694, adopted joint resolutions instructing the Attorney-General to proceed to Annapolis, and to endeavor to procure, by his own exertions and by co-operation with the other parties interested, friendly and considerate legislation from the State of Maryland; and upon the next day, another resolution, instructing the Attorney-General to pursue such legal or other measures as might be proper or necessary to protect, insure or recover the claims of the Commonwealth upon the Chesapeake and Ohio Canal Company then existing, or which might thereafter arise out of the engagements or guarantees of the Commonwealth for the said company.—*Acts* '59–'60, 694.

Mr. Tucker, then Attorney-General, went to Annapolis, and in conjunction with large bondholders, made efforts to accomplish the contemplated object. But his mission was altogether fruitless.

The canal company continued in default year by year—the annual receipts being consumed in current expenses or liquidation of floating debts carried from the one year to the next. In 1866, however, the prospects of the bondholders became more hopeful. The revenues of the company consequent upon largely increased business in the carriage of coal from the mines of Western Maryland, were much greater, and the report of the President and Directors of that year showed a surplus of $153,687, to be appropriated to the extinguishment of a floating debt of $154,998.36, with a reasonable prospect of equally favorable results from the operations of the then current year. The bonds of the company advanced in the market, but were still unsaleable, even as late as the year 1867, except at prices of 20 to 30 per cent. (See Colston's dep'n.)

Shortly prior to the passage of the joint resolution of February, '67, a conference was held of several large bondholders in Baltimore, at which it was deemed expedient to make renewed efforts to secure the control of the canal to be administered in the interest of the creditors. One of these defendants was present at that meeting, and it

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being deemed by all the parties eminently desirable to secure the co-operation of the State of Virginia, he came to this city and sought an interview with the Board of Public Works. The Board was so much impressed with the propriety of the conjoint action of the State and bondholders as suggested, that they substantially agreed upon a contract to employ these defendants as attorneys and representatives of the State before the attention of the General Assembly was called to the subject. It was deemed necessary, however, to have legislative action, and that action was had in the adoption of the joint resolution before referred to.

At that time, according to the statement of the bill, the State of Virginia held claims against the canal company to the amount of $817,559, consisting of claims for coupons paid as guarantor, amounting to $305,025, and interest thereon $166,494, and of claims assigned to her by Selden, Withers & Co., amounting to $346,240.

In addition to these claims for money due, she was liable to creditors of the canal company for the sum of $145,000 of arrearages of unpaid and overdue coupons, for $15,000 of coupons maturing every six months, for $200,000 of principal of repair bonds, to become due in two years, and for $300,000 of principal of construction bonds to become due in 1883-4-5.

Her claims against the company, so far as they were not protected by the lien upon the tolls and revenues, were utterly worthless, for they were postponed to the claims of the State of Maryland to the extent of millions of dollars; and so far as their validity under the lien was concerned, they were all embarrassed with the gravest difficulties. So far as her claim for the paid coupons went, she was without the evidence of the coupons themselves, except as to $35,400, which she had returned to the company, and for which she had received from it a certificate. The rest had been lost or stolen—most probably stolen when her records and offices were, by the disastrous results of the war, left unprotected.

In that very year of 1867, she had occasion to contest, in her own courts, her liability to a repayment as guarantor of the city of Wheeling, of coupons once paid by herself, and stolen, perhaps, at the time when these C. & O. Canal Company coupons were supposed to have been lost. See *Arents* v. *Commonwealth*, 18 Gratt., 750.

Her right to interest upon these payments was a controverted question, and has been rejected by the Court of Appeals of Maryland as a just claim upon the tolls and revenues.

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As to the claims of Selden, Withers & Co., the result of the subsequent litigation has been available to the State for a very small fraction—only $13,500 of construction bonds with arrears of interest from 1852.

A liberal estimate from the testimony of the then value of these claims of the State could not put their value at more than 10 per cent. of the face of the claim, or say $81,755.

Her own obligations, however, were fixed, and whatever might be their market value, were chargeable upon herself to the extent of every cent. She was debtor *in presenti* for $145,000 of over-due coupons, and her obligation was cumulating every six months by the maturing of $15,000 of coupons upon which she was guarantor, with the imminent liability in two years of $200,000 of principal of repair bonds, and a postponed liability of $300,000 of principal of construction bonds.

Under these circumstances, and in view of these facts, the General Assembly of Virginia passed the joint resolution of February 23, 1867.—*Acts*, '66–'7, p. 677.

Upon the face of this resolution, there is one projecting idea—the right of the General Assembly to command the agent. The language was not merely permissive in granting authority which the grantee, despite the distinguished honor conferred by the Assembly in its wide grant of discretion, might or might not elect to accept. It was mandatory and necessarily suggests the existence of some previous relation of the agent to the State as to the subject matter of the trust conferred. The recital of facts already made shows to no little extent what had been and was then this relation. The Board of Public Works had been the agent of the State which, under the authority of the General Assembly of 1847, had fastened upon the State liability for the $300,000 of guaranteed construction bonds, and the agent which, under authority of the Assembly of 1849, had in like manner fastened the liability for the $200,000 of guaranteed repair bonds. Out of those two acts all the claims and liabilities of the State grew, except what had been received from the assets of Selden, Withers & Co. The claims held under Selden, Withers & Co. were in the then custody and control of this Board of Public Works to secure a debt due to itself as agent of the State, and were held by the Board under a double fiduciary obligation to the State, and to Selden, Withers & Co.,

The Board of Public Works was then a constitutional branch of the Executive Department of the State created for the very purpose of supervising and protecting the interests

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of the Commonwealth in all works of internal improvement. This Board was originally a creation of the Legislature, but from the date of its first incorporation in February, 1815 (2 R. C., p. 201), down to this day, there has been an unbroken continuity in its relation to the State as the guardian of her interests and the executive of her will in all matters of internal improvement. The Constitution of 1850, which, in this respect, unamended at Alexandria, during the war, was the existing Constitution when this final resolution was passed, gave the Board a constitutional existence, subject only to abolishment by a vote of three-fifths of the members elected to each House of the Assembly. During the decade of years immediately prior to the war, the Board of Public Works was the great fountain of the power and patronage of the State. It negotiated millions of her bonds in the money markets of Europe and America, and expended the proceeds all over the Commonwealth. The State of Virginia was a subscriber to three-fifths of the stock in all the railroads then in progress in the State. All of this stock was held in the name of this Board. The State stock in the C. & O. Canal Company was held in their name also.—*Code* 60, ch. 65, §14, p. 384. Every dollar subscribed by the State was paid by and through the Board, and the representatives of the State in the meeting of stockholders and Board of Directors of the companies were, by requirements of the Constitution, appointed by the Board. Three out of five directors in every railroad company, and proxies casting two-fifths of the entire vote in all meetings of stockholders, were their appointees and subordinates. The Blue Ridge Tunnel, at a cost of more than a million of dollars, was constructed entirely out of the funds of the Commonwealth under their control, and hundreds of thousands of dollars were expended by this Board in like manner at the eastern and western ends of the Covington and Ohio Railroad. The greater part of the time of every session of the Legislature was consumed in the consideration of matters of internal improvement, and financial questions connected therewith, and a majority of the visitors to this city upon subjects of business with the State, were brought hither by their interest in these matters. All suits for or against the Commonwealth, regarding her internal improvement interests, were in the name of the Board of Public Works; all contracts on her behalf were made in its name; all moneys expended in construction of public works, were made by or through the Board; all moneys received from sale of bonds or dividends upon the stock of the State in improvement

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companies, stood upon the books of the treasury to the credit of the Board, and subject to its disbursement. As to all these matters, the powers, responsibilities, duties and obligations of the Board of Public Works, as defined and set out in the General Laws of the Commonwealth, were ample, comprehensive and discretionary to the largest extent necessary to constitute it in the sphere assigned to it, the *alter ego* of the Commonwealth.—See *Code Va.*, 1860, ch. 66–72, inclusive.

This was the agent upon whom the General Assembly of 1877, by its joint resolution, devolved the duty "to adopt such measures as in their judgment might be necessary and advisable to realize the preferred liens of the State upon the tolls and revenues of the C. & O. Canal Company.

The controversy as to the construction of this resolution arises out of variant interpretations of the meaning of the words "to realize the preferred liens of the State." It is maintained, on behalf of the plaintiff, that the only liens which the State held were liens to secure her the payment of her claims against the C. & O. Canal Company, and that the realization of those liens in contemplation of the resolution, must have been the collection of the money out of the tolls and revenues to satisfy the debt then due to her by the canal company; that as to the interest and principal which had not yet matured upon bonds on which the State was guarantor, any claim against the company was contingent and prospective, and that the holders of these bonds, and not the State, were the lien holders for their security.

The claims of the Commonwealth, however, were not all of the same character and rank. She asserted a present indebtedness by the canal company to her for money paid, as guarantor, upon matured coupons of the repair bonds, and paid, in like manner, also upon matured coupons of the construction bonds; and as holder of some of these construction bonds assigned by Selden, Withers & Co., she held other matured and over-due coupons. All this was due *in præsenti*, and as to the bonds which she held, she was, upon the most straightened letter of the law, undoubtedly a lien-holder for the payment of interest and principal thereafter to mature, as soon as the pay-day should arrive.

The repair bonds were issued as professedly prior, in right of lien, to the construction bonds, and the guarantee of the State of Virginia had been obtained upon the faith of assurances that they were to be first satisfied out of the tolls and revenues. This right Virginia was obliged to assert, and

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has been since recognized and established in the subsequent litigation in the courts of Maryland. It was impossible, therefore, that her lien, as holder of matured coupons upon the construction bonds, could be enforced without first securing her claim for paid coupons on the repair bonds, and her protection, as guarantor of those bonds, from liability for the unmatured coupons and principal. If, then, the resolution only contemplated the collection of the debt then due by the canal company, it must have contemplated the release of the State from liability as guarantor of the $200,000 of repair bonds.

There was no lien upon property then in existence, which could be exposed to sale in the market and the proceeds distributed among the creditors. The lien was only upon contingent and prospective profits to be earned by a company which had not, in fifteen years, earned one dollar to apply to the satisfaction of the lien-holders. Fifteen years arrearages of interest on the repair bonds, amounting to $180,000, and two more years of interest to accrue, $24,000, and $200,000 of principal to mature in 1869, aggregating about $400,000, had to be earned and paid before one dollar could be in hand for the benefit of the construction bondholders. Under the most favorable circumstances, it could not be expected that this amount could be paid off until two or three years had elapsed, and in the meantime, the liability of Virginia for maturing coupons on the $300,000 of guaranteed construction bonds was steadily increasing to the amount of $18,000 annually. If the claim which Virginia was asserting in common with other creditors for interest upon these coupons had been allowed, this $400,000 due on the repair bonds would have been considerably increased.

But after the satisfaction of these repair bonds, when every dollar of earnings was to be appropriated to the construction bonds, what was the prospect? There were already fifteen years arrearages due, not only upon the $300,000 bonds guaranteed by Virginia, but upon $1,400,000 more of the same issue and rank. There was every reason to anticipate, then, that there would be a cumulation of $1,800,000 or more over-due interest to be satisfied, and while the company was in process of payment of arrearages, $102,000 of interest was every year maturing; and of this, $18,000 was every year becoming a charge upon the Treasury of the State of Virginia. The coupons would have to be paid off according to date, beginning back in 1852, and, under the most favorable circumstances imaginable, very many

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years would have to elapse before Virginia could ever have hoped to realize her lien by actual receipt of money for the coupons she had paid in 1860 and afterwards, and the coupons of 1867 attached to the bonds she held as assignee of S., W. & Co. The General Assembly, therefore, in contemplating the payment of the then indebtedness to the State of the Canal Company, could not have closed their eyes to this annual increment of the liability of the State, and could not but have anticipated the necessity to enforce the lien upon the tolls and revenues long after every dollar then due had been fully paid and satisfied. That General Assembly did not contemplate the repudiation by Virginia of her obligations as they might accrue. It had then under consideration the subject of providing for payment of interest on the public debt, and did a few weeks subsequently pass an act providing for payment of 4 per cent. interest until a settlement could be had with West Virginia.—*Acts* '66–'7, p. 205. If, then, Virginia should meet her liabilities as guarantor in the future, and realizing her preferred liens meant only collection of money due, the necessity for enforcement of the lien must, in the contemplation of the General Assembly, have continued for many years. The repair bonds principal and interest, had to be extinguished; then all arrearages on construction bonds had to be paid. The State had to pay these arrearages of the company upon $300,000 out of $1,700,000 as they accrued every six months; and until those arrearages were paid, could in no event collect, year by year, more than three-seventeenths of the surplus tolls and revenues of the canal company. If the State failed to pay these arrearages as they accrued, she occupied the attitude of a defaulting debtor. If she paid them, she became creditor every year, and to realize her lien by collection of money due, required in the best conceivable contemplation of the future annual collections until all arrearages then existing, or thereafter to accrue, upon the whole issue of construction bonds, should be paid. If that Assembly could have forecast the future as well as we can now, that period of time might well have been anticipated as not likely to be in advance of the maturity of the construction bonds when the liability of the State for the principal of $300,000 would have been consummated, and when its non-payment by her as guarantor would have been occasion of reproach and discredit to her; and if paid by her, its collection had to be contemplated in any measures adopted to realize the liens of the Commonwealth.

Suppose that the construction placed upon this resolution,

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in condemning the action of the Board of Public Works, had been accepted by the Board in 1867. In that event, they were under obligation to act in regard to the claims of the State just as they would have acted as agents for an assignee of them who had no other interest in the affairs of the C. & O. Canal Company. Unless, in their judgment, it had been advisable, they were under no obligation to employ, in conjunction with the holders of similar liens, counsel for their enforcement. It might very well have been, in their honest judgment, wisest to realize at once what money might be obtained in the market by selling the claims, rather than submit to the certain delays of collection, the hazard of ill success, and even if partially successful, the commissions of counsel. Similar claims were bought and sold in the market, and, therefore, some holders of similar liens, perhaps not as much embarrassed for money as the State of Virginia was, had deemed that the wiser course. Suppose that the Board of Public Works had so acted, and had realized from the preferred liens of the State $80,000 or $100,000, and placed it in her Treasury, leaving her interests entirely uncared for as to her liability for $145,000 of over-due coupons, and of $15,000 coupons maturing every six months, and of $500,000 of principal at some future pay day. If it had so acted, and left the State exposed to all these liabilities without an effort to relieve her, the Board would have been justly amenable to censure and condemnation for evading a grave duty, by pleading a construction of the resolution of the Assembly which was not in harmony with its letter or its spirit. They were bound to know that the cardinal rule in construing statutes is so to read the words, "*ut res magis valeat quam pereat*," and the object of the resolution was so clearly manifest at that time that any construction which was so unequal to the necessities of the object would have been accepted by very few as a reasonable plea in extenuation of their default.

The broadest discretion is conceded in the resolution to the Board, with but one limitation. That single limitation is most significant of the object in view. The Board is forbidden to pay to counsel employed money out of the Treasury, but to the full extent of every dollar which might be collected, and every dollar of a debt which might be secured, the Board were authorized to contract for compensation to counsel. This looks very much as if the General Assembly thought that it might be wise and advisable to sacrifice the entire claim of the State upon the Chesapeake and Ohio

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Canal Company, if by so doing she could purchase relief from present and impending liabilities on her behalf. I am of opinion that the resolution gave to the Board of Public Works full authority to do so, if in their judgment such relief were practicable and such compensation advisable.

Looking to the subject matter of the resolution, the dignity of the agent designated, the duties of that agent under the Constitution and General Laws to the State as to all matters *in pari materia*, and the relations it had borne in the past to the interests of the State in the Chesapeake and Ohio Canal Company, the character of that interest, past, present and prospective, and the nature of the only security available for payment of present debts or relief from present and accruing liabilities, it is impossible for me to accept any theory which will justify imputation to the Board of Public Works of error in its contemporaneous construction thereof.

If the meaning of the resolution were more doubtful, that contemporaneous action of the Board, in the absence of fraud or collusion upon their part, is entitled to the greatest weight in resolving any doubt. The construction which the Board had placed upon their authority was no matter of concealment, and, in the nature of things, could not have been concealed. The day after the joint resolution, passed on the 27th February, 1867, the original contract with counsel was made and entered upon their public record. The amended contract was made, and in like manner entered of record on March 5th succeeding. The General Assembly was in session, and continued in session until the 29th April. The members of the Board were in high official position, and in daily intercourse with the members of the Assembly. They had every opportunity, and the best opportunity, to know the contemporaneous construction of their action by members of the Assembly, and they could have had no conceivable object in their own construction and consequent action, other than an honest purpose to subserve the interests of the State so far as they were confided to them by the Assembly of 1867, or Constitution and General Laws of the Commonwealth.

I am of opinion, therefore, that the action of the Board of Public Works, in making the original and the amended contracts with the defendants, and in their subsequent transactions, up to and including the final settlement, was not *ultra vires*, but was clearly within the scope of the authority conferred and the duty imposed upon the Board by the joint resolution of February 26, 1867.

If this be so, it is not a question open for judicial inquiry

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whether these contracts were or were not wise and provident, or whether the settlements had and made did or did not conform accurately with the contract. All these matters were within the discretion of the Board. Nor is it material whether the contracts were obnoxious, as alleged, to exception for containing within them the elements of champerty and illegal bargaining for lobby services. If they did, the Board might, perhaps, have repudiated its obligation after the services were rendered, but it cannot be made, by any department of the State, a matter of reproach to them that they did not. Certainly, I know of no case in which a party to an immoral contract has been held entitled to come into a court of justice and recover back money paid to or received by his confederate under any such contract. But I am of opinion that the contracts do not contain these exceptionable elements. The Board gave to the counsel no authority and made no bargain for lobby service. The authority was to take any necessary proceedings at law or in equity before any court anywhere, or before the General Assembly of Maryland, to attain the proposed object. There is nothing in the language which appears to contemplate anything but purely professional services, and "under all circumstances," says the U. S. Supreme Court, in *Trist* v. *Child*, 21 Wall, 450, "an agreement, express or implied, for purely professional services, is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee, or other proper authority, and other services of like character. All these things are only intended to reach the reason of those sought to be influenced. They rest on the same principle of ethics as professional services, rendered in a court of justice, and are no more exceptionable." The language of this contract looks as much to improper approaches to the judges who presided in the courts of Maryland, as to the individual members of her General Assembly.

Nor do I see any champerty in the engagement of counsel to bear the costs of proceedings and indemnify the State of Virginia from costs. If it be conceded that this would have been a champertous contract in Maryland, and that the courts of Virginia would ordinarily construe such a contract in the light of the law of Maryland where the proceedings were to be had, it is an abundantly sufficient reply that the State of Virginia is not bound to enforce the laws of Maryland against her own people as to contracts made within her own

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jurisdiction, except by the comity of nations, and only so far as may be consistent with her own policy.—Story on Conf. Laws, p. 34, § 23. This was her contract made by her agent under powers conferring the largest discretion, and the primary element of champerty at common law, that of compensation out of the fruits of the litigation was prescribed by the General Assembly as an essential ingredient of the contract. Judge Tyler, in *Major's ex.* v. *Gibson, &c.*, 2 P. & H., 73, says: "In *Findon* v. *Parker*, 11 Mees. & Wels., 675, Lord Abinger said: 'The law of maintenance, as I understand it upon the modern construction, is *confined* to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences, which they have no right to make, and champerty is defined to be an agreement to share the fruits of maintenance (7 *Bing.*, 369, *per Tindall, C. J.*, 15 *Vesey*, 139, and contracts arising out of the bringing or conducting such actions are illegal and void.'"

The counsel in this contract certainly cannot be regarded as stirrers up of unnecessary strife and litigation; nor the State of Virginia, as a speculative litigant for claims which she had no moral or legal right to assert.

The law of champerty, in its full old-time extent, rested upon principles of public policy which had always to yield to any expression of legislative will, and never could have applied to contracts made by and for a State.

I think, therefore, in this case, as Judge Tyler thought in *Major's ex.* v. *Gibson*—"that there is nothing on this record to show that this contract has any ingredient in it that would go to make up maintenance and champerty."

II. Now as to the matter of fraud. The charge of fraud is thus set out in the bill.

"In entering into the said contracts with the Board of Public Works, with full knowledge of the terms of the said resolution of the General Assembly, in the representations made by them to the Board of Public Works of their services rendered as attorneys of this complainant, in regard to the subject of her claim against the canal company, and liabilities for said company, and the result of said services so represented to have been rendered by them; and in procuring from the said Board the alleged settlements, and the allowance to them of the large amount of money and claims retained by them, the said attorneys, Johnson, Poe and Poe, did not practice good faith towards this complainant, but that their actings in said particulars were in bad faith, and

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contrary to equity and good conscience, and a fraud upon the complainant, to wit, the Commonwealth of Virginia."

This charge is very vague and indefinite. It seems, primarily, to rest upon the idea that the action of the Board of Public Works, in making the contracts with the defendants, was in excess of authority conferred by the General Assembly. As to that, I have already expressed my opinion.

It then proceeds to impute misrepresentations of the services rendered by the defendants in regard to the claims and liabilities of the company and the result of their services.

In this imputation, there is no specification of time or particulars, and after a careful examination and consideration of this whole record, I can find nothing upon which, in my opinion, the charge can be founded.

It is said that the Board was deceived by representations in 1867 that the canal company was utterly insolvent, and that this misconception appears in the preamble to the contract to have been the moving cause with the Board to make the contract. It must be observed that this allegation is but a portion of the preamble, and separated only by a semicolon from another statement *uno flatu*, that it was represented to the Board (by the defendants it is fair to presume) that if the tolls and revenues of the canal could be appropriated to the creditors, the State of Virginia might be, at least, partially relieved of her liability as guarantor—in which contingency she would necessarily recover, at least, a part of her claims against the canal company for money then due. But if the statement of insolvency had stood alone, it was an undoubted matter of fact. The Legislature of Virginia had assumed it to be a fact beyond controversy in 1860 (*Acts* '59–'60, p. 694), and seven years' entire interest upon an indebtedness of millions of dollars had subsequently accrued. The Court of Appeals of Maryland, at its October Term, 1866, only a few months before this contract was made, in *Brady* v. *The State*, 26 Mary'd Rep., 305, as to this very matter, had spoken thus:

"To say nothing of other claims of the State of Maryland as a creditor presented in this bill, here is an item of clear indebtedness exceeding $5,000,000, for which the net tolls and revenues have been pledged to the State by solemn obligation of the company, and in pursuance of one of the public statutes of the State. How far the information of the appellant is correct or can be relied upon as to the *solvency* and prosperous condition of the canal company, and its ability ere long to pay off its debts and establish its credit upon a firm and lasting basis, as averred in his answer, can be judged of in

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the face of this item of indebtedness alone, to say nothing of a ten millions of indebtedness besides, with an annual surplus of revenues from all sources in 1865 of but $37,000 as disclosed by said reports."

If the Board was deceived, then, as to the solvency of the company, it could plead the authority of the General Assembly of Virginia in 1860, and of the Court of Appeals of Maryland in 1866, in extenuation of its error.

But I know of no better evidence of insolvency than the confessed fact that not one dollar of a debt can be made by any remedy which the law affords *in personam*, and that the only hope of the creditor rests upon the remedy *in rem* against property specifically dedicated to the payment of his debt. A debt may be perfectly safe if a joint obligor who is surety is solvent, but if the only chance of making the debt is by pursuing the surety, it is not uncharitable nor untrue, in contemplating proceedings against the surety, to say that the principal is utterly insolvent.

Now as to the charge of misrepresentation of the services rendered by the defendants. It is not easy to understand how the Board of Public Works could have been deceived by any representation of the defendants as to the facts in regard to their services. The very nature of their employment and their duty excluded the possibility that there could be any mystery or concealment, or room for falsification as to what they did or failed to do. Their business was with public bodies, with public officials acting in the blaze of open day, with the public eye always upon them, with public corporations and judicial tribunals, whose records, made up day by day, preserved, always open to public inspection and examination, a perpetual memorial of their transactions. The defendants appear to have reported to the Board, from time to time, what action they had taken. These reports professed to state facts which stand of record in the archives of the Executive Department of the State of Maryland, upon the journals of both branches of her General Assembly, her Constitutional Convention of 1867, her Board of Public Works, and upon the records of the Chesapeake and Ohio Canal Company, and upon the order books and files of the Circuit Court of Baltimore City, and the Court of Appeals of Maryland. There are filed in the voluminous papers of this cause, considerable portions of each of these records, and I see no discrepancy between the facts upon the records and the facts appearing in the defendants' reports to the Board of Public Works.

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Now, it might be that the Board was misled by the opinions of their counsel. It might be that counsel placed too roseate a hue upon the efficiency of their services and the value of results thereof, present and prospective, and that the Board was improvident in accepting their view too readily, and premature in closing their transactions. But if this be conceded to the fullest extent, it would not begin to establish the charge of fraud.

III. But if I were of opinion that the charge of fraud had been sustained, and further, that the action of the Board of Public Works was in excess of authority contemplated by the joint resolution of the General Assembly of 1867, I would still be of opinion that this bill should be dismissed. If that were so, the State of Virginia would clearly have a right to say that she would not be bound by the action of the Board of Public Works, and to ask the relief prayed for in this bill. But I am of opinion that the State of Virginia is not before the court upon this record asking any such relief.

The General Assembly is the representative of the undelegated sovereignty of the State, and if this suit had been authorized by any act of the General Assembly, no action of the agent of the State, however high in dignity, could conclude the State, if such action were in excess of authority, or fraudulent in the agent, or induced by fraud in the defendants.

But no act of the General Assembly authorizing this suit has been produced, and in the absence of such act, I am of opinion that this suit cannot be maintained.

The Board of Public Works is a constitutional branch of the Executive Department of the State, and in the sphere of its duty is the representative of the State, to no less extent than the Governor, or any other constitutional officer of the State, in the sphere of his duty, is equally her representative. This matter was undoubtedly within the sphere of the duty of the Board of Public Works.

This court has no other right to revise its action now as to accomplished results than it would have had while the matter was *in fieri* to control and limit its action, and the name of the State can be invoked now by no less authority than it could have been invoked then.

It could not have been invoked then by either one or the other of the two branches of the General Assembly. The concurrent action of both branches of the Assembly is essential to any act purporting to represent the Commonwealth. This is too fundamental a principle to need enlargement.

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It may be very questionable whether it could have been invoked then in the name of the State by the Governor; for, although the Governor is charged by the Constitution with the duty of seeing that the laws are faithfully executed, that duty must be discharged with full recognition of the independence in their respective spheres of duty of every other constitutional department and officer of the government; and besides, the Governor was a constitutional member of the Board, and as such, the peer, and only the peer, of the Auditor and the Treasurer; and it might not be an unreasonable construction of the Constitution, that as to matters like this, his obligations and powers as Governor were merged in his obligations and powers as a member of the Board. As a member of the Board, he might, perhaps, have had the right to ask a restraining order from the courts to prevent the Board from any action in excess of its authority; but that would have been a very different thing from his demanding such action as Governor in the name of the State.

But be that as it may, there is no obligation upon the Governor to see that laws have been faithfully executed during the administrations of his predecessors, and no power is vested in him to review and revise the accomplished results of their actions. As to all those matters, he is without responsibility, and without any more authority to complain of it in the name of the State than any private citizen, except so far as his duty to communicate to the General Assembly all matters coming to his knowledge, pertaining to the interests of the Commonwealth, may justify him in a submission of the cause of complaint to the intelligent judgment of the General Assembly.

Nor am I aware of any authority which was vested in the Attorney-General which would have justified him, pending these transactions, in embarrassing the Board of Public Works, in the discharge of the duty assigned them by the Legislature, by appealing to the courts to control their action. The Constitution confers upon the Attorney-General no powers, and imposes no duties, except such "as may be prescribed by law."—Art. 5, sec. 21. The Code of Virginia, 1860, ch. 165, sec. 1, p. 700, made it his duty, when required to do so, to give his opinion and advice in writing to the Board. There was no obligation upon him to give his opinion unsolicited, or when given, to see that the Board conformed its action thereto. Wherever there is official power, there is correlative official duty. If, therefore, the Attorney-General had the right to bring the Board, in the name of the

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State, before the courts to have their duties defined and their action controlled, there must have been an obligation upon him, so far to overlook their action as might be necessary to keep himself at all times intelligently advised of any occasion which might require him to exercise such right. If any such obligation, in addition to his duties as prescribed by law, had been devolved upon the Attorney-General to supervise the action of the Board of Public Works while the Constitution of 1850 was in full force, *ante bellum*, his functions and duties would have exceeded any capacity of mortal mind or body.

But if any such obligation could be assumed as the incident of a high office pending these transactions, surely there can be no obligation upon the Attorney-General to search the files and examine the records of the Board of Public Works to satisfy himself that they have not, in any of their past history (for *nullum tempus occurret regi*, and no statute of limitations can deny the Commonwealth her rights), transcended the limits of their authority and protected the Commonwealth from fraud in any of their settlements with contractors under them.

This suit does not attribute to the Attorney-General any such right or duty. The bill is filed in the name of two eminent counsel and the Attorney-General, and it appears in the record that while the Attorney-General was a private practitioner of his profession, he was employed in conjunction with his associates by the Governor, under the authority of one branch of the General Assembly, to institute this suit. The then Attorney-General died before the suit was instituted, and the present Attorney-General succeeded him in office; and, therefore, this suit, by accident only, appears to have been instituted under the authority of the law officer of the State.

But suppose the Attorney-General should, in the discharge of his duty, make a compromise of this claim and ask the dismissal of this bill upon the statement that the defendants had, under such compromise, paid into the Treasury of the State, in full discharge of their liability, such sum as he had agreed to accept. If his two associates should object, and the authority under which this suit was brought be sufficient, this suit must proceed in despite of his compromise and his remonstrance.

But suppose that the court should recognize him as *magister litis* and dismiss the bill.

Can any successor of the present Attorney-General come

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into court, and upon a suggestion that his action was *ultra vires*, ask to have the suit reinstated? If so, the determination of controversy between the State and her adversary suitor would be indefinitely postponed, subject, when concluded by one Attorney-General, to be reinstated by his successor, and again dismissed by his successor, and so on *ad infinitum*.

It is a fundamental maxim of law that there must be an end to litigation and controversy, and this maxim is as applicable to the State when she deals in matters like these as it is to those with whom she deals.—*People* v. *Stephen*, 71 N. Y., 549–50 and 560.

The matters complained of in this bill were in the exact sphere of duty assigned to the Board of Public Works under the constitution and laws of the Commonwealth. They had finally disposed of them before this bill was filed. I see nothing in this record which would justify a court in undertaking to revise or review its action, even if complaint were made of it by the sovereign authority which had authorized these defendants to deal with the Board of Public Works as representative of the State.

The bill must be dismissed, but necessarily without costs.

U. S. CIRCUIT COURT EASTERN DISTRICT OF VA.

RICHMOND, May 14th, 1879.

Ex parte, EDMUND KINNEY.

There are two classes of privileges attaching to an American citizen, to wit: (1) those which he has as a citizen of the United States; and (2) those which he has as a citizen of the State where he resides as a member of society.

The Fourteenth Amendment of the U. S. Constitution forbids the States from abridging the privileges belonging to a person as a citizen of the United States; but does not forbid the States from abridging the privileges belonging to their citizens as citizens of States.

Marriage is a privilege belonging to persons as members of society, and as citizens of the States in which they reside, and may be abridged at the will of the States in which they reside.

Marriage, though a contract, is more than a civil contract, and is not affected by the clause of the tenth section of first article of the Constitution forbidding a State from passing any laws impairing the obligation of contracts.

A prisoner who has been prosecuted and imprisoned by his State for violating a law of his State relating to marriage, cannot be released by a United States court on *habeas corpus*, on the ground that such law violates the Constitution or a law of the United States.

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Section 1,977 of the U. S. Revised Statutes, giving to all persons the same right of making and enforcing contracts as is enjoyed by white persons, only extends to lawful contracts, and does not extend to a marriage declared void by the law of the State of the parties to the marriage; and this, whether the ceremony of marriage was performed in that State or in another State where such marriage was legal, if the parties to it go out of the State of their residence in order to evade her laws, and return to live and cohabit in the State in positive violation of her express law.

On petition praying that the writ of *habeas corpus* be addressed to Samuel A. Swann, Superintendent of the penitentiary of Virginia, in whose custody the petititioner is detained.

This petition was addressed to the judges of the United States Circuit Court for the Eastern District of Virginia, and was heard at Richmond on the 13th May before Judge Hughes, who rendered his decision on the following day, denying the prayer of the petition and dismissing it.

L. L. Lewis, U. S. Attorney, appeared for the petitioner.

James G. Field, Attorney-General of Virginia, appeared for the Commonwealth of Virginia.

Kinney's petition alleges that for five years he has been a resident of the county of Hanover in this State; that he is of the negro race; that he is confined in the Virginia penitentiary in violation of the constitution and laws of the United States; and prays for discharge from such confinement. The petition states that in October last petitioner and Mary S. Hall, a white woman, visited Washington, in the District of Columbia, and were there legally married; that they soon thereafter returned to Hanover county, and there lived together as man and wife; that they were subsequently arrested, tried and convicted by a State court for feloniously leaving the State of Virginia for the purpose of marrying, and for having married in the District of Columbia, and for having returned to this State and cohabited; that upon such conviction, they were each sentenced to serve a term of five years at hard labor in the penitentiary, where they are now confined. Petitioner claims that a marriage lawful in the District of Columbia is lawful everywhere in the United States, enabling those so married to live together as man and wife in any part of the United States, and

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that any State law forbidding them to do so is contrary to the constitution and void.

The following is the decision of the court:

HUGHES J. The question presented by this petition involves so seriously the relations of the Federal courts to the laws of the States and their administration by State tribunals, that I shall be excused for giving a carefully considered and painstaking explanation of the ground of my action in this matter. Leaving out of the text such words and clauses as have no application to the case, the following are the provisions of law relating to the jurisdiction of this court on the question of awarding a writ of *habeas corpus* on this petition:

Section 753 of the Revised Statutes of the United States provides that the writ of *habeas corpus* shall, in no case, extend to a prisoner in jail, unless (among other instances of which this is not one) "where he is in custody in violation of the Constitution or a law of the United States." Section 754 requires that the application for the writ shall be in writing, setting out the facts concerning the petitioner's detention, verified by affidavit; and section 755 authorizes the writ to issue, "unless it appears from the petition itself that the applicant is not entitled thereto."

The writ, therefore, is not issued as a matter of course. Whether it shall go out or not depends upon the facts presented by the petition, showing whether or not the petitioner's detention in jail is in violation of the Constitution or a law of the United States. If it appears from the petition itself that the Constitution or a law of the United States has not been violated in the petitioner's arrest and imprisonment, then, of course, the writ must not go out. It is essential, therefore, to inquire whether, in the facts stated by the petition, the Constitution or any law of the United States has been violated; and first, I will consider whether there has been a violation of the Constitution.

It must not be forgotten that the Federal courts are forbidden to issue the writ of *habeas corpus* in favor of a prisoner in jail under conviction of a State court, unless the petition itself makes a case for jurisdiction under section 753. I am to inquire whether the averments in this petition release me from that inhibition. I can imagine no subject on which the Federal courts ought to be more considerate in assuming jurisdiction.

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VOTING, NOT MARRYING, PROTECTED.

The petitioner here is a negro man; but the question of issuing the writ does not turn upon any provisions of the Constitution relating particularly to race or color. It is only the Fifteenth Amendment which makes special mention of that subject, in providing that the right of a citizen of the United States to vote shall not be denied or abridged on account of race or color. No other provision relates particularly to the distinction of race or color. And as no question of voting is raised in this case, we have no concern with the Fifteenth Amendment. The question here is one of marrying, and there is nothing in the National Constitution expressly forbidding a State from abridging the right of marrying, or indeed any right but that of voting, on account of race or color. The Fifteenth Amendment embodies the implication that a State may abridge any privileges of its citizens other than that of voting. No provision of the Constitution relating particularly to the colored man as such has been violated by the State of Virginia in the prosecution, conviction and imprisonment of this petitioner.

NATIONAL AND STATE CITIZENSHIP.

If any constitutional provision has been violated at all, it is only some general provision relating to the rights and privileges of citizens at large. Is it contended that the first section of the Fourteenth Amendment has been violated? That section declares that "all persons born in the United States are citizens of the United States and of the State wherein they reside," and provides that no State shall make or enforce any law which shall abridge the privileges of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws." This section, after declaring that all persons born in the United States shall be citizens (1) of the United States and (2) of the State wherein they reside, goes on in the same sentence to provide that no State shall abridge the privileges of citizens of the United States; but does not go on to forbid a State from abridging the privileges of its own citizens. Leaving the matter of abridging the privileges of its own citizens to the discretion of each State, the section proceeds, in regard to the latter, only to provide that no State "shall deny to any person within its jurisdiction the equal protection of the laws."

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Thus it is seen that the Fourteenth Amendment itself classifies the privileges of citizens into those which they have as "citizens of the United States," and those which they have as "citizens of the State wherein they reside;" and this classification has been abundantly recognized, illustrated and enforced by the Supreme Court of the United States in numerous decisions. See *Trustees of Dartmouth College* v. *Woodward*, 4 Wheaton, 629; *Gibbons* v. *Oden*, 9 Wheaton, 203; *New York City* v. *Miln*, 11 Peters, 133; *Scott* v. *Sandford*, 19 Howard, 404–'6 and 580; *License Tax Cases*, 5 Wall., 471; *Poul* v. *Virginia*, 8 Wall., 180; *United States* v. *Witt*, 9 Wall., 41; *The Slaughter House Cases*, 16 Wall., 36; *United States* v. *Reese et al.*, 2 Otto, 214, and *United States* v. *Cruikshank et al.*, 2 Otto, 542. See also *Corfield* v. *Coryell*, 4 Wash., c. c., 371; *United States* v. *Petersburg Judges of Election*, 1 Hughes, 505, and *The Federalist*, No. 45.

The rights which a person has as a citizen of a State are those which pertain to him as a member of society, and which would belong to him if his State were not a member of the American Union. Over these the States have the usual powers belonging to government; and these powers "extend to all objects which, in the ordinary course of affairs, concern the lives, liberties (privileges), and properties of the people; and of the internal order, improvement and prosperity of the State."—*Federalist*, No. 45. "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed." Chief-Justice Marshall, speaking specially of marriage, in the *Dartmouth College Case*, 4 Wheaton, 629. Their powers extend, of course, to the control of the domestic relations of all classes of citizens of a State.

On the other hand, the rights which a person has as a citizen of the United States are such as he has by virtue of his State being a member of the American Union under the provisions of our National Constitution. For instance, a man is a citizen of a State by virtue of his being native and resident there; but if he emigrates into another State, he becomes at once a citizen there by operation of the provision of the Constitution of the United States making him a citizen there; and he needs no special naturalization, which but for the Constitution, he would need, to become such a citizen. Again, if a citizen of Virginia is allowed by her laws to carry on a business by paying a certain tax, a citizen of Maryland who comes into Virginia and pays the tax is entitled under

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the National Constitution to carry on the same business in Virginia. The Virginian carries on the business here by right of his State citizenship; the Marylander carries it on here by right of his national citizenship. In the Slaughter House Cases, the Supreme Court of the United States had under review an act of the Legislature of Louisiana incorporating a company and conferring upon it the exclusive privilege of slaughtering animals within a defined area adjoining the city of New Orleans. Certain butchers of the vicinity, who were thus deprived of the privilege of exercising their trade in that area, assailed the charter as contrary to the provision of the Fourteenth Amendment of the National Constitution quoted above. But the Supreme Court held that the privilege of butchering animals was of the class belonging to persons as citizens of their State, and not belonging to them as citizens of the United States. It therefore held that the legislative act abridging this right of the New Orleans butchers, and confining it exclusively to a favored corporation, did not violate the Fourteenth Amendment or any law passed under it, and could not be the subject of relief by a Federal court, however unjust the State law.

In the light of this commentary, can it be intelligently contended that the laws of Virginia relating to marriage are obnoxious to the Fourteenth Amendment?

VIRGINIA MARRIAGE LAWS.

These laws are as follows:

The ninth section of chapter 104 of the Code of Virginia provides that "no man shall marry his mother, grandmother, stepmother, sister, daughter, granddaughter, half sister, aunt, son's widow, wife's daughter or her grandmother or stepmother, brother's daughter or sister's daughter." The tenth section of the same chapter provides that no woman shall marry within degrees correlative with those defined in the ninth section. Among still other inhibitions of marriage, the same Code, in the first section of chapter 105, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void, without any decree of divorce or other legal process."

The penal provisions are as follows: "If any person marry in violation of the ninth or tenth section of chapter 104 of

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the Code, he shall be confined in jail not more than six months, or fined not exceeding $500, at the discretion of the jury. Any white person who shall intermarry with a negro, or any negro who shall intermarry with a white person, shall be confined in the penitentiary not less than two nor more than five years."—Criminal Revisal of 1878, chapter 8, sections 3 and 8.

A SUBJECT OF STATE, NOT FEDERAL, JURISDICTION.

It is clear that I am bound by the authorities which have been cited to treat the privilege of marriage as belonging to the class which a person has as a member of society, and not to the class which he has by virtue of the State in which he resides being a member of the American Union. If Virginia were in the mid-ocean or on the antipodal continent, her control over the rights and privileges of her citizens as members of society, including marriage, would be, no more certainly than now, unrestrained by any provision of the National Constitution. The right to enact as law any one of the three prohibitions of marriage which have been quoted from the Code, as between her own citizens residing within her own territory, is as clear as the right to make the other two. With the propriety, policy or justice of such laws, a court of the United States has nothing to do. As individual citizens, their judges might possibly question the policy of such a State law, but as judicial officers they can only inquire what is the law. The Fourteenth Amendment gives no power to Congress to interfere with the right of a State to regulate the domestic relations of its own citizens, and if a State enact such laws as those which have been quoted, the Federal courts must respect them as they stand, without inquiring into the reasons of them. However harsh a State law may be, they can only say, with Ulpian, "*Hoc quidem perquam durum est, sed ita lex scripta est.*"

PRIVILEGE AND PROTECTION.

The clause of the Fourteenth Amendment under review makes a further distinction. After declaring that no State shall make any law which shall abridge the privileges of citizens of the United States, it adds: "Nor deny to any person within its jurisdiction the equal protection of the laws." Here is a distinction between citizens of the United States and "any persons," whether citizen or alien, residing or hap-

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pening to be within the borders of a State. The declaratory clause forbids any abridgment of the rights of citizens of the United States. The remedial clause gives equal protection to all persons whatever while within a State's borders. The amendment does not provide that the privileges shall be equal, but it does provide that protection shall be equal. It establishes equality between all persons in their right to protection, but does not confer equality in the privileges they are to enjoy. It provides that whatever privileges the Constitution and laws of the United States confer upon a citizen as a citizen of the United States, shall be enjoyed without abridgment; and it provides that all persons within a State, whether a citizen of the United States, or of the States, or aliens, shall be equally protected by the laws in whatever privileges, whether equal or not equal, they may have from the United States or from the State. However unequal their privileges respectively, yet a foreigner, a citizen of another American State, and a citizen of the State, shall have the benefit equally in the State of all remedial laws for the recovery of rights, and of all legal safeguards ordained for the protection of life, liberty and property.

I think it plain from this review that an equality of privileges is not enforced by the Constitution upon a State in respect to its domestic laws, for the government of its own citizens as such, while they are within its jurisdiction. But even if it did require an equality of privileges, I do not see any discrimination against either race in a provision of law forbidding any white or colored person from marrying another of the opposite color of skin. If it forbids a colored person from marrying a white, it equally forbids a white person from marrying a colored. In its terms, and, for all I know, in its spirit, the law is a prohibition put upon both races alike and equally. In the present case, the white party to the marriage is in imprisonment as well as the colored person.

LEGAL AND ILLEGAL CONTRACTS.

I think it clear, therefore, that no provision of the Fourteenth Amendment has been violated by the State of Virginia in its prosecution of this petitioner. It would seem to follow from this conclusion that no act of Congress passed to enforce that amendment is violated; and I know of none that can be claimed to have been, unless it be the first section of the Civil Rights Act of 1866, now section 1,977 of the

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Revised Statutes, which provides that "all persons within the jurisdiction of the United States shall have the same right in every State to make and enforce contracts as is enjoyed by white citizens, and shall be subject to like punishments," &c. As to punishments, I have just shown that the penalty of the State law is denounced equally and alike upon the white and colored persons who contract the illegal marriage with each other. As to rights, this is a law for the enforcement of that clause of the Fourteenth Amendment, which requires a State to give the equal protection of the laws to all persons within its borders. All are permitted to make and enforce contracts; not, indeed, any sort of contracts which they may see fit to make—*e. g.*, polygamous or incestuous contracts of marriage, or usurious contracts for money, but such contracts as are lawful. It is for a State and for Congress, each within its respective sphere of constitutional authority, to say what shall be lawful contracts, and it is only such as are legal that that can be made and enforced within the State by "all persons within the jurisdiction of the United States." Provided the State law does not abridge a right which a person has in his character of a citizen of the United States, of which marriage, as we have seen, is not one, the State may declare at will what contracts are and what are not legal within its jurisdiction, and section 1,977 confers the right of enforcing only such contracts as are legal.

MARRIAGE NOT A SUBJECT OF CONGRESSIONAL REGULATION.

Congress has made no law relating to marriage. It has not, simply because it has no constitutional power to make laws affecting the domestic relations and regulating the social intercourse of the citizens of a State. If it were to make such a law for the States, that law would be unconstitutional, and the federal courts would not hesitate to declare it so. It is the State which is endowed with the sovereign power of making such laws, and therefore only those contracts of marriage that are legal under State laws can be enforced or enjoyed within the jurisdiction of the State.

All this has been said on the hypothesis that the contract of marriage is subject, like pecuniary contracts, to the operation of section 1,977. But marriage is more than a contract. It may be entered into at the will of competent parties, but it cannot, as other contracts may, be released at their will. Nor can its terms be shaped at their will; it cannot be for so many years and then cease, for it must be "until death us do

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part;" it cannot be entered into with one or more of the opposite sex at pleasure, but must be with one only, for the joint lives; it cannot be confined in effect to a single territorial jurisdiction, but has the same effect all over the world, so far as permitted by the law of each State or nation. It is plain, therefore, that marriage is not, in many of its qualities, of the class of contracts contemplated by section 1,977 of the Revised Statutes; and in the Dartmouth College Case (4 Wheaton, 629), it was held by the Supreme Court of the United States that the clause of article 1, section 10 of the National Constitution, forbidding a State from passing any law impairing "the obligation of contracts" does not embrace marriage; it never having been intended to forbid a State Legislature to pass an act of divorce or an act conferring power upon State courts to grant decrees of divorce; the Supreme Court being of opinion that the contracts contemplated by the clause were only such as relate to property or pecuniary values (1 Minor's Inst., 275). Thus we see, from another point of view, that marriage is not one of the "privileges" in regard to which the National Constitution and Congress can restrict the power of the States.

It is clear, on the whole, that section 1,977 is not violated by the marriage laws of Virginia, and I know of no other act of Congress that has been, considering the petitioner and his consort as citizens of Virginia, and treating their case as if the marriage had been entered into in this State.

MARRIAGE IN ANOTHER STATE GIVES NO RIGHT CONFLICTING WITH THE LOCAL LAW.

But this marriage was not entered into here. The parties to it went to the District of Columbia for the purpose of contracting it; did there contract it, and returned to reside and cohabit together in this State. Yet this is not the case of citizens of another State, lawfully married in that domicile, afterward migrating thence in good faith into this State. If this petitioner had been a born citizen of the District of Columbia, and had there married a white woman in conformity to the laws of that jurisdiction, and had afterward migrated with his lawful wife to Virginia, and had been, after becoming thus domiciled here, prosecuted under that provision of the law of Virginia which has been quoted, and convicted and imprisoned, and had filed his petition here, praying for an inquiry into the cause of his detention in prison, the cause presented would have been essentially different from that ac-

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tually under consideration. Then the question would have been whether such citizens of another State could claim here the protection of the second section of the fourth article of the National Constitution. This section declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." At first blush it would seem that this provision would give a citizen of the District of Columbia, lawfully married as a citizen there and afterward domiciliating here, the right to reside here under that marriage. But even in such a case the Supreme Court has decided otherwise. That such a citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because those are privileges following a citizen of the United States, as given by the section of the Constitution just quoted, and by the clause of the Fourteenth Amendment previously considered. But it is equally true that such a citizen could not, by becoming a citizen of Virginia, bring here the privilege of exercising, as such, a right legally enjoyed in the District, but not given here. In the case of *Paul* v. *Virginia* (8 Wallace, 180) the Supreme Court of the United States held that "special privileges enjoyed by citizens in their own States are not secured to them in other States" by the provision of the fourth article of the Constitution which has been quoted. Reviewing its decision in *Bank of Augusta* v. *Earle* (13 Peters, 586) the court said that it was never intended by this provision to give to citizens from another State higher and greater privileges in any State than are enjoyed by citizens of that State; that it "was not intended by the provision to give to laws of one State any operation in other States; that they can have no such operation except by the permission, express or implied, of those States; and that the special privileges which they confer must be enjoyed at home, unless the assent of other States to their enjoyment therein be given." (Pp. 180, 181 of 8 Wallace.) The provision of the Constitution in question refers to the privileges given in the State into which the citizen goes, and not to those given in the State from which he comes. And so, even if this petitioner had been a citizen of another State, lawfully married there, and had come here bringing his wife, intending to live here in a condition of matrimony forbidden by our laws, he could not claim the protection of the National Constitution or of any law of Congress in thus violating our laws.

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AN ATTEMPTED EVASION OF VIRGINIA LAW.

But the case of the petitioner is weaker than that just supposed. He and his consort were citizens of Virginia. They went abroad to be married in evasion of her laws, and they returned to cohabit together here in violation of them. The marriage certificate gives Virginia as the petitioner's residence, and his going to the District of Columbia was plainly an act in *fraudem legis domesticæ*. The question whether a marriage illegal at home, and contracted in another place, to which the parties had gone in intentional evasion of the domestic law, should be treated as valid by the home State on their resuming residence within it, has been much discussed by learned juris-consults, such as Burge, Huber, Savigne, Pothier, Lord Mansfield, Lord Campbell, Lord Cranworth, Story, Kent, Wharton and others, whose opinions have been divided. But the question thus discussed has supposed the non-existence of positive law in the home State. It has been on the question whether the courts of the home State should, in the absence of statutory law, treat the marriage as valid in comity to the State where it was contracted; all writers conceding to the home State the power of adopting positive laws declaring such marriage illegal at will. For I think I do not go too far when I assert it as a principle now well settled that "a State may follow its citizens abroad and attach to acts done there the same consequences as if done at home; and that though the law of the place of a marriage may determine its forms and regularity, yet the law of the domicile of the parties must decide whether the contract was one which might be lawfully made;" and this unquestionably is the rule in regard to marriages polygamous, incestuous and contrary to public policy. Our own Court of Appeals has so decided in *Kinney* v. *Commonwealth* (2 *Virginia Law Journal*, 632); following the English House of Lords in the case of *Brook* v. *Brook* (9 House of Lords cases, 193). So also have the Supreme Courts of North Carolina, South Carolina and Louisiana, in *Williams* v. *Oates* (5 Iredell, 538); *State* v. *Kennedy*, (76 North Carolina, 351); *State* v. *Ross*, (77 ibid), and *Central Law Journal* for April, 1877, and *Duprè* v. *Bonead* (10 La. An., 411).

But the Supreme Court of Massachusetts, in *Medway* v. *Needham* (16 Mass., 157), and that of Kentucky, in *Stevenson* v. *Gray* (17 B. Monroe, 192), have decided contrariwise.

The question can no longer be treated as open, however, in Virginia, whose Legislature has recently, in the criminal

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revisal of March 14, 1878, chapter 7, section 3, declared that:

"If any person, resident in this State and within the degrees of relationship mentioned in the ninth and tenth sections of chapter 104 of the Code, or any white person and negro, shall go out of the State for the purpose of being married, and with the intention of returning, and be married out of it, and afterward return to and reside in it, cohabiting as man and wife, they shall be as guilty, and be punished, as if the marriage had been in this State."

Now there are many illegal marriages other than those named in the foregoing penal section, of which, though illegal here, Virginia takes no notice if contracted without her jurisdiction. The ordinary "runaway matches," so frequent in this country, and those known as Gretna Green marriages in England are not placed in either country under the ban of annulling or penal statutes, but, on the principle of interstate comity, are allowed to stand good. It is only marriages which are polygamous, incestuous or contrary to public policy which are made the subject of penal exactments, such as that of the third section of chapter 7 of our criminal revision just given.

LOCAL LAWS NOT TO BE IMPORTED AT A CITIZEN'S WILL.

This petitioner is here, not as a citizen of the District of Columbia, to which he went to be married in evasion of the laws of Virginia, but as a citizen of Virginia amenable to her laws. He is here in that character only, and has brought back no other right in regard to the marriage which he made abroad than he took away. He cannot bring the marriage privileges of a citizen of the District of Columbia, any more than he could those of a citizen of Utah, into Virginia, in violation of her laws. It was competent for the State of Virginia, so far as there is anything in the Constitution and laws of the United States to prevent, to enact the law just quoted under which the petitioner was convicted, and therefore his case is beyond relief from a federal court. I know it is claimed that the provision of the fourth article of the National Constitution, which requires each State to "give full faith and credit to the public acts, records and judicial proceedings of the other States," has an important bearing on the present case. I have already abundantly shown that it cannot have the effect of making the laws of one State the laws of another. It is doubtful whether the marriage certificate of a clergyman or magistrate is a "public" record in

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the meaning of this provision of the Constitution. But whether it be or not the clause in question could only go to the extent of rendering indisputable the fact of the marriage and of its legality in the place of contract. To give to public records "full faith and credit, is to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the State where they originated." Story on the Constitution, section 1,310. "A court is bound to take judicial notice of the public records of another State." *Owings* v. *Hull*, 9 Peters, 627. "A judgment in one State is a judgment in another, only so far as to preclude inquiry as to the merits of the subject-matter of the original judgment." *McElmoyle* v. *Cohen*, 13 Peters, 312. So that a money judgment obtained in the courts of another State is not a judgment here, but only a chose in action, requiring to be specially sued upon in this State. A public record certifying a marriage to have been legally contracted and valid there, though indisputable proof here of those two facts, yet does not convert the fact of validity there into validity here, contrary to the express local law. It has never been pretended that the laws of a State, can by the acts of individuals be subordinated within its own jurisdiction to the laws established by another State. A citizen of Virginia may go to the federal District of Columbia, or to the federal Territory of Utah, and be married there in conformity to the local laws, and may remain there as a resident and citizen with impunity. But if his object in going was to evade the laws of Virginia, and if, after marriage, he returns here and remains in a condition of matrimony forbidden by our laws, the certificate of his marriage in the District or Territory, in conformity to its laws, will have no other value here than as indisputable proof of his violation of our laws.

On the whole, I am of opinion that the law of Virginia, under which this petitioner is detained in prison by the State, does not violate the Constitution or any law of the United States; and that I have, consequently, no jurisdiction to grant the relief for which the petitioner prays. The writ of *habeas corpus* is denied.

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SUPREME COURT OF APPEALS OF WEST VA.

JOHNSON *v.* BROWN ET AL.

(*Absent, JOHNSON, Judge.)

Decided Special Term, 1878.

1. The inducement in a declaration in a libel suit is, that the plaintiff had been the general superintendent of a certain corporation. The libelous writing was alleged to be as follows: "The plaintiff was, through his own and his brothers' influence, placed and retained in the general management of said corporation during the years 1871, 1872 and 1873, for their own private and individual gain, and not the corporation's; that especially during the year 1873 the plaintiff in the libel suit did use, and employ, the goods, money, means and credit of the said corporation for his own use, and his brothers' private use, business and benefit; that he took the goods and money of the said corporation to pay his own employees; that he borrowed money, and used it in his own business, and gave said corporation's notes therefor; that he and his wife purchased goods, wares and merchandise of divers persons and at various times during the years 1871 and 1872, and especially during the year 1873, for their own and friends' use, and had them charged to the corporation." The allegations being set forth in the declaration, the innuendo was: "Thereby meaning that the plaintiff had embezzled the goods and money of said corporation." The allegations without any innuendo would not be libelous in themselves; and the innuendo improperly extended the meaning of these words. And if the publication of these words had been all that was complained of in the declaration, a general demurrer to the declaration ought to have been sustained.
2. But if such a declaration alleged the publication of a writing in these words: "The said plaintiff in the slander suit, and others, have been, and are, conspiring to defraud the other stockholders in said corporation, to divert the means, money and credit of the corporation to their own individual use and ends, and against the interest and welfare of the other stockholders in the said corporation;" and the innuendo is, "thereby meaning, that the plaintiff, while acting as the general superintendent and agent of said corporation, defrauded the said corporation, and conspired with other persons to defraud and cheat said corporation," this language without any innuendo was libelous; and the innuendo did not extend the meaning of the words. And as this allegation is in its nature distinct and divisible from the others, the defendant could not properly demur to the whole declaration; and such a demurrer ought to be overruled.
3. The libelous matter, stated above, being contained in a bill in chancery, filed under the fifty-seventh section of chapter fifty-three of the Code of West Virginia, and the bill having alleged that the party, who was plaintiff in the libel suit, had been elected general superintendent by himself and brothers, who held a majority interest in the stock of said corporation; and that they still voted such stock; and asking a decree of the court dissolving said corporation, the said allegations were pertinent to the case, sought to be made by the bill, and the relief prayed for; and no libel suit could be instituted based on them, they being absolutely privileged publications.

*Was counsel in the cause below.

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4. Libelous matters, published only in the due course of legal procedures, cannot be the basis of a libel suit, provided the court, in which they were published, had jurisdiction of the cause, and they were pertinent to the suit, even if they be libelous reflections on the character of persons, not parties to the suit, if the suit was not resorted to merely for the purpose of conveying the scandal, and as a cover for the malice of the party, and not in good faith for the assertion of a right, or redress of a wrong. If the suit was resorted to for such purpose, and with such wrongful motives, the court does not decide whether such pertinent allegation would or would not be regarded as an absolutely privileged publication, exempting the party from liability to a libel suit, this question not arising in this case.
5. If a declaration on its face shows that the libelous matters complained of were published in the due course of legal procedures, it will be held fatally defective on general demurrer, unless it further shows that the libelous matters complained of are not absolutely privileged publications under the general rule, that all such publications are so privileged, by alleging facts that bring it within some exceptions to this general rule, such as, that the court had no jurisdiction, or that the libelous matters alleged were not pertinent to such judicial procedure.
6. If the declaration allege facts showing that the libelous allegations come within some exception to the general rule, a plea denying that they come within such exception, named in the declaration, by alleging that the court had jurisdiction, or that the libelous allegations were pertinent to the cause, as the case may be, is a good plea in bar, though it does not deny express malice.
7. A plea that the libelous matters complained of were only published in the pleadings in a cause, instituted according to the regular course of judicial procedure, and that the defendant had reasonable cause for believing, and did actually believe, that they were pertinent to the cause, is a good plea in bar; and such plea need not deny express malice.
8. But if there is no allegation in the plea that the libelous allegations were pertinent, or that the defendants had reasonable cause for believing, and did actually believe, them to be pertinent to the cause, it must then deny malice in the publication, or the plea will not be a good plea in bar.
9. All the above defenses to an action of libel may be proved under the general issue. And upon the trial on such issue, if it appear that the libelous allegations were published in the due course of legal procedure, though it be proved that the court had no jurisdiction, or that the allegations were not pertinent to the legal procedure, still the law does not presume malice on the part of the defendant; but the plaintiff must prove express malice to entitle him to recover. The simple fact that the libelous matters were published in the due course of legal procedure, though the court had no jurisdiction, or the libelous matters were impertinent, rebuts the *prima facie* presumption of malice, and makes it incumbent on the plaintiff to prove express malice, the case being what is called a conditionally privileged publication.
10. The question whether in such a case the libelous matters, if they are contained in the pleadings in a cause, are or are not pertinent to the cause, is a question of law which ought to be decided by the court, and not a question of fact to be submitted to the jury.
11. A plea in bar that the libelous matter was published only in a pleading in the regular course of judicial procedure, and was pertinent thereto, should conclude with a verification by the record, as it proposes for decision a question of law and not one of fact.

Supersedeas to a judgment of the Circuit Court of the

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county of Tyler, rendered on the 14th day of November, 1876, in a certain action, in said court then pending, in which Isaac H. Johnson was plaintiff, and Nelson H. Brown and others were defendants, allowed on the petition of said defendants.

Hon. James Monroe Jackson, judge of the fifth judicial circuit, rendered the judgment complained of.

The facts are sufficiently stated in the syllabus.

GREEN P. delivered the opinion of the court.

HELD as stated in the head-notes.

MISCELLANY.

THE INDIANS.

The greatest national sin of which we have been guilty, is the cruelty and oppression with which we have treated the Indians. We certainly have reason to be ashamed of our conduct towards them, and ought, by all means in our power, to make reparation for the wrongs inflicted. As early as 1655–6, the Virginia Legislature was animated by a desire to promote their welfare, and to deal with them kindly, as will be seen by an act passed at that period.

"Whereas wee have bin often putt into great dangers by the invasions of our neighbouring and bordering Indians which humanly have bin only caused by these two particulars our extreame pressures on them and theire wanting of something to hazard & loose beside their lives: Therefore this Grand Assembly on mature advice doth make these three ensueing acts, which by the blessing of God may prevent our dangers for the future and be a sensible benefitt to the whole countrey for the present."

"*First*, For every eight wolves heads brought in by the Indians, The King or Great Man (as they call him) shall have a cow delivered him at the charge of the publick. This will be a step to civilizing them and to making them Christians, besides it will certainly make the comanding Indians watch over their own men that they do us no injuries, knowing that by theire default they may be in danger of losing their estates, therefore be it enacted as aforesaid only with this exception, That Acomack shall pay for no more than what are killed in their own county."

"*Secondly*, If the Indians shall bring in any children as gages of their good and quiet intentions to us and amity with us, then the parents of such children shall choose the persons to whom the care of such children shall be intrusted and the countrey by us their representatives do engage that wee

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will not use them as slaves, but do their best to bring them up in Christianity, civility and the knowledge of necessary trades; And on the report of the commissioners of each respective county that those under whose tuition they are, do really intend the bettering of the children in these particulars then a salary shall be allowed to such men as shall deserve and require it."

"*What* lands the Indians shall be possessed of by order of this or other ensueing Assemblyes, such land shall not be alienable by them the Indians to any man de futuro, for this will put us to a continuall necessity of allotting them new lands and possessions and they will be allwaies in feare of what they hold not being able to distinguish between our desires to buy or inforcement to have, in case their grants and sales be desired; Therefore be it enacted, that for the future no such alienations or bargaines and sales be valid without the assent of the Assembly, This act not to prejudice any Christian who hath land allready granted by pattent." 1 Hening's Statutes at Large, p. 393.

WARRANTS FOR SMALL CLAIMS.—The following is the act, as amended by the Legislature, in relation to warrants for small claims:

1. Be it enacted by the General Assembly, That section seven of chapter one hundred and forty-seven. Code of Virginia, edition of 1873, be amended and re-enacted so as to read as follows:

§7. If a judgment of a justice of the peace be for a sum exceeding ten, and not exceeding twenty dollars, exclusive of interest and costs, the justice rendering it may stay execution on it for forty days from its date; if the judgment be for a sum exceeding twenty, and not exceeding thirty dollars, he may stay execution on it sixty days from its date; if the judgment be for a sum exceeding thirty dollars, he may stay execution on it ninety days from its date, on such securities being given in either case for its payment as he may deem sufficient. From any judgment rendered by a justice in any case of which he has jurisdiction, the justice rendering it may within ten days on such serurities being given as he approves for the payments of the same and all costs and damages if it be affirmed, allow an appeal where the case involves the constitutionality or validity of an ordinance or by law of corporation, or where the matter in controversy, exclusive of interest, is of greater amount or value than ten dollars. The verbal acknowledgment of any surety taken under this section shall be sufficient, and the endorsement by the justice of the name of the surety upon the warrant on which the judgment is rendered, shall be conclusive evidences of such acknowledgment. The court in which the appeal is cognizable may, on motion, for good cause shown, require the appellant to give new or additional security, reasonable notice of such motion having been given to said appellant, and if he fail to give such security, the appeal shall be dismissed with costs, and the court shall award execution on the judgment rendered by the justice, with costs against the appellant and his surety.

2. This act shall be in force from its passage.

SUMMER LAW COURSE.—We have received the Catalogue of the University of Virginia for the session of 1878-9, containing a notice that the *Summer*

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Law Course, inaugurated by Prof. Minor, and which has been prosecuted for the past eight years with so much success and usefulness, will be continued by him this summer. We know the value of this course, either for reviewing the regular course, or to aid the new practitioner, or beginner in the study of the law, and we cannot commend it too highly to persons of either class. We regard Prof. Minor as the greatest teacher that we ever knew of in his department.

BOOK NOTICES.

THE AMERICAN DECISIONS, containing all the cases of General Value and Authority decided in the courts of the several States from the earliest issue of the State Reports, to the year 1869. Compiled and Annotated by JOHN PROFFATT, LL.B., Author of "A Treatise on Jury Trial," etc. Vol. IX. San Francisco: A. L. Bancroft & Co., Law Book Publishers, Booksellers and Stationers. 1879.

We have, on previous occasions, spoken of the general plan and utility of this series, and the excellent manner in which it is being carried out. The present volume is fully equal in merit to those preceding it, verifying the promise made at the outset, that no pains would be spared to make this series the best of its kind.

The cases reported in this volume are from the following reports, viz: 2nd N. H.; 17 Mass.; 18 Johnson; 5 Johnson's Chy.; 5th and 6th Ser. & Rawle; 5 Harris & Johnson; 1 Gilmer (Va); 3 Murphy (N. C.); 1 Hawk's (N. C.); 1 Nott & McCord (S. C.); 3rd and 5th Haywood, (Tenn).

The editor has added copious notes to some of the cases, materially enhancing the practical value of the work. The publishers are certainly entitled to the thanks and patronage of the profession, and we trust will reap the harvest they so richly deserve.

WE have received a pamphlet on the *Examination of Witnesses*, which will prove very instructive and interesting reading.

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THE

VIRGINIA LAW JOURNAL.

JULY, 1879.

THE POOR MAN'S LAW.

I noticed in the May number of the *Law Journal* a brief article on the "Poor Man's Law," adverting pointedly to and criticising justly an apparent obscurity in that very inartistically framed statute. Another ambiguity, which the writer of the article alluded to does not mention, and one which may at any time present difficulties to the courts, especially the magistrates in the country, is this: In the 33d section of chapter 49 Code of 1873, certain specified articles are set apart to "a husband, parent, or other person who is a householder and head of a family," as exempt from levy or distress, among which are "one horse." This horse, I take it, then, like the other articles named, is set apart, exempted and vested in the husband or head of a family upon his exercising the right given him by the 34th section and choosing it. It is absolutely his and exempt from distress or levy by virtue of his being a husband, or head of a family, and having chosen it. Then the 34th section goes on to provide that "if the debtor be at the time actually engaged in the business of agriculture, there shall be exempt from such distress or levy while he is so engaged one yoke of oxen, or a pair of horses or mules in lieu thereof," &c. This is some. times designated the "agricultural exemption." Now, the question is, Shall the poor debtor, who is a householder and also who is engaged in agriculture, have two horses only under the 34th section, or three?—one under the 33d section and two under the 34th? It may be argued that, as to the first horse, that is his absolutely and vested, he having filled all the requirements of the law to entitle himself to it. It is

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exempt from levy and distress because he is a husband and head of a family. No process of law, save for taxes and county levies, can reach it. When the officer comes with his warrant or *fi. fa.*, that horse is out of the question—can't be touched. But the debtor is plowing with two other horses; these he claims under the 34th section. That section does not say he shall have two horses in lieu of the one, or instead of the one already exempt; it simply provides that while engaged in agriculture two horses, or oxen, shall be exempt; and, of course, for that purpose, viz., plowing, &c. The one horse is already exempt for the use of his family and household; these two (oxen or horses), says he, are exempt for the use of the farm.

To say the least of it, the law is ambiguous. For my own part, I have no doubt that the Legislature meant him to have *only two* horses or oxen exempt in any case, and that the law should be understood to say that if the debtor be engaged in agriculture, he shall have one horse in addition to the one already exempt under section 33, or a yoke of oxen *in lieu* of one horse. This is the common sense view of it, but why not make our statute law explicit? C. L. P.

Leesburg, Va., May 21st.

THE CASE OF BROWN v. BURTON.

Post p. 416 Reviewed.

The facts of the case of *Brown* v. *Burton*, reported post p. 416, decided by the Supreme Court of Appeals of Virginia in the spring of 1879, are sufficiently stated in the report of the case, and need not, therefore, be restated here.

The appellant founded his claim upon the terms of the marriage contract entered into between Mr. and Mrs. Brown before they were married (the appellant being one of the children of that marriage). He contended that that marriage contract provided that the sum of money covenanted by it to be raised from the estate of James Brown, was to be held by trustees for the benefit of all the children of the marriage, with a right of survivorship between those children—that is, that as one of them died, his or her share was to devolve to the others, and not to the heirs of that one, until there was only one of them left, who was then to take the entire fund in fee simple.

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The court, however, held that it was intended by the marriage contract that all the children of the marriage living at the death of Mrs. Brown should take equal interests in the fund, and that it should be divided out equally, at that time, between all the children then living.

The appellant contended that when the marriage contract was entered into, and the marriage effected, the children to be born of the marriage acquired a vested right to have the fund disposed of according to the true construction of the terms of the marriage contract, and that this was a right of which no parties or power could divest them. For this he cited the case of *Tabb* v. *Archer*, 3 Hen. & Munf., 399.

The reasons upon which the court based its opinion were,

1st. That James Brown's *will* (made in 1842) contemplated equality of distribution between and amongst his children, and therefore that he could not be supposed to have intended the disposition of this fund contended for by the appellant.

2d. That the disposition of the property contended for by the appellant was a harsh and unnatural one, which would cut out grandchildren, and it would not be presumed, though the parties to the contract had it in their minds, that they intended to do so cruel and unnatural a thing if any other construction could be adopted (and in this connection the court seemed to place great reliance on the use of the word "issue" in the contract.

3d. That upon authority, the construction adopted by the court was the correct one, citing for it cases both English and Virginia.

I propose to examine each of these grounds in their order. It is a new, and by many, will be regarded as a dangerous doctrine, to say that a man may enter into a written contract, and thirty-five years after may, by any declaration of his, whether by will, affidavit or otherwise, determine and fix the meaning of the language in which the contract is expressed, as againt a party in interest claiming against that construction. There is no other case that I have been able to find that sanctions this doctrine. If it is to become law in the State of Virginia, it will have to become so by force of the decision in the case under review or by act of the Legislature.

As to the second ground upon which the court based its opinion: Let it be observed that the marriage contract contains a provision that if all the children of the marriage should die before arriving at the age of twenty-one, the fund was to lapse into James Brown's estate. Now, the parties to the contract might have had a number of children, and all of

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them might have married and died under the age of twenty-one, each one leaving a family of children. Yet, their grandchildren, by this express provision of the contract, would, in that case, have been cut out of all claim to the fund, and their grandfather, in that event, would have had it in his power to will or deed the property away to an entire stranger. In view of this express provision in the contract, it seems difficult to understand how it can be said that an intention to cut out grandchildren cannot be imputed to James Brown and his wife.

But if events had turned out differently, that very result would have happened, to avoid which, the court made the construction that it did. If the construction which the court gave is the true construction, it would have been necessary to give it, never mind how events had turned out. Now, suppose that James Brown had died ten years after the marriage, leaving seven children, and that Mrs. Brown had lived to the year 1850. Suppose, further, that six of these seven children had married, and had all six died before the year 1850, when Mrs. Brown died, each leaving a family of six children—thirty-six grandchildren in all—under the construction which the court has put upon the marriage contract, the child of the marriage who outlived Mrs. Brown would have taken the entire fund to the exclusion of the thirty-six grandchildren! If the court's construction of the contract is correct, this result must have followed in case events had turned out in this way, if the rule is to work both ways—and the rule, to be a rule, *must* work both ways.

Nor will it better things to change the period of survivorship to the death of James Brown. For exactly the same thing might have happened in that case—there might have been numerous grandchildren living at his death, and only one child; besides, as is remarked in the opinion of the court, the fund was not to be raised until after James Brown's death, and after the payment of his debts, and therefore it is impossible to suppose that the words of survivorship refer to his death. If the construction which the court has put upon the contract is the true one, it imputes to James Brown and his wife an intention, to avoid imputing which to them is the avowed object and purpose of the construction. If it was really the intention of the contract to provide for the "issue" of the marriage as contradistinguished from the "children," then some construction other than that put upon it by the court must certainly be found. For the court's construction cuts out all the children of children who might be dead when

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Mrs. Brown died, thus making it impossible for all the "issue" of the marriage to take the fund upon that construction; and the same would be the case if the period of distribution is changed to James Brown's death.

There are only two other constructions which it is possible to put upon the contract; the one, that which the appellant contended for; the other, that it was intended to provide for all the *issue* of the marriage indiscriminately, children and grandchildren alike, all to take equal shares. This latter, it is, of course, impossible to make; because, in the first place, it would be necessary to pervert every word used in the contract, from its natural and settled meaning, in order to do so; and second, because it would make grandchildren take *per capita* instead of *per stirpes*—because it would make each grandchild take a share equal to that taken by each child. The deed says that they shall take "as tenants in common." Tenants in common, if no more is said, take equal shares. Now it surely cannot be said that James and Mrs. Brown intended that if, at the death of James or his wife, there were thirty-six grandchildren and one child, that the fund was to be divided into thirty seven parts.

What now of the authorities upon which the court relied? The English cases relied on are *Maberly* v. *Strode*, 3 Vesey, 450; *Roebuck* v. *Deane*, 2 Vesey, 265; and *Stringer* v. *Phillips*, 1 Eq. Ca. ab., 293. The case of *Maberly* v. *Strode* is principally relied on as a case directly in point. I think a critical examination of these cases will show that they do not sustain theopinion of the court.

The case of *Maberly* v. *Strode* was this: Samuel Strode devised and bequeathed certain estate to his son Samuel Strode for life, "but in case my said son shall die unmarried and without issue, or having issue, they shall all die before he, she or they, if a son or sons, shall attain the age of twenty-one years respectively, or if a daughter or daughters, shall attain the age of twenty-one years, or be married respectively then, and in such case in trust to assign and transfer the principal of such funds and securities unto my nephews, William and James Strode, and to my niece, Cecil Strode, in equal proportions, share and share alike HIS, HER AND THEIR ISSUE, OR THE ISSUE OF EITHER OF THEM TO TAKE THEIR PARENTS' SHARE, with benefit of survivorship to my said nephews and niece." The court, construing this will, held that these words were to be read as follows: "But in case my said son shall die unmarried, OR without issue, * * * then, and in such case, to my nephews and niece, in equal proportions,

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share and share alike, his, her and their issue, or the issue of either of them, to take their parents' share with benefit of survivorship."

Now, this case did not raise, and could not have raised, a question for the construction of the words "with benefit of survivorship," used as they are used in James Brown's marriage contract. The will expressly provided that the issue of either of the nephews or niece was to take their parents' share. How could there be a "benefit of survivorship" amongst the nephews and the niece, if the issue of one dying was to take the share of such issue's parent? After the will had said the children of a child dying should take their parents' share, "benefit of survivorship" amongst the parents could not exist, except in the case of the two nephews and the niece never marrying and having issue, and doubtless that is what the Master of the Rolls thought these words meant; to-wit: that there should be survivorship amongst them in case noneever had issue, but no survivorship amongst them in case they all had issue; according to the argument made in the case for the defendants, on the second question; though the report does not show what his opinion was upon that point.

But the words of the will had made it impossible for the words "with benefit of survivorship" to have their proper meaning, except in the limited case of the nephews and niece never having issue, which case was not before the court.

But at best, it must be admitted that the opinion of the Master of the Rolls in this case, as reported, is a model of obscurity. In the first part of that paragraph of his opinion, which is upon the words "with benefit of survivorship," he says, speaking of *Roebuck* v. *Deane*, "I followed that and *Stringer* v. *Phillips* in *Perry* v. *Woods*. This case is very nearly the same as those." If the opinion went no further, it would be fair to suppose that he decided *Maberly* v. *Strode* upon the authority of *Stringer* v. *Phillips*, *Roebuck* v. *Deane*, and *Perry* v. *Woods* (and perhaps he did), for the reason that he thought some one or all of those cases were the same in substance as *Maberly* v. *Strode*. It is proper, therefore, to look into those cases and see exactly what they did decide. The case of *Stringer* v. *Phillips*, 1 Eq. Ca. ab., 293, the earliest of the series, was this: "One devised £100 to five, equally to be divided between them and the survivor and survivors of them; and if A (one of the five) died before marriage, her share to go over to another person; and it was decided that they took this £100 as tenants in common." The Mas-

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ter of the Rolls said that the words "survivor or survivors of them" were words of doubtful import. They might mean that the fund was to belong to the five with a right of survivorship amongst the five, or they might mean that those of the five who survived the testator should take the fund. If, however, he made the words mean a survivorship amongst the five, that would be making them contradict the first words which gave the fund to the five as tenants in common. He therefore felt constrained, as it was doubtful what the testator meant by these words, to give them such an effect as would not bring them into collision with other words of the will. He felt himself the more constrained to this construction by two circumstances: the first was that if he held that the words made a jointenancy in the five, it would have the effect of producing an intestacy, in case all of the five died before the testator, which a court of equity will never do if it can be avoided. (See *Wadley* v. *North*, 3 Ves., 367; *Booth* v. *Booth*, 4 Vesey, 403; *Cooke* v. *De Vandes*, 9 Vesey, 206; *Bird* v. *Hudson*, 2 Swanston, 345.)

The second was the limitation of A's share over if she died before marriage, which made her a tenant in common with the other four; and as the devise was to all five, they must all take alike; and not A to be a tenant in common, and the other four joint tenants with A, a tenant in common. There is certainly nothing in this case which denies to the words, "with benefit of survivorship," the construction that the appellant contended for. The next one of the cases, in point of time, is *Roebuck* v. *Deane*, 2 Vesey, 265.

In that case, "testatrix gave £1000 to trustees on trust to pay the dividends to her niece for life, and after her decease, that the said £1000 should be equally divided among the brother and four sisters of the testatrix, 'and in like manner to the survivors or survivor of them.' The niece was residuary legatee." Now, the entire question was, whether this was a case in which the words "survivor or survivors" of them was intended to make a survivorship amongst the parties, or whether it was intended to refer to a period for distribution. It was almost exactly the preceding case of *Stringer* v. *Phillips*

The court held that the words "equally to be divided" made it clear that there was to be a tenancy in common; there could be no survivorship amongst the parties, and therefore, to prevent this conflict between the two provisions of the will, it would hold the words "survivors or survivor" to mean that it should go to such persons as survived the testa-

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trix. There is certainly nothing in this case which conflicts with the construction of these words, "with benefit of survivorship," which the appellant contended for. The next one of the cases cited, in point of time, is "*Perry* v. *Woods*," 3 Vesey, 204.

In that case a testator gave £1500 in trust to pay the interest to Anne Darby for life; and after her decease, to and among her child and children; to be applied towards their maintenance and education; and the principal to be paid to them at the age of twenty-one respectively. But in case the said Anne Darby should die and leave no child or children, he directed that the principal should be paid to his cousins William and John Pricklow, share and share alike, "*or to the survivor of them.*" It is obvious this case raised exactly the same question that had been raised in the two preceding cases, to wit: Whether having said "share and alike," which made a tenancy in common, the addition of the words "or to the survivor of them," destroyed the tenancy in common already created. The Master of the Rolls held that as it could just as well apply to those who should survive the testator, as to a survivorship amongst the parties themselves, he would prevent the collision by making it refer to that event. The Master of the Rolls also thought it an important circumstance in this case, as had been thought in *Stringer* v. *Phillips*, that to make the words as to survivorship refer to a survivorship amongst the parties, might produce an intestacy, by reason of all dying before the testator. There is certainly nothing in this case which denies to the words "with benefit of survivorship," the meaning which the appellant contended for. I return now to the case of *Maberly* v. *Strode*. When I commenced the digression to comment upon the cases of *Phillips* v. *Stringer*, *Roebuck* v. *Deane*, and *Perry* v. *Woods*, I had remarked that if the Master of the Rolls had stopped his opinion with what he said in respect to those three cases, the necessary conclusion would have been that he decided the case under the authority of those cases. After saying "I followed *Roebuck* v. *Deane* and *Stringer* v. *Phillips* in *Perry* v. *Woods*. This case is very nearly the same," he adds, "Perhaps rather stronger; for the life of the son is a very long period—within which it was very likely every one of these, nephews and niece, might be dead; in which case there would be a total intestacy; and that is one reason why it is necessary to adopt, if possible, the construction of the word 'survivorship' as applicable only to the death of the testator. The construction that the benefit of survivorship was to pre-

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vent a lapse, and that the interests vested at the death of the testator, is much the most beneficial construction."

It cannot, therefore, be said upon what the Master of the Rolls put the decision of *Maberly* v. *Strode*. The plain reason for the decision, which was a right one, was, that the issue of the nephews and niece could not have taken their parents' share, if there was to be survivorship amongst the nephews and niece themselves; and therefore some meaning not their ordinary one, had to be found for these words, "with benefit of survivorship." In the absence of this plain ground being assigned as the reason for the decision, and the judge putting it first upon the ground that it was covered by *Stringer* v. *Phillips* and *Roebuck* v. *Deane*, and next upon the ground that he made the construction that he did to prevent a lapse, without a word of explanation of this inconsistency, there arises very good ground to surmise that, as was very much the habit at that day, the report of what the judge said in deciding the case, is not something written by himself, but what the Reporter understood him to say verbally. In any event, however, there is nothing in the case in conflict with the construction of the words "with benefit of survivorship," contended for by the appellant. The words were plainly not used in their natural sense, because there could not be a survivorship amongst the nephews and neice, if the issue of each one was to take the parents' share. The Master of the Rolls was well warranted in speaking of these words, as used in that will, as "blind words." For, literally construed, they made utter confusion of what, without them, was perfectly plain.

And there is no room in the case at bar to argue that the words ought to be warped from their natural signification to prevent a lapse, as was so much commented on in the cases examined; for James Brown's marriage contract expressly contemplates all the children of the marriage dying before the event when the money was to be raised, and provides that if there should be no issue of the marriage living at the death of James, the fund should lapse into his general estate.

The decision that the court has made is, therefore, one which (if some of James Brown's children had died leaving children, before the death of James or Mrs. Brown, whichever one may be taken to be the event when the period of distribution was to arrive) would accomplish the very thing which the court has made its decision to prevent. It has not the support of a single case, English or American; it stands alone—by itself; and, as I shall now proceed by due stages

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to show, it has what have always been regarded as fixed and settled rules, and a series of cases, running through a long series of years, directly opposed to it.

First, let it be always borne in mind that the appellant founded his entire claim upon the marriage contract. He claimed that when the contract was entered into, and the marriage solemnized, the contract was one of the considerations entering into the marriage, and that the children to be born of the marriage at once acquired an interest in it, and a right to have it executed, literally, according to the settled import of its terms. That this is settled law, he conceives, cannot be questioned. *Tabb* v. *Archer*, 3 Hen. & Munf., is sufficient authority to cite for this.

He therefore most earnestly protested that James Brown's will, made in 1841, could not be referred to to determine what James Brown meant by the use of the language in which his marriage contract is expressed, a contract entered into and put into writing in 1807. But what was intended by that contract must be determined from an inspection of itself, and by giving to its terms that meaning which they had when the contract was written.

In the opinion of the court it is said, "It is true that the rights of the children were fixed by the marriage settlement, and could not be affected by the will of James Brown. But we refer to the will as well as the deed, to show that on the part of James Brown, at least (the grantor and testator), *equality* of distribution among his children and not *inequality* was his declared intention and fixed purpose." I most respectfully submit that James Brown's will, made in 1841, cannot show that equality of distribution among his children was his declared and fixed purpose in 1807. His purpose in 1807 may have been *inequality* of distribution, but that purpose may have changed by 1841, and equality have become his subsequent purpose. His will cannot, therefore, be referred to to determine what his previously made marriage contract was intended to mean, unless the rule of law, which says that written instruments are not to be explained by parol, is to be abandoned in this case. It is further said in the opinion that "the deed of settlement being recognized and re-affirmed in the will, is as much a part of the will itself, so far as the provisions we are considering are concerned, as if it was literally and entirely incorporated therein." If the rule that every written instrument must stand upon its own terms is to be adhered to, I cannot perceive of what consequence it can be whether the will is to be read as though the marriage contract were written out in it or not. For writing

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the contract out at large in the will, made thirty-four years after the contract was entered into, cannot possibly vary the interpretation that the terms of the marriage contract are to receive. That the marriage contract is to be considered as written out in the will, may be a most material circumstance in interpreting *the will;* but I cannot see how it can affect the interpretation of the marriage contract made thirty-four years before the will. But it is of no consequence to me what interpretation is given to the will. I founded no claim upon any provision of the will. I founded my claim upon an instrument made long prior to the will and superior to it, which it was beyond the power of James Brown to affect by will or otherwise. My claim was founded on the marriage contract.

I must also be permitted to protest against the application to this contract of a rule of construction laid down by the court. It is said in the opinion of the court that the interpretation contended for by the appellant "can only be given in a case so plain as to compel the court to adopt it by some rigid and arbitrary rule of law, from which there is no escape or evasion." If by this it is intended to say that a different rule of interpretation is to be applied to this marriage contract from what would be applied to any other, I ask why was this appellant to be put under a ban which is applied to no other? All that he asked was, that the ordinary rules of law, which are applied to the interpretation of other written instruments similar to James Brown's marriage contract, should be applied to it. He asked neither more nor less; more, he could have had no pretence for asking; to give him less would seem to have done him a great wrong. Now, the settled rule for construing such instruments is to ascertain the intention of the parties by giving to every word such a construction as will make it harmonize with every other word, but, at the same time, as far as possible, to give to each word its ordinary, settled and fixed meaning.

The rule does authorize the giving to words a meaning different from that which is their fixed and settled meaning, when, to give that meaning, would bring them into collision with some declared purpose of the instrument. But the rule never permits a sense to be given to words different from their ordinary and fixed meaning, unless giving them that fixed meaning would bring them into collision with and defeat some paramount, declared purpose of the instrument.

The old Latin distich, quoted by Lord Coke with approbation, expresses the rule most happily:

"*Verba ligant homines;*
Taurorum cornua funes—"

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though it take ropes to bind the horns of bulls, men are bound by their words.

That admirable writer, Williams, in the second volume of his work on Executors, seventh English edition, sixth Amer. edition, top paging 1148, marginal 1078, lays the rule down in the most happy terms. "*The question*," says he, "*in expounding a will is not what the testator meant*, BUT WHAT IS THE MEANING OF HIS WORDS. The use of the expression, that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means. The will must be expressed in writing, and that writing only is to be considered, and in construing that writing, the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. * * * * Nevertheless, if technical words are used by the testator, he will be presumed to employ them in their legal sense, unless the context contained a clear indication to the contrary. 'If words of art,' said Lord Alvanley in *Thellusson* v. *Woodford*, 'are used, they are construed according to the technical sense, unless upon the whole will it is plain that the testator did not so intend.' Courts, therefore, have no right or power to say that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by law."

The case of *Doe* v. *Brabant*, 4 Durnf. & E., 706, affords a most striking instance of the way parties are held down to the literal meaning of their words, even when that literal meaning defeats what was the testator's obvious intention.

In that case the testatrix devised her property to C when she should attain the age of twenty-one, and if she should die under twenty-one, leaving children, then to those children.

It will be seen that this made no provision for giving the property to C's children in case she died *over* the age of twenty-one. She died after reaching the age of twenty-one, leaving two children, and it was insisted that those children should take as being obviously within the scope of the testatrix's intention. But the Court of Kings Bench held to the

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contrary. Lord Kenyon, delivering the opinion of the court, said: "Nothing can be more clear than the words of this will. The devise is to L. Counsell when she shall attain the age of twenty-one, and if she shall die under twenty-one, leaving children, then to those children; but she did not die under that age, and therefore nothing can pass to the grandchildren. If this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the grandchildren; but as she has not done so, we cannot make a will for her." The case of *Calthorpe* v. *Gough*, reported in a note to the foregoing case, is also directly in point. See also opinion of Moncure P. in *Moon* v. *Store*, 19 Gratt., pp. 327, 328.

The question to be determined in this case is, therefore, first, What was the settled meaning of these words, "tenants in common with benefit of survivorship," when the marriage contract was written? And second, that meaning being ascertained, are there any other words in the will inconsistent with those words according to their settled meaning? Can they have their settled meaning consistently with all the other words having theirs?

When James Brown's marriage contract was written, these words were not new words; the expression "benefit of survivorship" was as old as the common law, and was of as frequent occurrence as any words of art used in law. It was the phrase by which lawyers expressed the survivorship which takes place amongst tenants where one dies and his part goes to his co-tenants, and not to his heirs It meant that and it meant nothing else, and expressed that idea with the same fixed precision as the words "die without issue" expressed the idea of an estate tail; and this can now be shown beyond the possibility of question.

Lord Coke says, 1 Coke Lit., 181 a, 181 b: "But although survivorship bee proper to joyntenants, yet it is not proper *quarto modo* (that is) *omni, soli et semper;* for there may be joyntenants, though there be not equall BENEFIT OF SURVIVOR on both sides. As if a man letteth lands to A and B during the life of A; if B dyeth, A shall have all by survivor; but if A dyeth, B shall have nothing." Upon which Messrs. Hargrave and Butler, two of the profoundest common law lawyers that ever wrote, make this note, "(1) See further as to *benefit of survivorship* on one side only, post."

Again, Lord Coke says, Coke Lit., 183, a: "And the reason of this is, for if the joynture be severed at the time of the death of him that first deceased, the *benefit of survivor* is ut-

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terly destroyed forever." Again, same page, he says, "And secondly, that notwithstanding the act of any one of the joint tenants, there must be equall *benefit of survivor* of the freehold. But here, if either joint tenant had first died, there had been no *benefit of survivor* to the lessor, without question."

Littleton says, sect. 281, "as if a lease of lands or tenements bee made to many for terme of years, he which survives of the lessees shall have the tenements to him only during the terme by force of the same lease." Messrs. Hargrave and Butler make this note upon this passage: "60. And this *benefit of survivorship* takes place on a lease for years to two, though one of the lessees dies before entry." These notes by Hargrave & Butler were written before the year 1787.

Blackstone says in his Commentaries, vol. 2, p. 184, "and this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the king nor any corporation can be a joint tenant with a private person. For here is no mutuality; the private person has not even the remotest chance of being seized of the entirety by *benefit of survivorship;* for the king and the corporation can never die." This was written about the year 1760. In the case of *Jeffries* v. *Small*, Vernon's Reports, 217, decided in 1683, the Lord Keeper said he "was clearly of opinion the plaintiff ought to be relieved; and said if a farm had been taken jointly by them, and proved a good bargain, then the survivor should have had the benefit of it."

In the case of *Rose* v. *Hill*, 3 Burrow's R., 1784, decided in the year 1776, Lord Mansfield said, "An estate to more than one, *with a benefit of survivorship*, is a joint tenancy."

In the case of *Hawes* v. *Hawes*, decided in 1747, the will containing the very words that are in James Brown's settlement, Lord Hardwicke decided that they meant a survivorship amongst the tenants themselves.

In *Doe* v. *Abey*, 1 Maule & Selwyn, 434, Bayley J. said: "The fair construction is to treat it as a devise to the sisters as *tenants in common with benefit of survivorship*, and thereby give effect to all the words. A tenancy in common with benefit of survivorship is a case which may exist, without being a joint tenancy; because survivorship is not the only characteristic of a joint tenancy. There is one view in which it might be important to the testator to create a tenancy in common with survivorship, and yet not a joint tenancy. It might be important in this view; because if it were

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a joint tenancy, one joint tenant might, by means of a lease made during her life, convey to her lessee a little paramount to that of the survivors. It might, therefore, be the object of the testator to obviate such a consequence which would in effect defeat his intention." (See this reasoning cited with approbation by Mr. Jarman in his work on Wills, vol. 2, page 450, top paging, 3d Am. Ed., 631, marg.)

Lord Ellenborough said in the same case: "To take as tenants in common is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean that they were to enjoy it as tenants in common, which they might do with benefit of survivorship, then the only repugnancy seems to be in the use of the words, and not as joint tenants. I would preserve the words to take as tenants in common; the words tenants in common are of flexible meaning, and may be understood that, although they should take by survivorship as joint tenants, yet the enjoyment was to be regulated amongst them as tenants in common." This case was decided in 1813, six years after James Brown's marriage contract was written. Instances of the use of these words to express the idea of a survivorship amongst the tenants might be multiplied indefinitely, but no instance could be found in which they were ever used to express any other idea. If, therefore, any language can be said to have had a settled meaning at any time, this may be said to have had the settled meaning contended for in 1807. It therefore only remains to inquire whether there is any other language in the will with which it would be inconsistent to give them their settled meaning.

The deed sets out by declaring, "And further, in order more effectually to provide for the CHILDREN of the said marriage," James covenanted that there should be raised out of his estate the sum of £10,000, to be placed in the hands of the trustees "*for the purpose aforesaid*," and for the further purpose of making a provision for the wife to be held by the trustees "in trust for the issue of the marriage, if there be any, to be held by them; if there be more than one, as tenants in common with benefit of survivorship, and if but one child, then the estate to belong to such child. * * * * * * * * * * ** And if there shall be no *issue* of the said marriage living at the death of the said James Brown then," after paying a certain annuity to the wife, "the surplus of the said ten thousand pounds, as well profits as principal, to be and remain a part of the estate of the said James Brown."

The purpose of this deed is declared upon its face to be to

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make a provision for the "children" of the marriage. Now, the word "children" has not only a well-settled, popular meaning, indicating children in the first degree, but it has also a perfectly settled technical meaning, indicating the same thing. Cases by the score for this could be cited. In 2d Jarman on Wills, beginning of ch. 31, p. 51, 3d Am. Ed, it is said: "The legal construction of the word *children* accords with its popular signification, namely, as designating the immediate offspring; for in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import as issue." In the case of *Moon* v. *Stone*, 19 Gratt., 328, the court says: "Here is an express loan to his daughter, Sally, during her natural life. This is plain language, and, standing by itself, cannot be misunderstood. What is there in the will to change its natural meaning? Only the word "children," which twice follows it in the same clause. Now, this word children is just as plain as the loan for life previously given. Its meaning is issue in the first degree, and it can generally have no other meaning unless there be other words in the will to give it such other meaning, except the rule in *Wild's Case* applies, which is founded on peculiar reasons. A testator may use words in any sense he pleases, however different that sense may be from their natural meaning; and, therefore, he may use the word "children" to embrace grandchildren or other descendants, or issue indefinitely; but then it must appear from his will, at least generally, that such was his intention."

Whenever, therefore, one says in an instrument that a fund is to be for the benefit of children, he is taken to mean that it is to be for the offspring in the first degree, and this meaning is unalterably attached to his words, unless there be other words in the same instrument which make it absolutely certain that "children" was not used in the sense of offspring in the first degree. The expression in the contract of James Brown, which the court seems to rely on as showing an intention to include remoter issue (and, indeed, they are the only words as to which there can be any pretence to say that remoter issues were intended to be included), are, "to be held by them in trust for the *issue* of the said marriage, if there be any;" and "if there shall be no issue of the said marriage living at the death of the said James Brown," then over.

The word "issue" undoubtedly comprehends not only the immediate offspring, but offspring in a more remote degree;

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and, indeed, it is the proper word to express issue indefinitely. But, as it comprehends in its signification immediate offspring, as well as more remote descendants, so is it always liable to be held to refer to either, according as the context shows that the one or the other is intended to be described by it. Jarman says, in the 2d volume of his work on Wills, top paging 27, marg. 36, 3d Am. Ed., "The word 'issue,' however, may be, and frequently is, explained by the context to bear the restricted sense of *children*." It cannot be necessary to add authorities upon this point. A thousand cases in which the word "issue" is read "children" could be added if required.

Now, the first circumstance to be referred to in this deed to show that the word "issue" was used in it synonymously with "children," is the fact that the parties declared at the outset that the provision was to be for the *children* of the marriage; they provided that in a certain contingency, that of all the children dying under 21, the fund was to lapse into the general estate, although all the children might have left children; and when it was said that the fund was to be held for the benefit of the "*issue*" of the marriage as "tenants in common with benefit of survivorship," it was said that it was to be so "held by them, if there be more than one;" "and if but one CHILD, then the estate to belong to such child." How could a man speak of *one issue* in the sense of indefinite descendants? When a man says, "if there be only one issue of the marriage," he must necessarily mean "if there be but one child of the marriage."

But Brown, after using that expression, "if there be more than one issue of the marriage," did not leave room for any conjecture as to what he meant by that expression, for he adds, "and if but one child, then the estate to belong to such child;" showing in what sense he had used the preceding expression, "if there be more than one issue of the marriage," to wit, "if there be more than one child of the marriage."

It is a cardinal rule of interpretation that every word of an instrument shall be so interpreted as that every other word shall have a meaning given to it as near to what is its true meaning as possible. Now, the word "issue" is a word just as apt for expressing offspring in the first degree as it is for describing more remote descendants. Children of a marriage are just as much "issue" of the marriage as grandchildren are; and when they are spoken of as "issue" of the marriage, the term is just as correctly used as when it is used to include descendants in a more remote degree. Now,

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by confining the word "issue" in this deed to describing the children, it is used with absolute correctness, and its proper meaning can be given to the words "tenants in common with benefit of survivorship." By making it, in defiance of the context, include more remote descendants, the proper meaning for the words "tenants in common with benefit of survivorship" is rejected for those words, and they are either stricken out of the instrument, or a meaning is given to them which philology itself cannot make them bear. Of course, I do not overlook the fact that the first clause of the contract declares that the purpose of the settlement is to provide for the "issue" of the marriage. But all I have said upon the word "issue" applies to its use in the first clause with the same degree of force that it applies to its use in the second. The only question is, Whether the word was used in its more limited sense to describe children, or in its larger sense to include indefinite descendants, and the second clause describes the sense in which it is used to be "children." I would also call attention to the fact that the court's construction, cutting out children of children who might die before Mrs. Brown, is inconsistent with the word *issue* having its more enlarged sense.

It is said, in the opinion of the court, that there has been great conflict in the English cases over the word used in this contract (or words of similar import), and that it is impossible to draw from them any fixed rule for their interpretation; and that our Court of Appeals has determined for the State of Virginia, in *Martin* v. *Kirby*, *Hansford* v. *Elliott*, and the other cases mentioned in the opinion, that they shall mean that the property is to vest in all the children living at the death of the maker of the instrument.

I have not been able to find a single English case in conflict with any other case, English or otherwise, in the construction of the words used in Brown's contract, or in the construction of words of similar import. It is true there has been conflict in the English cases upon the construction to be given to such language as is found in *Stringer* v. *Phillips*, *Roebuck* v. *Deane*, *Perry* v. *Woods*, *Bindon* v. *Lord Suffolk*, and other similar cases; but the language to be construed in those cases is in no respect like the language to be construed in this. They are all cases in which the testator gives his property to a person for life, and after that person's decease to "his (testator's) surviving children," or words equal in effect to these. The question in such cases is, What does the testator mean by these words, "my surviving children?" His

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children who should survive one event, or those who should survive another? Those of his children who should survive himself, or those who should survive the person who is to have the property for life? The words will apply to and describe either; which is he supposed to mean? Some of the English decisions have been that they mean those living at the death of the testator; others that they mean those living at the death of a life tenant; and on this point there has undoubtedly been a conflict between them. Our court has settled for us that they shall be taken to mean those living at the death of the testator. But what possible similarity can there be between those words and the words "tenants in common with benefit of survivorship?" If language means anything, this language means that the tenants in common are to have some sort of benefit. The other language means that the property is to go, upon a certain event, to such persons as may be living at a certain event. One describes the kind of interest which a fixed number are to take; the other describes the number of persons that are to take property. (See the opinion of Lord Cranworth.—*Taffee* v. *Conmee*, 8 Jurist, N. S. 919.)

In every case which I have been able to find in which the words used in James Brown's marriage settlement, or equivalent words, are employed, the decision has been according to what the appellant contended for. The case of *Hawes* v. *Hawes*, a judgment of Lord Hardwicke is exactly in point. This case is so badly reported that it is necessary to compare all the reports of it critically in order to determine exactly what was decided. It is reported in 3d Greenleaf's Cruise, p. 399, *et seq.;* in 5th Bacon's Abridgment, Am. Ed., 1848, 256 *et seq.;* in 3d Wilson's R., 165; in 1 Vesey, Sr., 13; and in 3d Atkyn's R., 523. It is better reported in Cruise than elsewhere. The case was this: A. Hawes bequeathed personal property to his "four younger sons—William, Charlton, Andrew and Thomas—their heirs and assigns, equally to be divided, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship *if any died under the age of twenty-one.*" He then, by the same will, devised real estate to the same four younger sons, by the same language, in part, as follows: "To them, their heirs and assigns, equally to be divided between them, share and share alike, as tenants in common, with benefit of survivorship."

It will be observed that in this devise of the real estate, he does not say *if any die under the age of twenty-one*, nor does he say with *like* benefit of survivorship. One of the

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sons died under the age of twenty-one, and the question was, Whether his interest in the real estate went to his heir, or whether it went under the will to the three brothers? And this raised the further question, Whether, if the three brothers took, they took by virtue of the general words in the devise of the real estate, "with benefit," &c., or whether that provision was to be read like the limitation of the personal property, in case any child died under twenty-one. Lord Hardwicke held that the effect of the provision as to the personal property was to give it to the four brothers with a conditional limitation attached, that if one of them should die before he reached the age of twenty-one, that his interest should go to the other three, and that, though the testator did not attach to the devise of the real estate the provisions as to dying under twenty-one, nor say that the real estate was devised with *like* benefit of survivorship, still, having in the bequest of the personalty shown unequivocally what he meant by the words "with benefit," &c., that he would be intended to have meant the same sort of survivorship as to the real estate that he had defined as to the personal estate. Accordingly, the deceased brother's share was given to the three brothers as against the claim of the heir. Now, the devise in that case is exactly the same thing in substance as the provision of James Brown's covenant. In that case, the devise is "to four, as tenants in common, with benefit of survivorship, if any die under twenty-one."

In James Brown's covenant it is "to the number who may be living at my death, as tenants in common, with benefit of survivorship, never mind at what age any may die. The important thing decided in *Hawes* v. *Hawes* was that the words "with benefit of survivorship" mean, in their natural and primary sense, that survivorship which takes place when one dies, and his interest, instead of going to his heirs, goes to his co-tenants. And if this be the meaning which is to be primarily attached to the words "with benefit of survivorship," there can be no difference between saying, "I give to my four sons, as tenants in common, but if any die under the age of twenty-one, the share of that one or those to go to his brothers who outlive him," and saying "I give to those of my children living at my death, as tenants in common, but *when* any of them die, the share of that one or those so dying to go to those of their brothers or sisters who outlive them;" and the case of *Hawes* v. *Hawes* becomes a case directly in point.

The case of *Doe* v. *Abey*, 1st Maule & Sel., 428, is also a case

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directly in point. In that case, a testator gave his estate to his three sisters for and during their natural lives and the life of the survivor, to take as tenants in common, and not as joint tenants. The court held that these words made it clear that the sisters were to have the property as long as any of them were alive, and that this could only be by a survivorship amongst the sisters themselves. That they were, therefore, to be tenants in common with the incident of survivorship attached to their estates, and that it would treat the devise as though it were in these words, "to my three sisters as tenants in common with benefit of survivorship;" and if these words had been used, the case was not open for a question. See opinions of Bayley J. and Lord Ellenborough in this case, quoted ante p. 402.

The case of *Haddesly* v. *Adams* (2 Jurist, N. S. 724) presented the same question also, and received the same decision. A testator in that case devised his estate to trustees for the use of A and his wife for life, and from and after the decease of the said A and his wife, the testator gave the said property unto and amongst his four granddaughters (naming them) "to hold to them as tenants in common, and not as joint tenants, during the term of their respective natural lives, with benefit of survivorship." The court held that as each grandchild died her interest succeeded to the others.

In the course of his opinion in this case, Sir John Romily, M. R., said: "There can be no doubt that where there is a simple devise to four persons to hold to them as tenants in common with benefit of survivorship, they hold as tenants in common, and as one dies the survivors are to take the benefit of the estate."

The case of *Taffee* v. *Conmee*, 8 Jurist, N. S., 919, presented the same question and received the same decision. This case is a judgment of the House of Lords. The Lord Chancellor of England, Lord Westbury, and three ex-Lord Chancellors, to wit, Lord Cranworth, Lord Chelmesford, and Lord Kingsdown, took part in the decision, each one delivering a separate opinion, and all concurring. The case is, therefore, one of very high authority. In that case, a testator devised his property "in trust for his nephew for life, and after his death to his three nieces—J. F., R. F. and B. F.—and the survivor of them for the term of their natural lives, as tenants in common, and not as joint tenants." It is obvious that this case presented the same question as the case of *Doe* v. *Abey* already commented on, and it received the same decision.

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The Lord Chancellor, in answer to the argument that this devise came within the principle established by such cases as *Martin* v. *Kirby* as to a period for distribution, says at page 921, "But there is another and a simpler meaning of the word, which I think is the true meaning in this case. The natural and obvious meaning of the word 'survivor' is not the person who shall survive or outlive a particular event; but when it is applied to a class of persons and individuals who are named, the natural and obvious meaning of the word is the longest liver of those who are named; and, therefore, in this particular case, as in other cases, the word 'survivor' should, I think, be regarded, not as referring to any particular event previously mentioned, but as referring to that which, as I have already observed, is the natural meaning of the word, namely: that individual person who, out of the individuals named, shall turn out to be the longer liver. It has been sometimes objected that this interpretation of the word 'survivor' cannot be adopted where there is a gift to several persons as tenants in common, not as joint tenants. But there is obviously a very great distinction between the limitation of survivorship that is involved in a gift of joint tenancy, and the limitation of the word 'survivor,' which is annexed to the tenancy in common. The survivorship involved in an estate in joint tenancy is that which is capable of being defeated at the pleasure of a joint tenant. But if, by alienation or otherwise, the joint tenancy is converted into a tenancy in common, the survivorship ceases. But, when a gift to the 'survivor' is annexed to a tenancy in common, and not to a joint tenancy, then the limitation takes effect by virtue of the gift, and not by virtue of something involved in a limitation of joint tenancy."

Lord Cranworth said, in the same case, p. 922: "Now, it is argued that each (niece) took a separate estate as tenants in common, with remainder afterwards as to each of their thirds to their first and other sons, * * * * and that the now sole surviving niece took only one-third for her life. I think that such a construction cannot be maintained. It would, in truth, make the word 'survivor' of them utterly inoperative; *the word 'survivor,' then, does not point to the person who was to take the estate by virtue of being survivor, but to the extent of the interest which the nieces were to take.* According to a distinction which, I think, was correctly enunciated by the present Master of the Rolls in the case cited in the argument *Haddesly* v. *Adams*, the word 'survivor' here means not to indicate the person who is take by surviving at any

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particular period, but to indicate what interest the three nieces are to take. It is just the same as if, instead of 'survivor,' it had been 'the longer liver.'"

It was argued at the bar in *Brown* v. *Burton* that the construction contended for by the appellant would make an estate which would violate the rule against perpetuities, for the reason that under the appellant's construction it would be making James Brown attempt to control his property throughout the period of his own life, and until there should be only one of his children living which might have been for a period longer than twenty-one years and ten months after a life in being; and that, therefore, even if the appellant's construction of the contract should be adopted, it would bring about a case of *felo de se*, and the estate would be destroyed.

This presented a very interesting, important and rather novel question. The appellant's counsel thought that he answered the point completely, and the court did not see fit to put its judgment upon that ground. The length of this article forbids a discussion of that question here, but I think it is of sufficient importance to deserve a discussion, and I may, at some future time, submit my views upon it to the judgment of the profession.

WILLIAM L. ROYALL.

ENGLISH COMMON PLEAS DIVISION.

THE HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE COMPANY (limited) *v.* GRANT.

A contract is binding upon the proposer as soon as a letter of acceptance, properly directed to him, has been posted by any person to whom the proposal has been made, notwithstanding such letter never reaches him, provided that there is no unreasonable delay in accepting the proposal, and that the ordinary and natural mode of transmitting the acceptance is through the post.

A. who resided at Swansea, handed a written application for one hundred shares in the B company to the manager of the company, on the 30th September. On the 20th October, the B company, whose office was in London, posted a letter of allotment of one hundred shares to A, directed to the address at Swansea that A had given in his form of application. This letter of allotment never reached A. HELD:

In an action by the B company against A for the amount of a call due in respect of the one hundred shares allotted to him, that A was liable to pay the call.

This was an action for £94, 15s. claimed as due in respect to a call on 100 shares alleged to be held by the defendant in

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the plaintiff's company. The defendant denied that he was a shareholder. At the trial before Lopez J., it appeared that the defendant, who resided at Swansea, and who was afterward appointed agent for the plaintiff's company at Swansea, applied in September, 1874, for one hundred shares in such company, with a view of his being appointed such local agent. The application was sent through the manager of the company, and was in the usual form, of which the following is a copy:

Application for shares.
Liability limited to £2 per share, interest at the rate of £5 per cent. per annum from the date of allotment.
The Household Fire Insurance Company (Limited).
Offices: 4 St. Paul's Churchyard, London, E. C., and 56 George street, Edinburgh.

To the Directors:

Gentlemen,—Having paid to your bankers the sum of £5, being a deposit of 1s. per share on one hundred shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares or any less number you may allot me, and I agree to pay the further sum of 19s. per share within twelve months from the date of the allotment, and I authorize you to insert my name on the register of members for the number of shares allotted to me. I am your obedient servant,

Name in full, Alexander Grant.
Address, 16 Herbert Place, Swansea, Glamorgan.
Occupation, Commission and Insurance Agent.
Date, September 30, 1874.
Usual signature, A. Grant.

The shares so applied for were allotted to the defendant, and a letter of allotment in the usual form directed to the defendant according to the address he had so given, was posted on the 20th October, 1875. The following is a copy of such letter:

Allotment letter.
Household Fire Insurance Company (Limited), 4 St. Paul's Churchyard, London, E. C.
20*th October*, 1874.

Sir,—In reply to your application for 100 shares in this

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company, the directors have allotted you 100 shares, the payments on which are as follows:

Deposit of 1s. per share on 100 shares allotted.....£5 0 0
Deposit received from you on application.....
Balance due by you now (on allotment).....

£

A further sum of 19s. per share, namely £95, will be due from you on the 23d day of October, 1875.

Certificates of shares when ready (of which due notice will be given) will be delivered in exchange for the banker's receipt for the deposit money, and the receipt for the further payment. I am, sir, your obedient servant,

HENRY HARE, Secretary.

To Alexander Grant, Esq., 16 Herbert Place, Swansea.

The defendant swore that he had never received this letter, and that he had had no letter about the shares until March, when he received the following:

19*th March*, 1877.

Sir,—The following amounts being due from you in respect of 100 shares held by you in this company:

£5 due 23d October, 1874;
£95 due 23d October, 1875;

I am instructed by the directors to require you to pay these amounts at this office on or before the 19th day of April next, and to inform you that in the event of your not doing so, the said shares will be forfeited.

I am, sir, yours truly,

(Signed), J. E. REDMOND, Secretary.

Mr. A. Grant, 7 Herbert Place, Swansea.

Credit, however, was given in this action for $5 5s., that sum being found entered in the books of the company as having been paid by the defendant on the 100 shares. The jury found that the letter of the 20th October, 1874, had been posted, but that it had never been received by the defendant. On these findings the learned judge reserved judgment, and the case now came before him on further consideration.

W. G. Harrison, *Q. C.*, and *Wilberforce* for plaintiffs.

Finlay and *Dillwyn* for defendant.

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They cited *Taylor* v. *Jones*, L. R., 1 Ch. Div., 87; 34 L. T. Rep. (N. S.), 131; *The Imperial Land Company of Marseilles, Wall's Case*, L. R., 15 Eq., 18; *Redpath's Case*, L. R., 11 Eq., 86; 23 L. T. Rep. (N. S.), 834; *Finucane's Case*, 20 L. T. Rep. (N. S.), 729; *Adams* v. *Lindsell*, 1 B. & Ald., 681; *Higgins* v. *Wilson & Co.*, 6 Scotch Sess. Cas. (2d ser.), 1407; *Taylor* v. *The Merchants' Fire Ins. Co.*, 9 How. (Am.), 390; *Dunmore* v. *Alexander*, 9 Shaw & Dunlop, 190, in addition to the authorities referred to in the judgment. *Cur. adv. vult.*

Lopez J. This action is brought to recover £94 15s. for balance due on 100 shares in plaintiff's company applied for by the defendant. The defendant denies his liability. On the 30th September, 1874, the defendant, who acted for the plaintiffs at Swansea, applied through the manager for 100 shares, and handed him a written application for shares in the usual form. The manager laid the application before the plaintiffs, and an allotment letter was prepared in the usual form. The defendant swore he never received this letter, or any notice of calls or dividends. His name was duly entered on the list of shareholders. Evidence was given on behalf of the plaintiffs to prove the postage of the allotment letter of the 20th October. The defendant swore he had not received any letter about the shares until the 19th March, 1877. I asked the jury if they thought the letter of allotment of the 20th October was in fact posted; they replied in the affirmative. I also asked them if they thought the letter of allotment was in fact received by the defendant; to this they replied in the negative. It was urged by Mr. Finlay, for the defendant, that the letter of application was sent by hand, and there was no request to be answered by post. The letter of application, it will be observed, is in the usual form, and contains the usual particulars of name and address, and having regard to the position of the plaintiff's office and the defendant's residence, the ordinary and natural mode of transmission of the allotment letter would be through the post. The question raised in this case is, Whether the contract between the plaintiffs and the defendant was complete when the letter accepting the defendant's offer was put into the post by the plaintiffs, or not until it was actually received by the defendant? The question is difficult, and the decisions are conflicting. It appears to me, however, that regard being had to the general inclination of the authorities and to mercantile convenience, the plaintiffs are entitled to succeed. I will refer only to a few of the leading cases.

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In *Dunlop* v. *Higgins*, 1 H. L. Cas., 381, the proposal did not prescribe any time, but the nature of it implied the answer must be speedy. The acceptance was not posted by the earliest post. The court decided that the contract was binding on the proposer. Lord Cottenham appears to have thought that the contract was absolutely concluded by the posting the acceptance (within the prescribed, namely, a reasonable time), and that it mattered not what became of it afterward. In *Duncan* v. *Topham*, 8 C. B., 225, not long afterward, Wilde C. J., Maule J., and Cresswell J., seem to have so understood it, so that the contract would be binding, though the letter did not arrive at all. In the case of *The British and American Telegraph Company* v. *Colson*, L. R., 6 Exch., 108; 23 L. T. Rep. (N. S.), 868, it was found as a fact that the letter of allotment was never received. The court held the defendant was not bound, and endeavored to restrict the effect of *Dunlop* v. *Higgins*. In the *Imperial Land Company of Marseilles, Harris' Case*, L. R., 7 ch. 587; 26 L. T. Rep. (N. S.), 781, the letter of allotment was duly received, but in the meantime the applicant had written a letter withdrawing his application on the ground of the delay in answering. The lords justices held the applicant was bound on the authority of *Dunlop* v. *Higgins*, with which they thought it difficult to reconcile *The British and American Telegraph Company* v. *Colson*. In the case of *Brogden* v. *The Metropolitan Railway Company*, L. R., 2 H. of L., 691, Lord Blackburn says: "So, again, when in *Harris' Case* a person writes a letter and says, 'I offer you an allotment of shares,' and he expressly or impliedly says, 'if you agree with me, send an answer by post;' then, as soon as he has sent that answer by the post. and put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound, I agree that the contract is perfectly plain and clear." And again, at page 692: "I take it that that which was said 300 years ago and more is the law to this day, and is quite what Mellish L. J., in *Harris' Case*, accurately states, that when it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post this letter the offer is accepted." Acting upon these cases, I came to the conclusion that the contract here was complete on the posting of the allotment letter, and that it is immaterial whether the defendant actually received that acceptance of his offer. There is, doubtless, hardship caused to the proposer if the acceptance does not come to hand, but against this he may guard himself by

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making the proposal expressly conditioned on the arrival of the answer within a definite time. It would be difficult to exaggerate the mischievous consequences to the commercial world which would follow if it were held that a contract was not complete until the letter accepting the offer had reached the proposer, and that it might be revoked at any time until the letter accepting it had been actually received.

JUDGMENT FOR PLAINTIFFS.

SUPREME COURT OF APPEALS OF VIRGINIA.

BROWN *v.* BURTON'S EXECUTORS ET ALS.

Richmond, March, 1879.

In the year 1807. J. B. and A. B., being about to be united in marriage, enter into a contract in writing, whereby J. B. covenants with trustees that after his death, and the payment of his debts, the sum of £10,000 currency shall be raised from his estate and held by the trustees for the issue of the marriage as tenants in common with benefit of survivorship. HELD: That those of the children of the marriage who were living at the death of the wife took vested interests in fee simple, and that as one of them died, his or her share descended to his or her heirs, and did not pass by survivorship to the other brothers and sisters.

This was an appeal from a decree of the Chancery Court for the city of Richmond. In the year 1807, James Brown being about to be married to Mrs. Anna P. Burton, entered into a marriage agreement with her, which was reduced to writing, but never recorded (which agreement, so far as it was involved in this case, is set out in the opinion of the court). The marriage took place, and there were seven children born of it, all of whom were living at the death of both James Brown and Mrs. Brown. The estate left by Brown was for many years involved in litigation, and it is only within the past two or three years that it was ready for distribution. In the meantime, all the children of the marriage have died except two sons, George L. and A. Spiers Brown. One of the children of the marriage married and left four children, who were all living at the time of the decree. A. Spiers Brown claimed that by the terms of the marriage contract, the fund provided for by it was to pass as each child died to those of his brothers and sisters who survived him or her. The Chancery Court decided against his claim, holding that the

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children who were living at the time of Mrs. Brown's death took vested interests in the fund, and that when one died his or her share passed to his or her heirs. Such other facts as are necessary to understand the case are set out in the opinion of the court.

Wm. L. Royall for appellant.

Wm. W. and *Bev. T. Crump*, and *Andrew Johnston* for appellees.

CHRISTIAN J.—This case is before this court for the *third time*. Nearly forty years have elapsed since the litigation commenced, and the children surviving, who were unborn at the date of the marriage contract (executed in 1807) which we are now called upon to construe, are now aged men. It is to be hoped that this appeal will put an end to this protracted litigation, and settle the rights of all the parties finally and forever.

When the case was here in 1872, it involved a number of different questions concerning the settlement of the partnership transactions of Brown, Rives & Co., in which Robert Burton, the elder, was a partner ; also the accounts of James Brown as executor of Robert Burton the elder, together with the judicial construction of the will of Robert Burton, Jr., and other papers, deeds and contracts, forming a fruitful source of uncertainty and strife in the courts. The record in that case was composed of two large printed volumes of many hundred pages each.

But as numerous as were the questions then brought up and decided by this court, the question now to be determined was not presented in that record, and was raised for the first time when the case was sent back to the Chancery Court, for further proper accounts, ordered by the decree of this court, to be taken before its commissioner.

The only question we have now to determine is, what is the true construction to be given to certain provisions of the deed of marriage settlement entered into on the 9th day of October, 1807, between James Brown and Anna P. Burton his intended wife. These provisions are as follows:

"*And further*, in order more effectually to provide for the children of the said marriage, the said James hereby covenants and agrees with the said John P. Braddock, Charles Johnson, Charles I. Macmurdo, that after his just debts, there shall be raised out of his estate the sum of ten thousand

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pounds current money, to be paid in preference to any voluntary disposition of his property, whether by will or otherwise, and placed in the hands of the said trustees, for the purpose aforesaid, and the further purpose of making a provision for the said Anna P., the said money to be raised as soon as may be done after the decease of the said James Brown, and to be held by them in trust for the issue of the said marriage, if there be any, to be held by them, if there be more than one, as tenants in common, with benefit of survivorship, and if but one child, then the estate belong to such child; and in either case the said Anna P. shall be entitled to share the profits of the said ten thousand pounds during her life in the following proportions: that is to say, if there be only one child, she is to receive for life, after the decease of the said Brown, one-third of the said profits for life, and no more; and if there be more than one child, she is in no event to have more than the profits of a child's part,; and *if the children of the said marriage* should all of them die before attaining the age of twenty-one, then so much of the said sum of ten thousand pounds as shall remain after providing as is herein above set forth for said Anna P., to be disposed of as part of the estate of the said James Brown, in like manner as if provision had not been made for the issue aforesaid; and if there shall be no issue of the said marriage, living at the death of the said James Brown, then the said trustees shall pay unto the said Anna P. out of the said profits, the sum of five hundred pounds current money, annually, during her life, and no longer, and the surplus of the said sum of ten thousand pounds, as well profits as principal, to be and remain a part of the estate of the said James Brown; the said annuity of five hundred pounds to be paid in half yearly payments."

None of the contingencies mentioned in the foregoing provision ever happened. There was issue of the marriage—seven in number; none of them died before attaining the age of twenty-one years, and all were living at the death of Jas. Brown, and of his wife, Anna Pittfield Brown. Jas. Brown departed this life in March, 1841, having just made and published his last will and testament, which bears date January 1st, 1841, and was duly admitted to probate and record. His will contains the following provisions:

"Whereas, by virtue of a deed of marriage settlement entered into between myself and my wife, Anna Pittfield Brown, on the 9th day of October, 1807, in which I ordered to be raised out of my estate the sum of ten thousand pounds cur-

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rency, in preference to any voluntary disposition of my property, whether by will or otherwise, and held for her use, &c., &c., which deed not having been recorded, may be held as annulled, agreeable to the laws of this Commonwealth; now, in pursuance of said deed, be it here distinctly understood, I will and desire the same by this writing to be put in full power and force, and now fully confirm the same."

Looking to these provisions of the deed of marriage settlement and the will of James Brown, which "confirms and puts in full power and force" said deed in all respects, we have now to declare what is the true construction to be given to the words found in said deed, "to be held by them, if more than one, as *tenants in common, with benefit of survivorship.*" In solving this question the controlling, if not only legitimate inquiry is, What was the intention of the grantor and testator James Brown in the use of these words? In ascertaining that intention, we cannot rely upon any fixed canon of construction founded upon arbitrary rules and technical principles, but that intention is best derived from the terms and provisions of both the deed of marriage settlement and the will of James Brown viewed in the light of the circumstances which attended the execution of these two instruments. In this case we may look not only to the deed of marriage settlement, but to the will of James Brown; indeed, we *must* look to both to aid us in the interpretation of the true intention of the grantor and testator, because the deed of settlement being recognized and reaffirmed in the will, is as much a part of the will itself, so far as the provisions we are considering are concerned, as if it was literally and entirely incorporated therein.

In seeking for the true interpretation of the language used, we are not tied down to the literal words, however technical and of whatever established legal signification they may be, when read abstractly in a single phrase, but must read them and interpret them in their relation to other terms and provisions of the instrument in which they occur. The subject-matter of the contract, the general purpose and object of the contracting parties, or of the testator, shown by the instrument itself, has always been considered a just foundation for giving the words of the instrument an interpretation when considered relatively, different from that which they would receive in the abstract. The provisions in the whole writing taken together and showing the general design and purpose to be accomplished, is a just medium of interpretation of the language and meaning of the parties in relation to it. 1 Greenl. Ev., §§ 286, 287, and cases there cited.

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The great object being to discover the intention, the court may put itself in the place of the parties, and then see how the terms of the instrument affect the property or subject-matter.

Applying these rules of interpretation to the case before us, and looking first to the deed of marriage settlement, we discover that it is the declared purpose of that instrument, first, to secure to Mrs. Burton, whom he was about to marry, her separate estate; and second, to provide for the issue of the marriage. This purpose is plainly declared in the first clause of the deed in distinct and unequivocal terms, as follows: "Whereas a marriage is shortly intended to be solemnized between the said James Brown and Anna P. Burton; now this indenture witnesseth, that for and in consideration of the premises, and for and in consideration of the sum of one dollar by the said John P. Braddock, Charles Johnson and Charles I. Macmurdo, to the said James Brown in hand paid, the receipt whereof is hereby acknowledged, and with a view to secure to the said Anna P. Burton her separate property, *and to provide for the issue of said marriage*," &c., &c. After securing to Mrs. Burton her separate estate, the deed provides, "and further, in order more effectually to provide *for the children of the marriage*, * * * there shall be raised out of his estate, the sum of ten thousand pounds current money, to be paid in preference to any voluntary disposition of his property, by will or otherwise, and placed in the hands of said trustee *for the purpose aforesaid*, * * * to be held by them in trust *for the issue of said marriage*." Now, up to this time there cannot be a doubt, nor is there a word that can raise a doubt, that the plain intention of James Brown was to provide for the *issue of the marriage, for all and not a part*, to provide for *all* his children alike, and not alone for that child, which might happen to be the last survivor of them all. Such intention is plain from the very terms of the deed, up to the point, where it uses the words, "to be held by them if there be more than one, *as tenants in common, with benefit of survivorship*." How far the use of these words upon the true interpretation to be given them will control and affect the plainly declared purpose and object of the deed, will be considered presently.

Now, leaving for a moment the deed of marriage settlement, and looking to the will of James Brown, we find that after the payments of debts and legacies, he devises the whole of his estate, real and personal, to his seven children, to be equally divided between them.

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It will thus be seen that both in the deed of settlement in the provisions above quoted, and by the will of the testator, equality of distribution among his children, and not inequality, was fully declared as the purpose and object of both instruments. It is true that the rights of the children were fixed by the marriage settlement, and could not be affected by the will of James Brown, and we refer to the will as well as to the deed to show that on the part of James Brown, at least (the grantor and testator), *equality* of distribution among his children, and not *inequality*, was his declared intention and fixed purpose. But it is insisted by the learned counsel for the appellant that the words "*to be held by them as tenants in common, with benefit of survivorship*," are the all controlling words in this contract; that these words are of plain legal signification and fixed meaning by judicial construction, and that they determine the rights of James Brown's children, and the nature and extent of the estate they take under the marriage contract. He insists that by the use of these words James Brown intended that his children should enjoy in equal shares the profits of the funds (ten thousand pounds) to be raised for them, and as each died the profits were to be divided among those remaining, until finally the sole survivor would *succeed to the whole fund.*

This construction, so at variance with the declared purpose of the grantor *to provide for his issue*, and which would at some indefinite period give the whole fund to the last survivor of unborn children, without any provision for the families of those who have died, can only be given in a case so plain as to compel the court to adopt it, by some rigid and arbitrary rule of law, from which there is no escape or evasion.

To maintain his position, the learned counsel for the appellant relies upon certain English cases, and affirms that at the date of the deed of settlement (1807), the words used by the grantor, "tenants in common, with benefit of survivorship," had a fixed legal signification established by the decisions of the English courts, and are capable of but one construction, and that is, that when such words are used, the period of distribution—that is, the period at which the fund absolutely vests—is the death of all the donees except the last survivor, and cannot be referred to the death of the testator or grantor, or to any other particular event.

In other words, his construction of this provision is, that upon the death of James Brown, his children took under the marriage settlement a vested interest in the fund, liable to be divested by dying, not being the longest liver of all. Ac-

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cording to his construction, all the children had a vested interest in the profits of the fund, and each a contingent interest in the whole fund, dependent upon his or her being the longest liver of them all. An examination of the English cases will show that certainly as far back as 1807, when this deed of marriage settlement was executed, there was no such uniform and unvarying rule of construction of the words "with benefit of survivorship," or words of like import, established by the English courts. On the contrary, the cases on this subject were conflicting and seemingly irreconcilable—this conflict of opinion having been noticed and commented upon in two cases in this court. See *Hansford* v. *Elliott*, 9 Leigh, 79; and *Martin* v. *Kirby*, 11 Gratt., 67.

In the former case, Judge Parker delivering the opinion of the court, after reference to many of the English cases, was of the opinion that the weight of authority in the English courts was in favor of the doctrine that the period of survivorship, where a different intent was not plainly manifested, should be referred to the death of the testator. He was of opinion that the cases which opposed a contrary doctrine, were to be reconciled upon the special circumstances of those cases. This case was decided in 1827. In *Martin's ad'mr* v. *Kirby*, 11 Gratt., p. 69, Judge Lee, in referring to Judge Parker's opinion, says he does not concur with Judge Parker, that the preponderance of the English authorities are in favor of the rule making the words of survivorship relate to the period of the testator's death. He says the cases are directly conflicting and irreconcilable, and remarks that, "in the earlier cases, almost without an exception, it will be found that the words of survivorship have been held to refer to the period of the testator's death" (and he cites a number of cases). On the other hand, numerous cases are to be found affirming a different rule, and referring the words of survivorship to the death of the tenant for life, or other prior particular estate, and he cites a number of cases affirming this view. He then observes (*vide cases* cited p. 68, many of which are the same cited in original note) that whatever might be the safest and soundest rule of construction, and that best adapted to promote the intention of the testator, the preponderance of the English authority is now in favor of the rule making the words of survivorship relate to the expiration of the previous particular estate to the period of the distribution of the subject of the gift, rather than to the death of the testator. But Judge Lee, after expressing this opinion, differing from Judge Parker as to the preponderance of

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the English cases, immediately adds, "But it may admit of very grave question whether this is a subject upon which anything like a fixed rule of construction can be established. The question, and the only legitimate inquiry is, What is the intention of the testator?

A careful examination of the English cases has convinced me that the English courts have established no such fixed and invariable rule of construction as that insisted upon by the learned counsel for the appellant.

Even in the English cases, which hold that the period of survivorship relates to the period of the distribution, and not to the death of the testator, the general rule is always controlled by the special intent shown by the whole instrument.

It is impossible, in the course of our opinion, to pass in review all the English cases on this subject, and it is sufficient to say, after careful examination, that they do not establish any such fixed and uniform rule as that contended for.

But there is a case decided by Lord Alvanly, just a few years before the deed of marriage settlement we are considering was executed, and reported in 3 Vesey, 450, which gives to the words "with benefit of survivorship" a very different construction from that contended for by the appellant's counsel. It is the case of *Maberly* v. *Strode*, and was decided just fifty years after the case of *Hawes* v. *Hawes*, and thirty years after the case of *Rose* v. *Hill*, so much relied on by the appellant's counsel as establishing the rule contended for. In that case, the clause for construction in the testator's will was as follows: "But in case my son shall die unmarried and without issue, * * * * then, and in such case in trust, to assign and transfer the principal of such funds and securities unto my nephews, William and James Strode, in equal proportions, share and share alike (his, her and their issue, or the issue of either of them, to take their parents' share), *with benefit of survivorship to my said nephews and niece.*"

Upon the construction of these words (the same words used in the deed of settlement before us), it was held that "*words of survivorship added to a tenancy in common, in a will, are to be applied to the death of the testator, unless an intention to the contrary appears.*" It is instructive to read Lord Alvanly's opinion in this case as showing the conflict of views on this question at that time, only a few years before the execution of the marriage contract before us, and as settling by his opinion that there was no arbitrary rule of construction which gave to these words, "with benefit of survivorship," a fixed legal signification. At the expense of protracting this opinion beyond a reasona-

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ble length, I cannot refrain from giving an extract from his opinion, as it is a case exactly in point. He says (page 4), "The other question (*i. e.*, the question, to what period the words of survivorship related) admits of more doubt; but in the opinion I have formed upon the words of survivorship, I found myself upon what I thought myself warranted to do in *Perry* v. *Woods* (ante, 204), when I had occasion to look into all the authorities, and I relied upon *Stringer* v. *Phillips*, followed by *Roebuck* v. *Deane*, which is almost exactly the present case; and there the Lord Chancellor thought himself warranted to follow *Stringer* v. *Phillips*. All the cases were considered in *Perry* v. *Woods;* and *Brograne* v. *Winder*, 2 Vesey, 634, was urged as an authority that the Lord Chancellor had changed his opinion. I have looked into these cases rather to form my opinion upon them. *Roebuck* v. *Dean* is as near this case as can be. *Bindon* v. *Lord Suffolk* seems, as the Lord Chancellor said, to have had a very odd fate in the House of Lords. Considering *Stringer* v. *Phillips*, recognized by Lord Hardwicke, his Lordship thought it safer to adhere to that. It is very true, in *Brograne* v. *Winder*, he was of opinion, the words were such as plainly favored the vesting being postponed; he gives his reason, but does not retract what he said in *Roebuck* v. *Deane*, but founds himself upon the words; from which it plainly appeared the time to which the words were meant to apply. I followed that (*Roebuck* v. *Deane*) and *Stringer* v. *Phillips* in *Perry* v. *Woods*. This case is very nearly the same as these; perhaps stronger." After this reference to the authorities, Lord Alvanly concludes as follows (and we may adopt his language in this case):

Upon these authorities, I am of opinion that, *upon these blind words*, ("with benefit of survivorship," the same used in the case before us), the safest and soundest construction, best warranted by the authorities, most beneficial to the parties, most likely to be that intended, is, that the meaning is, *such as shall survive the testator*, and that it is not meant that it shall remain in contingency and vest only in such as should happen to survive the son; with the chance of the whole being lost and a total intestacy occurring.

This case was decided in 1797, just ten years before the marriage contract was executed, and is the last English case I can find before 1807. This case is in utter repugnance to the doctrine contended for here by the appellant's counsel. See also *Stringer* v. *Phillips*, 1 Eq. Ca. ab., 293; and specially *Roebuck* v. *Deane*, 2 Vesey, 265. In that case, testatrix gave stock in trust to pay dividends to her niece for life, and after

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her decease, that the stock should be equally divided among three brothers and four sisters of the testatrix, and in like manner to the survivor or survivors of them. This was declared to be a tenancy in common between those alive at the death of the niece, and representatives of such as died in her lifetime. It is proper to remark before passing from the English authorities, that in the case of *Hawes* v. *Hawes*, so much relied on as establishing the rule contended for, the Lord Chancellor said, this case stands on its own circumstances, divested of all authorities, yet consistent with all.

I have thus considered at length the English cases, because they were relied on as establishing the rule of construction, of the words used, "with benefit of survivorship." While there is no case in this court in which this precise question has arisen, or these words have been construed, yet the doctrine of this court on the general subject of survivorship, has been clearly affirmed in several decisions, which refers the period of survivorship to an indefinite period, when the last survivor *only* shall be living, as the period for the employment of the fund. See *Hansford* v. *Elliott*, 9 Leigh, 79; *Martin's ad'mr* v. *Kirby*, 11 Gratt., 67; *Stone's ex'or* v. *Nicholson*, 27 Gratt., and cases cited in opinions of Judges Parker and Lee.

Both upon principle and authority I am of opinion that the words in the marriage settlement before me do not limit the enjoyment of the fund to the last survivor of the children of James Brown, but that it refers to the death of Mrs. Brown. Those who succeed her take equal interest in the fund; this gives a firm and legal construction of the words of survivorship; the period of distribution relates to the death of Mrs. Brown and not to the death of all the donees save the last survivor. I would fix that period at the death of Mrs. Brown rather than to the death of the grantor, James Brown, because the fund was not to be created until after the death of Brown, and after the payment of all his debts and legacies; and for the further reason that, during the life of Mrs. Brown, she is entitled to a certain portion of the profits of said fund, contingent upon the number of children that might be the fruit of the marriage. I would therefore fix the period to which the words of survivorship relate, as the death of Mrs. Brown, and not the death of the testator. It can make no difference in the decree of the court below, inasmuch as the children all survived both James Brown and his widow. The effect will be the same whether the period of distribution be referred to the death of James Brown, or to that of Mrs. Brown.

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The construction which we have given to the marriage settlement is that which is fully warranted by the authorities, and which carries into effect the plain meaning and intention of the parties, without resorting to the unusual and unnatural interpretation which pre-supposes an intention to give the whole fund at an indefinite period—it may be nearly a century afterwards—to the longest liver of the unborn children of a prospective marriage.

Upon the whole case, I am of opinion that there is no error in the decree of the Chancery Court, and that the same be affirmed.

SUPREME COURT OF APPEALS OF VIRGINIA.

SANDS, RECEIVER, *v.* CITY OF RICHMOND.

MARCH TERM, 1879.

1. The City Council of Richmond has authority, under its charter and the Constitution of Virginia. to require the owner of a lot upon a street, which has been graded, paved and guttered by the city, to pave the sidewalk in front of his lot; and when it is at the corner of a street, to pave the sidewalk on the side of the lot. And if the owner does not have the work done within the time prescribed by the ordinance, the city may have it done and collect the money from him.
2. If the charter of the city requires that an ordinance providing for the opening, grading, &c., of streets shall be passed by a vote of three-fourths of each branch of the Council, although the present ordinance was not so passed, yet if it is an amendment of a prior ordinance giving substantially the same powers to the Council, the act of the Council will be sustained.

This was an appeal from a decree of the Chancery Court of the city of Richmond, made in a cause depending therein in the name of *Atkinson* v. *Atkinson and others*, directing Alexander H. Sands, as the receiver of the court in that case, to pay to the city of Richmond $53.82, expended by the city in paving the sidewalk in the front and on the side of a lot, at the northwest corner of Leigh and Tenth streets, owned by the parties in that cause It appears that the city having, in pursuance of the ordinance of the city, graded, guttered and curbed the streets and sidewalk along the front and side of said lot, gave a notice to Sands, as receiver in said cause, to pave the sidewalk; and he failing to have the work done within thirty days, the engineer of the city, as directed by the ordinance, had the work done, the cost of which was $53.82. This bill was presented to Sands for payment, and

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payment was refused, for the reason that, being an officer of the court in the case, he desired the order of the court in the premises.

The petition was thereupon filed by the city, and Sands filed his answer, in which he insisted—

1st. That the ordinance was invalid as being in violation of the Constitution of the State.

2d. Because the ordinance under which this demand upon him was made, was not passed by three-fourths of the members of each branch of the City Government, as required by the 25th section of the charter of the city.

It was agreed by the parties that the ordinance was not passed by either branch of the City Government by the vote of either two-thirds or three-fourths of all the members of each body, respectively; but it appears that the ordinance of which this was an amendment, contained substantially the same provision.

The case came on to be heard upon the petition on the 9th of May, 1878, when the court held the ordinance was valid, and that the claim made by the city was a valid charge against the property in question, and decreed that Sands, receiver of the court in the cause, do forthwith, or as soon as funds come into his hands, pay to the city of Richmond the sum of $55.82, with interest thereon until paid, in full of the claim set forth in the bill accompanying the petition, and also the costs of this proceeding. And thereupon Sands applied to a judge of this court for an appeal, which was allowed.

Johnston, Williams & Boulware and *Sands* for the appellants.

Keiley for the appellees.

STAPLES J. The charter of the city of Richmond provides that whenever a new street shall be laid out, a street graded or paved, or any other improvement whatsoever made, the City Council may determine what portion, if any, of the expenses thereof ought to be paid from the public treasury of the city, and what portion by the owners of real estate benefited, or may order and direct that the whole expense be assessed upon the owners of real estate benefited thereby. Under an ordinance adopted by the City Council, whenever a street is opened, graded, guttered and curbed, in whole or in part, including the walkways, it is made the duty of the

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owner or owners of property along said street *to pave the walkway* the full width across their fronts with bricks, or such other material as the Committee on Streets may approve. Where the property comes on two streets, the property-owners shall pave the said walk along his depth one-half the distance at his own cost, and the city shall pave the other half at its cost. If, upon notice by the City Engineer, the owner fails to make such pavement, the engineer is authorized to have the work done by the city contractor, and the costs are to be collected from the owner.

There are other provisions of the ordinance bearing upon the subject, but they are not necessary to be cited here.

The appellant, acting as receiver by appointment of the Chancery Court of Richmond city in the case of *Atkinson* v. *Atkinson et als.*, was notified by the City Engineer to pave the sidewalks fronting the property under his control as such receiver. The appellant having failed to comply with this order, the City Engineer caused the work to be done by the city contractor, and the question of the receiver's liability was referred to the Chancery Court, from which the receiver derived his authority. That court sustained the claim of the city, and from that decision an appeal was taken by the latter to this court.

In the petition for an appeal, and in the argument here, the ordinance already cited has been assailed on various grounds.

It is insisted that the assessments authorized by the ordinance, if they are to be regarded as an exercise of the taxing power, violate the rule of uniformity and equality required by the Constitution; and if they are not to be so regarded, they are mere appropriations of private property for public purposes without just compensation. This question was fully considered in the case of *Ellis* v. *City of Norfolk*, 26 Gratt., 224. It was there held that special or local assessments are a peculiar species of taxation governed by principles that do not apply to the general burdens imposed for State and municipal purposes. They proceed upon the assumption of peculiar benefits conferred upon the persons liable to the tax in the enhancement of the value of their property by the contemplated improvement. It is not necessary now to go into the argument in support of these propositions. The validity and constitutionality of these assessments are sustained by an array of authority and force of reasoning which ought to be decisive of the question. Most of the cases on the subject may be found in 2 Dillon on Municipal Corpora-

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tions, sec. 596 to 600; Cooley's Constitutional Limitations, sec. 619 to 636. In Cooley on Taxation, chap. 20, pages 416 to 473, the whole subject is exhaustively discussed, and all the objections to this species of taxation fully answered. It is not denied that a local assessment may so far exceed the limits of equality and reason that, instead of being a tax or contribution, it would practically amount to confiscation of the property benefited. In such cases, it would be the duty of the courts to interpose for the protection of the citizen.—*Alley* v. *Drew*, 44 Ver., 186.

The real difficulty in this class of cases, is not with respect to the power to assess the expense of local improvements upon the property specially benefited thereby, but with respect to the method or basis of apportioning the expense among the property-holders adjacent to the improvement. It has been held in a number of cases not allowable to impose upon each owner of a lot upon a street the entire cost of grading and paving the street along its front, without reference to any contribution to be made by any other property; but that the true mode is to make the street a taxing district, and to apportion the expense of the improvement among the various lots in proportion to their frontage. An opinion was incidentally expressed in accordance with this view in *Ellis* v. *City of Norfolk*, but the case did not call for a decision of that question. Nor is it necessary to decide it in the present case. For here the assessment is not for the purpose of grading and paving the street, but for paving the sidewalk after the street is graded, guttered and curbed, including the sidewalk. The city, at its own expense, grades and paves its streets, but requires the owner to pave the sidewalk in front of his lot. The owner is supposed to be peculiarly interested and benefited by the sidewalk in front of his lot, but in the street he is generally interested along with other citizens. Whether this distinction be sound in principle or not, it is needless to inquire. It is sustained by very respectable authorities.

In Goddard, petitioner, 16 Pick. R., 508, a leading case recognized as authority, the court says: "Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it, and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit in accommodating his cellar door and steps, a passage for fuel, and the passage to and from his own house to

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the street. To some purposes, therefore, it is denominated his sidewalk.

In *Woodbridge* v. *The City of Detroit*, 8 Mich. R., 310, Judge Christiancy, while maintaining with great ability the invalidity of an assessment upon the owner to defray the expense of grading and paving the street adjacent to his property, partly upon the ground that such an improvement is for the public benefit, and the owner is entitled to no peculiar use of the street not common to the public, concedes that the same rule does not apply to an assessment for the purpose of paving the sidewalk, in which the adjoining owner is recognized as having a peculiar interest and benefit distinct from that which he enjoys in common with the rest of the community.

In his work on Taxation, Judge Cooley strongly controverts the justice, as also the legality, of assessing each individual lot with the cost of improvements along its front. The reason he assigns is, that if every owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessment upon his neighbors. Nothing is apportioned or divided between him and them, and each particular lot is in fact arbitrarily made a taxing district, and charged with the whole expenditure thereon. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot. These circumstances, not at all contributing to make the improvements to the lot more valuable, was specially burdened, perhaps even having the opposite consequence.

The learned author nevertheless concedes that a different rule applies to assessments for the construction and repair of the sidewalks. He declares that the cases of assessments for the construction of walks by the side of streets in cities and other populous places are more distinctly referable to the power of police. The duty imposed upon the owners is enjoined as a regulation of police, made because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing with promptness and convenience the duty of putting them in a proper state, and of afterwards keeping them in a condition suitable for use. Upon these grounds, the authority to establish such regulations has frequently been supported.—Cooley on Taxation, 398, 453; see, also, *Mayer & Alderman* v. *Maberry*, 6 Hun., 368; Cooley on Court Limitation, 734.

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Whether the learned author is correct in referring the improvement of the sidewalks by the owner to the police power, or whether it belongs to the taxing power, it is not material to discuss. It is a power exercised by the municipal authorities of perhaps three-fourths of the cities in the United States, under their respective charters; it is just and reasonable in itself, and, with a few exceptions, is approved by the whole current of decisions.

The ordinance of the city of Richmond would seem to be peculiarly favorable to the owners of the lots in merely requiring them to pave the sidewalks after they have been graded at the expense of the corporation. And in the case before us the assessment does not appear to be extravagant or in excess of the benefits which the owners of the property will probably derive from the improvement. We are, therefore, of opinion that the ordinance is not obnoxious to any of the objections based upon the ground of its alleged illegality or unconstitutionality.

It has been argued, however, that the ordinance upon which these assessments are based was not adopted by a three-fourths vote of all the members of each branch of the City Council, as required by the charter. The counsel for the city of Richmond concedes this, but he maintains that a three-fourths vote was not necessary; that the charter confers upon the City Council two distinct powers—one for the general management of all the streets, found in the 19th section of the charter; the other, for the improvement of particular localities; and for these latter exceptional cases, the charter confers a special power contained in the 26th section, only to be exercised with the concurrence of three-fourths of the Council. We are not prepared to give our assent to this construction of the provisions of the charter referred to. And if the assessment in this case depended exclusively upon the amended ordinance approved 18th May, 1875, we think there might be some difficulty in sustaining it. Without expressing any opinion on this point, it is sufficient to say that if that ordinance be void for the want of the requisite vote, it leaves in full force the preceding ordinance, which is substantially the same, and under authority of which this assessment might have been made. It is difficult, therefore, to see what advantage the appellant expects to gain when he succeeds in establishing the nullity of the amended ordinance.

Another objection to the ordinance is, that it attempts to delegate to the City Engineer and to the Committee on

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Streets the exercise of functions which properly belong to the City Council. We are unable to perceive the force of this objection. The City Council determines when a new street is to be opened or an old one to be graded; and the work is, of course, to be done under the supervision of the City Engineer. The ordinance requires that the owner shall pave the sidewalk after the street is graded, and the City Engineer merely gives notice to the owner to do the work as prescribed by the ordinance. The City Engineer is the mere agent of the Council to carry into execution its orders, and cannot be said, in any sense, to exercise powers properly belonging to the City Council. The same is true with respect to the Street Committee, as it is termed.

With respect to the alleged insufficiency of the notice in failing to describe the property to be paved and the precise duty to be performed, it is sufficient to say that a copy of the ordinance was appended to the notice, which fully informed the appellant of all that was required to be done by him. If the location of the property was not described with entire accuracy, the appellant was not in the least misled by it. He well knew the lot or lots under his control as receiver were referred to. His failure to perform the work did not proceed from any misapprehension on this point, but because he considered it his duty to resist the assessment as illegal, and to submit the whole matter to the determination of the courts.

The objection does not appear to have been made in the court below, but is for the first time suggested in this court.

This disposes of all the material points raised by the appellant. For the reasons stated, we are of opinion that none of them are valid, and the decree of the Chancery Court must be sustained.

DECREE AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

EDMUNDS' ASSIGNEE *v.* HARPER.

March 20, 1879.

S. as principal and H. as his surety, execute their bond to E. E. owes S. & N. partners an account, and N. assigns it to S. E. becomes bankrupt, and S. proves the account before the register in bankruptcy, and he afterwards became bankrupt. The assignee in bankruptcy of E. sues H. on the bond, and H. pleads the account as a set off. HELD: Under the Virginia Statute of set off, Code of 1873, chap. 168, sec. 4, the account is a valid set off for H in the action against him on the bond.

This was an action of debt in the Circuit Court of Brunswick county brought by the assignee in bankruptcy of Thos. D. Edmunds, a bankrupt, against J. W. Harper, co-obligor with Peter Stainback, also a bankrupt, to recover the amount due upon a bond for $933.32, executed by said Stainback and Harper to Thomas D. Edmunds, dated 24th July, 1860.

The defendant pleaded payment and offsets; and the only question was, whether the offset pleaded was available to the defendant. It was an account due from Thomas D. Edmunds to the firm of Edmunds & Stainback, the partners being Peter Stainback and N. S. Edmunds. In March, 1862, N. S. Edmunds transferred all his right and interest in this account to Peter Stainback. And it appeared that Stainback proved the account as a debt due to him from Thomas D. Edmunds before the register in bankruptcy; but no further proceedings seem to have been had in Edmunds' case, except a direction to his assignee to bring suit upon the bond.

It appeared further, that in September, 1866, Thomas D. Edmunds conveyed all his property, including the bond sued upon in this case, describing it as the bond of Peter Stainback and Joseph W. Harper, subject to certain credits which he estimated would reduce it to about $600, to a trustee, for the payment of certain debts therein mentioned. That prior to this conveyance, he applied to Peter Stainback to know if he had any objection to his conveying the said bond; that Peter Stainback stated that he had no objection if he would allow a credit upon the said bond for the account due Edmunds & Stainback; that T. D. Edmunds did not consent to the accounts being allowed as a setoff to the bond, and gave

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as a reason for not so doing, that N. S. Edmunds owed him. Edmunds & Stainback were insolvent in 1865, but good in 1862; and the transfer of the account was never mentioned to T. D. Edmunds until the year 1865.

After the testimony was given in, the plaintiff moved the court to exclude the setoff from going to the jury, upon the ground that it was an open account due by T. D. Edmunds to N. S. Edmunds and Peter Stainback, late merchants and partners, trading under the name and style of Edmunds & Stainback, and therefore not a legal offset to the bond sued on. But the court overruled the motion and instructed the jury as follows:

1. If the jury believe, from the evidence, that N. S. Edmunds, P. Stainback, and T. D. Edmunds, all consented that the setoff filed should be put as a credit upon the bond in suit, they must allow it as an offset.

2. If the jury believe, from the evidence, that the setoff filed was passed upon and allowed as a debt against T. D. Edmunds by the bankrupt court, they must allow it as an offset.

The plaintiff excepted to the opinion of the court, and the court certified the facts proved, substantially as hereinbefore given.

The jury found a verdict in favor of the plaintiff for the amount of the bond, subject to credits, including the amount of the setoff pleaded; and the plaintiff moved the court for a new trial, on the grounds that the verdict was contrary to the evidence and the instructions of the court. But the court overruled the motion, and entered a judgment upon the verdict; and the plaintiff again excepted, and applied to a judge of this court for a writ of error; which was awarded.

Jones & Bouldin for the appellant.

Friend and *Davis* for the appellee.

STAPLES J. delivered the opinion of the court, in which the other judges concurred.

HELD as stated in the head-note.

JUDGMENT AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

KINNY *v.* HOFFMAN AND ALS.

February 6, 1879.

1. Specific performance of a contract for a sale and purchase of land will only be decreed as a matter of favor where the vendor is not prepared to comply with his covenants until the hearing; and such favor will only be granted in cases where it can be granted without prejudice to the rights of the vendee. This indulgence will not be granted when the defect to be remedied was known to the vendor or his attorney at the time of the contract and was concealed from the purchaser. And more especially will such indulgence be denied when, beside the failure to disclose the existence of incumbrances, an account is necessary to ascertain the state of the title, the extent, nature and amount of such incumbrances.
2. A contract for the sale of land, which provides that the vendor shall convey to the purchaser a clear title, entitles the purchaser to a conveyance of the land with general warranty, and free from incumbrances.
3. A purchaser of land buys with a view of immediately removing his family to it, and is assured it is free from incumbrances except one deed of trust to secure a specific debt. Soon after the purchase, he ascertains it is covered by several deeds of trust, and by a number of judgments against a prior owner of unascertained amounts. HELD:
   He is well justified in refusing to carry out the contract; and specific performance will not be enforced against him, though in a suit brought by the vendor, after two years he has had the liens ascertained, and they may be paid out of the purchase money.

This was a suit in equity in the Circuit Court of Fauquier county, brought on the 28th of December, 1868, by Charles W. Hoffman against P. G. Kinny and several others, to have specific execution of a contract by which said Hoffman sold to said Kinny a tract of land of five hundred and eighty-five acres, in said county, at $25 per acre, and to have the liens by deed of trust and judgments ascertained, in order that he might make a clear title to the purchaser.

The written contract bears date on the 10th of August, 1868, and after setting out the land and the price to be paid, provides that Hoffman shall deliver immediate possession of the land, except certain specified parcels, and of these possession was to be given on the 1st of January next. And it further provides "that Kinny is to pay to said Hoffman the whole amount of the purchase money as soon as a clear title is made to him."

Kinny resisted the specific execution of the contract, on the ground that immediate possession was the important in-

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ducement to the purchase by him, and that he ascertained, after the contract was made, that the land was incumbered by various deeds of trust and judgment liens, and he therefore refused to carry out the purchase, and gave notice thereof to Hoffman.

The cause was pending and strongly contested for two years, and two or more reports were made by a commissioner, as to the liens upon the property by deed of trust and judgments; and all the liens by deed, but one for a specific amount, having been removed, and the judgments and their amounts ascertained, the cause came on to be heard on the 29th of September, 1870, when the court held that the plaintiff was entitled to have a specific execution of the contract, and decreed that P. G. Kinny should pay to R. Taylor Scott, who was appointed special commissioner for the purpose, the sum of $14,635.32 within thirty days from the date of the decree; and that upon the payment of said sum of money to said special commissioner, he, the said special commissioner, should deliver to the said Kinny the deed from C. W. Hoffman and wife to said Kinny, filed in the court with the bill; and the sheriff was directed to put the said Kinny in possession of the land. Should the said Kinny fail to pay the said sum of money within the time aforesaid, then it was further decreed that commissioners named should proceed to sell the land at public auction, on the terms of cash for so much as was necessary to cover expenses, and for the balance on a credit of one, two and three years, and make report, &c.

In February, 1871, the commissioners reported that they had sold the land, and that C. W. Hoffman had become the purchaser at $18.50 per acre. And on the 17th of April the court made a decree confirming the sale. From these decrees Kinny applied to this court for an appeal; which was allowed.

John S. Mosby and *Wm. H. Payne* for the appellant.

Brooke & Scott for the appellees.

ANDERSON J. delivered the opinion of the court, in which the other judges concurred.

HELD as stated in the head-notes.

DECREE REVERSED.

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SUPREME COURT OF APPEALS OF WEST VA.

SWEENEY *v.* BAKER ET AL.

Decided Special Term, 1878.

1. If a declaration in a libel suit set forth, in what is drawn in the form of one count, that the defendant on a given day published a libel against the plaintiff, containing in one part certain specified libelous allegations, and also containing in another part certain other specified libelous allegations of an entirely different character, this is nevertheless but one count, it being entirely formal, by the rules of the common law, to set forth in this manner all the libelous allegations published at one time.
2. To the two distinct libelous allegations, contained in such a count, distinct pleas could be filed.
3. Under our statute law no demurrer will lie in any case, because of duplicity in a declaration.
4. Under the 8th section of article 3 of the Constitution of West Virginia, which provides, that in "prosecutions and civil suits for libel the truth may be given in evidence; and if it shall appear to the jury, that the matter, charged as libelous, is true, and was published with good motives and for justifiable ends, the verdict shall be for the defendant." HELD:
   I. The truth, and that the publication was made with good motives and for justifiable ends, cannot be given in evidence under the general issue; but if given in evidence under the plea of justification, they may, though not amounting to a full justification, be considered, either as a mitigation or aggravation, as the evidence may be strong or weak.
   II. A general plea that the libelous matter charged is true, and was published with good motives and for justifiable ends, is not a good plea, where the libelous matter is a general charge.
   III. In such case the plea, to be good, must specify the particular facts, which show the general charge to be true; and must, unless the declaration shows it on its face, further allege the particular facts which show, that the end for which the publication was made, was justifiable; and it would be insufficient, without so doing, to allege generally that the motives were good and the end justifiable.
   IV. These rules apply equally to suits for common law, to libels, and to statutory suits for the publication of insulting words.
5. A statutory suit for insulting words can be brought, though the words used were such as would sustain a suit at common law, and though they were published or written.
6. A plea ought to be rejected, which is an allegation of the truth, of a distinct portion of the libelous charges contained in a count for a common law libel, and that it was published with good motives and justifiable ends, when the portion of the charge thus justified was not at common law libelous, as such portion of the charge inserted in the declaration must be regarded as surplusage. But such plea ought to be received, if pleaded to such a portion of the charge in a count in a suit, brought under the statute for insulting words, as no distinct portion of such charges can be treated by the court as surplusage.
7. An editor of a newspaper has no peculiar privilege of publishing what is injurious to another. He can only publish with impunity that which any other person would have an equal right to publish in a newspaper.

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8. An editor of a newspaper, or any other citizen, has a right to publish in a newspaper any allegations, true or false, with good motives or maliciously, in reference to the physical or mental qualifications of a candidate for an office in the gift of the people.
9. But if a publication be made in a newspaper of such a candidate with reference to his moral qualifications, which is libelous in its character, the party making such a publication may be held liable therefor in a suit for libel, unless he can prove the charges made to be true. It will not, in such a case, be sufficient to prove, that the party publishing had good reason to believe, and did believe, them to be true, as a publication of this character is not even conditionally privileged. From the publication of such libelous charges the law implies malice, as well as damages to the plaintiff; and the jury may, therefore, on proof of the publication, only render a verdict for substantial damages.
10. Comments may be made in a newspaper on the acts or conduct of a candidate for an office, in the gift of the people, with impunity, if such comments are made *bona fide* and not maliciously, even though they be unjust, provided that the acts or conduct commented on are in fact, what they are represented to be in the publication.
11. There is copied by the clerk in the record a certificate, signed by the judge, stating that a demurrer to a declaration had been filed and overruled by the court, but that the clerk had not entered the filing of the demurrer on the record. This memorandum is no part of the record.
12. If a rejected plea is by order of the court made a part of the record, and the order book shows, that its rejection was excepted to, the Supreme Court of Appeals will review the action of the court in rejecting such plea, though no formal bill of exceptions was taken to the rejection of such plea.
13. If a motion in arrest of judgment and a motion for a new trial are made simultaneously, they may properly be both acted upon by the court; as under such circumstances the motion in arrest of judgment cannot be regarded as an admission, that the verdict was unobjectionable.
14. Several pleas are filed, and several issues made on them, and the record states, that the jury was sworn to try the issue joined and find a verdict, which is responsive to all the issues; and judgment is entered thereon. This court will not reverse such judgment, because of the manner, in which the record states the jury was sworn.
15. The record states, that a general replication is filed to a special plea, and issue joined. But no written replication appears in the record. This is no error for which an appellate court will reverse a judgment entered on a verdict.
16. The Supreme Court of Appeals will not reverse the judgment of a Circuit Court, refusing to grant a new trial in a libel suit, because the damages are excessive, unless they are so enormous, as to furnish evidence of partiality, passion, corruption or prejudice on the part of the jury.
17. A new trial will not be granted, because a juror is alleged to have made up his mind on the merits of the case, before he was called on the jury; unless it appears from the whole case that the party seeking the new trial suffered injustice from the fact, that such juror served.

GREEN P. delivered the opinion of the court.

HELD as stated in the head-notes, which are copied from the official report of the case as made by the Reporter of the Court.

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SUPREME COURT OF MISSOURI.

June, 1879.

STATE *v.* COLLIER.

A candidate for a county office publicly pledged himself before the election to perform the duties of the office for much less than the compensation established by law, by reason whereof a sufficient number of voters were induced to vote for him to secure him the election. In an action of *quo warranto*, *held*, on demurrer, that an information setting forth the above facts was sufficient.*

At a mass convention of the voters and tax-payers at Callaway county, held in the city of Fulton, August 17, 1878, there were present about one thousand citizens of the county, for the purpose of nominating candidates to be voted for, for the various county offices, at the general election in November of that year. Respondent, Collier, was a candidate before the convention for the office of probate judge of the county, and he offered a resolution, which was adopted by the convention, requiring delegates to pledge themselves to perform the duties of the various county offices for much less than the compensation allowed by law—among others, that of probate judge for $1,200. Respondent was nominated for probate judge, accepted the nomination, made the pledge required by the resolution, and canvassed the voters of the county prior and up to the day of the election, pledging himself in his public speeches, in the newspapers of the county, and in his personal solicitations to the voters, to perform the duties of the office, if elected, for $1,200 a year, declaring that the legal fees amounted to $2,600 per annum. The ballot, on which respondent's name as a candidate was printed, and which was voted by the voters, was printed with the names of other candidates nominated at the county convention, and was headed, "Low Salary Democratic County Ticket." At the general election, November 5, 1878, respondent was elected probate judge of the county, receiving two hundred votes more than his competitor, duly qualified, and entered upon the duties of his office. The attorney-general, February 7, 1879, filed his information in the Su-

*In the similar case of *State* v. *Church*, 5 Or., 375. S. C., 20 Am. Rep., 746, the information was held bad for not showing that the voters influenced by such offer were tax-payers of the county, or would otherwise be benefited by the performance of the promise.

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preme Court for writ of *quo warranto* against respondent, setting up these facts, and asking judgment of ouster, to which respondent demurred, assigning specific reasons which are sufficiently noticed in the opinion.

Attorney-General Smith for relator.

Boulware, Snell & Flanagan for respondent.

SHERWOOD C. J. delivered the opinion of the court.

The legal sufficiency of the information being questioned by the demurrer, requires at our hands an examination into such alleged sufficiency.

Every one will concede that it is of the first importance that popular elections should be conducted in such a way as to exempt them, so far as the infirmities incident to human agencies will permit, from improper influences. Here the demurrer confesses that being induced by the offers of respondent to take for his own use only $1,200 out of $2,600, the aggregate fees of the desired office of judge of probate, two hundred of the voters and tax-payers of the county who would otherwise have voted for respondent's rival, changed their purpose, and voted for respondent, who, but for such offers and their acceptance, would never have been elected. These admissions of the demurrer throw the burden of the assumed lawfulness of his acts upon the shoulders of the respondent, and the question arising upon the admitted facts is, whether the means employed by him to secure his election were lawful means—means such as this court can sanction, when the respondent, called upon by our writ of *quo warranto*, to disclose his title to the office of judge of probate, discloses also that his title must, for its validity, ultimately rest upon the means of whose employment the State in her information complains.

In the recent case of *State* v. *Purdy*, 36 Wis., 213; S. C., 17 Am. Rep., 485, the question raised by this information was learnedly and exhaustively discussed, and in such a manner as to leave nothing to be desired, and the conclusion there reached that means similar to those employed in the present instance were not to be tolerated, and that the title to the office secured thereby would be declared invalid. There the contest was between two individuals as to whom was entitled to the office of county judge—the relator claiming it in consequence of the reception of twenty-three more

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votes than the incumbent, but the latter claimed in his answer that the salary of county judge was fixed at $1,000; that relator, being a candidate for the office, published and circulated through the country a promise addressed to the electors thereof, that if elected county judge, he would perform all the duties, and furnish an office, and all other incidentals except the record books, for $600 per annum during his term, and that *solely* by this offer, one hundred of the voters of the county were induced to vote for relator, thus securing his election. This was held sufficient on demurrer.

I am unable to distinguish this case in principle from that one. Here, it is true, the result of respondent's action, if he complied with his promise, will not be as there, the enriching of the county treasury—by refraining from withdrawing therefrom a sum of money, and thereby benefiting, pecuniarily, each tax-payer in the county—but the legal effect of the offer of the respondent is in nowise different; for while he does not propose to enrich the treasury of the county, as in the Wisconsin case, he does propose to impoverish himself, and benefit every suitor who might come before him in his judicial capacity, by diminishing his lawful fees to less than one-half of their usual rate. In other words, he appealed, and the demurrer admits he was successful in that appeal—not to the fair and honest judgment of the voters touching his qualifications and fitness for the office to which he aspired, but to the cheapness with which he would discharge his judicial duties. He said to the voters in effect and with effect, "Elect me probate judge of your county, and no suitor who comes before me shall ever be charged even half the fees which the law allows"—thus making the office which he sought not a matter of qualification, but of bargain and sale. It is not necessary, in this case, to show, as claimed by respondent, that he or those who voted for him, have been guilty of the crime of bribery in its strict sense. In instances like the present—instances involving the freedom and purity of elections—that term possesses a broader significance. As is well said in the case above cited, "It may properly be employed to define acts not punishable as crimes, but which involve moral turpitude, or are against public policy." And there the court held that, though the answer did not contain allegations of fact showing that the relator, or any of the voters of the county, had been guilty of the criminal offense of bribery, yet that answer was sufficient; and that acts falling short of that crime in its more restricted and technical meaning, would justify the rejection

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of votes cast for the party made successful by the employment of the unlawful means. And Hawkins' Pleas of the Crown is quoted from extensively, and fully supports the position taken, where he says: "Also bribery sometimes signifies the taking or giving of a reward for offices of a public nature; and certainly nothing can be more palpably prejudicial to the good of the public than to have places of the highest concernment, on the due execution whereof the happiness of both king and people doth depend, disposed of, not to those who are most able to execute them, but those who are most able to pay for them; nor can anything be a greater discouragement to industry and virtue, than to see those places of trust and honor, which ought to be the reward of those who, by their industry and diligence, have qualified themselves for them, conferred on such who have no other recommendation but that of being the highest bidders; neither can anything be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expense they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectation." Vol. 1, ch. 27, § 3. Again, the learned author says: "It is of the utmost importance to the public welfare that, in the administration of the government, none but persons competent to perform the duties of their offices should be admitted into any department. But if the sale of offices were allowed to those who have the patronage and appointment, it is evident that there would be the greatest danger of situations being filled, not by those whose talents fitted them for the station, but whose purses enabled them to obtain it. The sale of offices may, therefore, justly be ranked as an offense against the political economy of the State." Vol. 1, ch. 32, p. 748.

In *Tucker* v. *Aiken*, 7 N. H., 140, a similar view was taken, concerning a practice which had obtained of putting up at public auction, and disposing of the office of constable to the highest, and of collector to the lowest bidder, the court there saying in reference to the custom: "It has a tendency to divert the attention of the electors from the qualifications of the candidates, to the terms on which they will consent to serve, and makes the choice turn upon considerations which ought not to have an influence." The doctrine in that case, so far as concerns public offices, met with approval in Massachusetts, the court, in *Alvord* v. *Collin*, 20 Pick., 428, saying: "We fully recognize the validity of the objection to the sale

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of offices, whether viewed in a moral, political or legal aspect. It is inconsistent with sound policy. It tends to corruption. It diverts the attention of the electors from the personal merits of the candidates to the price to be paid for the office. It leads to the election of incompetent and unworthy officers, and on their part to extortion and fraudulent practices to procure a remuneration for the price paid. Nor can we discover a difference in principle between the sale of an office for a valuable consideration, and the disposing of it to a person who will perform its duties for the lowest compensation. In our opinion, the same objection lies against both." And the Legislature of Massachusetts applied the principle now being discussed in a still more marked manner in the year 1810. The town of Gloucester, though entitled to six representatives, for economical reasons, was accustomed to return but two members, whose pay had by law to be furnished by the town. In that year, however, for political considerations it was deemed desirable that the entire number of representatives to which the town was entitled should be elected. Whereupon several individuals, with a view to induce the town to elect a full delegation, gave a bond for the use of the inhabitants, conditioned that the whole expense of such a representation should not exceed the pay of two members. But it was held by the Legislature that the election was void, though none of the members elected from the town had any agency whatever in procuring the execution of the bond. The Supreme Court of Wisconsin, after citing the above and other authorities, say: "The doctrine which we think is established by the foregoing authorities, and which we believe to be sound in principle is, that a vote given for a candidate for a public office in consideration of his promise, in case he should be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county or any other corporation, is void."

We must regard the cases above cited as conclusive of this one, and reiterate the statement that the offers in this case made by respondent differ in no essential particular from the Wisconsin case—the offers in each case were equally deserving of condemnation, and were in spirit and purpose the same. For if bribery in its larger sense, in its application to election cases, is the promise by the candidate to donate, if elected, a sum of money or other valuable thing to a third party, the promise in the case at bar ought to be held as falling within the same category, since, though the suitors who may have to appear before the candidate when judge of pro-

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bate, cannot in the nature of things be designated, yet the corrupting tendencies of the offer remain the same; remain to swerve the voter from his duty as a citizen, to blind his perception as to the question he should consider, the qualifications of the candidate, and to fix them upon considerations altogether foreign to the proper exercise of the highest right known to freemen, the right of suffrage; a right upon whose absolutely free and untrammelled exercise depends the perpetuity of our republican institutions.

The transaction of which the State in the present instance complains may have been entered into with laudable motives, but it is, as we think has been successfully shown, decidedly demoralizing in its tendencies, and utterly subversive of the plainest dictates of public policy. The maxim in such cases should be *obsta principiis*, and it is only by a rigid observance of which by the courts that the purity of elections can be preserved. The Legislature of this State has, as we are informed, at its last session enacted a statutory prohibition against the employment in elections of agencies such as have been condemned, thus giving legislative recognition to the principles herein enunciated.

Holding these views, the information will be held sufficient in law, the objections taken thereto by the demurrer not well taken, and the respondent required to plead further. All concur. *Albany Law Journal.*

CIRCUIT COURT OF COUNTY OF GLOUCESTER.

ROW'S ADM'R *v.* COCHEW AND ALS.

1. A resulting trust may be set up by *parol* to a tract of land, in opposition to the letter of the deed conveying the same; but in order that this may be done, the evidence must be clear and satisfactory. It must be clearly shewn that the *property* claimed as the subject of the trust was actually bought with the *precise money* of the alleged beneficiary of the trust, and it is indispensable that the payment of the purchase-money should be made *at the time* of the alleged purchase; payment after the purchase has been completed, will not raise a resulting trust.
2. It was alleged that C. sold a slave of B. in 1856 for $900, and invested $600 of the money in a tract of land, for which C. took the deed in his own name, took possession, and has retained the land as his ever since. In 1867, R. obtained a judgment against C., and filed his bill to subject this land to its payment. B. having died, her heirs filed their petition in the suit, claiming the land, and seeking to set up the resulting trust to the same by *parol*, in opposition to the terms of the deed to C. The evidence offered to establish the trust, consisted of the admissions of said C. (who was a brother of B.), denied by the petitioner, and the statements of four other persons, to the effect that they had heard B. say

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in her lifetime that C. purchased said land with the money derived from the sale of her said slave. HELD:

I. The testimony of the four witnesses, as to the admissions made by B. in her lifetime, was mere hearsay, and therefore incompetent.

II. The testimony of C., the alleged trustee, is insufficient, under the circumstances of this case, to establish the resulting trust in favor of the heirs of B., as against the terms of the deed to said C., and the land is therefore liable to the judgment obtained by said R. against him.

From the Circuit Court of Gloucester county.

The facts are fully stated in the opinion of the court.

M. B. Seawell for the plaintiff.

B. F. Bland for the petitioner.

JEFFRIES J. The bill in this case seeks to subject a tract of land in the county of Gloucester, alleged to be the land of one Marcellus Cochew, to the satisfaction of a judgment rendered at the April term of this court, in the year 1867, against the said Cochew for the sum of $150, with interest thereon from the 25th day of June, 1860, and $7.11 costs. Pending the suit, one Francis Buck and one Walter R. J. Buck filed their petition and an amended petition in the suit, praying to be admitted as parties, and setting forth, that about the year 1848, their father, Francis Buck, died intestate, leaving a small personal estate, including a slave woman named Lucinda. That said slave had been purchased by the said Francis in his lifetime of one A. W. Robbins, to whom a balance of about $250 of the purchase-money was due; that their father, the said Francis Buck, left a widow, their mother, Lucretia, who was, before marriage, Lucretia Cochew; that he left the petitioners (who were infants at the time) his only children and heirs at law; that their said mother, for the purpose of paying off the said balance $250, exchanged the said slave, Lucinda, with one John R. Bryan for a small girl named Peggy Smith, the said Bryan paying a difference in the exchange of $250. This, as stated in the petition, was in the year 1849. It is then stated in said petitions, that in the year 1856, their said mother, Lucretia, got her brother, the above-named Marcellus Cochew, to sell the slave, Peggy Smith, for the purpose of purchasing a tract of land as a house for herself and her children; that the said Marcellus sold the girl Peggy for the sum of nine hundred dollars; that the said Marcellus invested four hundred

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and fifty of the nine hundred dollars in the purchase of the tract of land mentioned in the bill, and expended one hundred and fifty dollars of said amount in improvements on said land. It is then charged that six hundred of the said nine hundred dollars, being a part of the proceeds of sale of the slave Peggy, the property of the said Lucretia Buck, or of her husband's estate, was the money of their said mother, or of their said father's estate—the same having arisen from a sale of the slave placed by their mother in the hands of the said Marcellus Cochew by the said Lucretia, and sold by him, the said Marcellus—he taking a conveyance of said land to himself. It is then insisted by the petitioners, that inasmuch as the said land was bought with money arising from the sale of property which was their father's, they, as his only heirs and distributees (their mother, the said Lucretia, being dead), are entitled to have a conveyance of the said land, there being, as they insist, a resulting trust in their favor as to the said land. This petition I shall treat as a cross-bill.—*Sayers* v. *Wall*, 26 Gratt., 354. The attempt is thus made by the petitioners to set up a resulting trust in their favor, by parol, in opposition to the letter of a deed made, executed and acknowledged in the year 1856, more than twenty years before any assertion of such claim. The answer of the plaintiff traverses every important allegation of the petitioners, and puts them to proof of all their allegations. And this court is to decide whether, upon the pleadings and proofs, such allegations are so far sustained as to entitle the petitioners to the relief they ask. That such a trust may be set up, by parol, against the letter of a deed, the authorities, I think, are clear and explicit, and it has been so held, with but few exceptions, from the earliest times. But in order for this to be done, the evidence must be clear and satisfactory. It must be clearly shown, that the property claimed as the subject of the trust, was actually bought with the money of the alleged beneficiary of the trust—3 Sugden on Vendors, top p. 174, note 1—not only so, but it is indispensable to the establishment of such a trust, that payment of the purchase-money shall be made at the time of the alleged purchase. Payment after the purchase has been completed, will not raise a resulting trust.—1 Lomax Dig., N. Ed., m. p. 204, *Bottsford* v. *Burr*, 2 John Ch. Repts., 406; and it must be shown by the same degree of evidence, that the money expended or invested was the *precise* money which belonged to the alleged *cestui que trust*, and that the land was bought with *that* money.—3 Sugden, 174, *supra*. Every

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fact necessary to establish such a latent equity must be shown by the most conclusive proof. Conjectures and speculations are entirely insufficient.—Sugden, *ubi supra.* The learned author, at page 174, note 1, states the rule thus: "Unless the trust arise on the face of the deed itself, the proof must be very clear. And when the conveyance states the purchase-money to have been paid by the grantee (as in this case) and there is nothing on the face of the deed to indicate any trust, the evidence to raise a trust must be *very clear* and satisfactory. It must be of so positive a nature as to leave no doubt of the fact; and the trust must be so clearly defined as to leave no doubt or question."—*Idem*, note 2. As was said by the lamented Bouldin in the late case of *Phelps* v. *Seely*, 22 Gratt., 589 (and the whole court agreed with him), "Vague and indefinite declarations and admissions long after the fact (here the transaction was as early, certainly, as 1856, more than twenty years before any assertion of a claim), have always been regarded as unsatisfactory and insufficient." As early as the year 1805, Sir William Grant, in the leading case of *Lench* v. *Lench*, 10 Ves., Jr., 514, 517 and 518, speaking of such declarations and admissions to establish a resulting trust, says: "The witness swears to no fact or circumstance capable of being investigated or contradicted, but merely to declarations of the alleged trustee himself, admitting that the purchase was made with trust money, or with the money of the alleged beneficiary. That is in all cases the most unsatisfactory evidence on account of the facility with which it may be fabricated, and the impossibility of contradicting it." He further says, as to the evidence necessary to establish a resulting trust, "in most cases, there has been at least something in writing, some account by which it appeared that the precise fund was laid out in the land as claimed." Now, it seems to me, if the learned Chancellor who spoke this language had had in his mind the facts of the case in judgment here, he could not have spoken more appositely to the point we are considering. In the case of *Bottsford* v. *Burr*, before cited, Chancellor Kent quotes approvingly the language of Sir William Grant in *Lench* v. *Lench*, and he adds: "This is a remarkable instance of the fallacy of relying on parol evidence in opposition to written deeds for the purpose of establishing a resulting trust, and it shows the great danger of giving too much latitude to those implied trusts founded on naked parol declarations as opposed to written documents. Applying these well-settled principles to the case in hand, let us proceed to examine the evidence

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relied on to establish the implied trust as claimed by the petitioners. Before doing this, however, it is to be remarked, that the effort here is to establish this latent equity, not against the alleged trustee himself, but against a *bona fide* creditor of his, seeking to enforce his demand, and to subject to such demand the subject of the supposed trust. Such creditors being a favored class with courts of equity, in order to defeat them in the recovery of their demands, the clearest and strictest proof is at all times required. In all the cases above cited, the question was between the claimants of the trust and the alleged trustee himself. Now, if the principles above announced as the result of the authorities apply to the case of the alleged trustee claiming under a conveyance to himself (and as before said, all the authorities cited apply to such a case), *a fortiori* do they apply, and with much greater force, to such a case as the one in judgment. And this brings me to consider the case upon the proofs. The depositions of Elizabeth Row, J. R. Seawell, Martha Berry, Eleanor Walker, John R. Bryan, and Marcellus Cochew, the alleged trustee, are alone relied on to establish the trust. Are they sufficient for the purpose in opposition to the strict letter of the deed? The evidence of the first four witnesses (excepted to by the plaintiff's counsel) are certainly incompetent, and cannot, for a moment, be considered by the court. They consist wholly of declarations made to them by Mrs. Buck in her lifetime—she being herself the beneficiary of the trust. These witnesses neither know, or profess to know, personally, anything about the matter to which their evidence relates. They speak only to the effect, that Mrs. Buck told them the land in question was bought with money which was hers, or the money of her deceased husband's estate, and that the conveyance was taken to her said brother. Such evidence is, in the strictest sense, hearsay; and not only so, but it consists of the declarations of a person asserting her own interest and affirming her own title, and is, in the judgment of the court, clearly inadmissible. In regard to the evidence of Bryan, he knows nothing, except as to the exchange of the slave, Lucinda, for the girl, Peggy. All his other statements are, like those of the witnesses last referred to, but hearsay, and attributable to rumors in the neighborhood. The case is thus left to rest, solely on the unsupported testimony of Marcellus Cochew. Can a trust, such as is insisted on, be set up on the testimony of a single witness, and he situated towards the parties, and the subject of the alleged trust, as this witness was? I cannot think so. And to hold that it can, will be to throw open wide the door to frauds,

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the most dangerous to public safety, and set a precedent in this court which would tend strongly to unsettle the oldest and best established titles. In setting such a dangerous precedent, I can never consent to be the pioneer. In the first place, this single witness, Cochew, is the person who perverted the fund from the object of its creation. Next, he is a near relative of the parties asserting the trust. And next, the effect of his evidence would be to prevent a sale and continue him (the witness) in the occupancy of the land which he has held, as the record shows, for more than twenty years before and since the death of Mrs. Buck; during all which time, the judgment debtor, Cochew, has stood on the records of the country as the absolute owner of the property, living on it, cultivating it, reaping the fruits of it, and during all this time nothing is heard of the dormant equity now asserted in this case, until the plaintiff seeks by his bill to assert his lien on the land in the hands of his debtor, Cochew. Mrs. Buck, and those claiming under her, have slept much too long on their rights to receive favor at the hands of a court of equity, whose powers can never be brought into active exercise but by conscience, good faith and reasonable diligence—the last of which, at least, is signally wanting in this case. Courts of equity, in obedience to the law, apply the statute of limitations to all demands of a strictly legal nature, and in equitable demands, by analogy, it applies the same bar that the statute fixes for legal demands of the like character; and upon its own inherent doctrine not to entertain stale or antiquated demands, and not to encourage *laches* and negligence, will, sometimes, in cases, not barred by any statute of limitations, refuse to interfere after a considerable lapse of time from considerations of public policy, from the difficulty of doing justice where the original transactions have become obscured by time, and from a consciousness that the repose of titles and security of property are best promoted by adhering rigidly to the maxim, *vigilantibus non dormientibus jura subveniunt.* Waving, then, all other considerations, in this case I am persuaded that the lapse of time forms an insurmountable barrier to the relief asked for by the aforesaid petition. The title of the judgment debtor to the land in the bill mentioned has vested in him too long to be now questioned in the manner proposed; and as applicable to the case in judgment, I can't do better than to quote the very striking language of Edmund Burke (I think it was) who once said, as illustrative of the influence of time on human transactions, that it was not only the great destroyer of evidence, but the great protector of titles. That if he

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comes with a scythe in one hand, with which he mows down the muniments of title, he holds an hour-glass in the other, by which he measures incessantly the portions of duration which, under those muniments, are no longer necessary. All these doctrines and principles apply, as it seems to me, with peculiar force to the case in hand, and press on my mind the irresistible conclusion that the petitioners, Francis and Walter Buck, under the facts and circumstances of the case, cannot have the relief they ask; that in the light of the authorities I have cited, and of many others I might have cited, the effort to set up a resulting trust has failed; that the land in the bill mentioned is liable to the demand of the plaintiff, may be subjected therefor, and the decree may be accordingly.

MISCELLANY.

JUDGE MONCURE.—We are deeply pained to learn that this "noblest Roman of them all" has been suffering from ill health since the adjournment of the Court of Appeals here. We trust that, instead of attempting to hold the Wytheville and Staunton terms, he will spend the summer in the mountains, take a good rest, which he needs and deserves; and that by this means, he and his noble wife, may be built up in health and strength, and spared for many years to come, in the walks of honor and usefulness, which both have adorned so long. We are satisfied that in what we have said, we utter the wishes of the other members of the court, and of the profession in Virginia.

DEATHS.—Since our last issue, the Richmond Bar has been called on to mourn the loss of two of its prominent members, John Harmer Gilmer and Chastain White, Esqrs. Both of these gentlemen had many noble qualities of head and heart, and will be mourned and missed by the Bar, and a large circle of friends. Both had, at different periods of their lives, been prominent in the politics of the State, and had represented their constituencies with fidelity and ability. Both had been presidential electors, we believe, for the Democratic party, and both members of the Virginia Senate.

DOCTORS AND APOTHECARIES.

An Act for Regulating the Fees and Accounts of the Practicers in Phisic.

I. Whereas the practice of phisic in this colony, is most commonly taken up and followed, by surgeons, apothecaries, or such as have only served apprenticeships to those trades, who often prove very unskilful in the art of a phisician; and yet do demand excessive fees, and exact unreasonable prices

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for the medicines which they administer, and do too often, for the sake of making up long and expensive bills, load their patients with greater quantities thereof, than are necessary or useful, concealing all their compositions, as well to prevent the discovery of their practice, as of the true value of what they administer; which is become a grievance, dangerous and intolerable, as well to the poorer sort of people, as others, and doth require the most effectual remedy that the nature of the thing will admit.

II. *Be it therefore enacted by the Lieutenant-Governor, Council and Burgesses, of this present General Assembly, and it is hereby enacted by authority of the same,* That from and after the passing of this act, no practicer in phisic, in any action or suit whatsoever, hereafter to be commenced in any court of record in this colony, shall recover, for visiting any sick person, more than the rates hereafter mentioned; that is to say,

Surgeons and apothecaries, who have served an apprenticeship to those trades, shall be allowed:	£. s. d.
For every visit and prescription, in town or within five miles	00. 5.00
For every mile above five and under ten	00. 1.00
For a visit of ten miles	00.10.00
And for every mile above ten	00.00.06

With an allowance for all ferriages in their journeys.

To Surgeons, for a simple fracture, and the cure thereof	2.00.00
For a compound fracture and the cure thereof	4.00.00

But those persons who have studied phisic in any university, and taken any degree therein, shall be allowed:	£. s. d.
For every visit and prescription, in any town or within five miles	00.10.00
If above five miles, for every mile more under ten.	00. 1.00
For a visit, if not above ten miles	1.00.00
And for every mile above ten	00. 1.00

With an allowance of ferriages as before.

III. And to the end the true value of the medicines administered by any practicer in phisic, may be better known, and judged of, *Be it further enacted, by the authority aforesaid,* That whenever any pills, bolus, portion, draught, electuary, decoction, or any medicines, in any form whatsoever, shall be administered to any sick person, the person administering the same shall, at the same time, deliver in his bill, expressing every particular thing made up therein; or if the medicine administered be a simple or compound, directed in the *dispensatories*, the true name thereof shall be expressed in the same bill, together with the quantities and prices, in both cases. And in failure thereof, such practicer, or any apothecary, making up the prescription of another, shall be non-suited, in any action or suit hereafter commenced, which shall be grounded upon such bill or bills: Nor shall any book, or account, of any practicer in phisic, or any apothecary, be permitted to be given in evidence, before a court; unless the articles therein contained be charged according to the directions of this act.

IV. *And be it further enacted, by the authority aforesaid,* That this act shall continue and be in force, for and during two years, next after the passing thereof, and from thence to the end of the next session of assembly. 4 Hening's Statutes at Large, page 509 (1736).

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"LADY'S LAW."—Some extracts from this quaint and rare old work, will be found most interesting, and we propose to publish some, from time to time, in our *Miscellany*—among them at some future day the able and interesting argument of Judge Hide delivered in the Exchequer Chamber, Trin. Term, Char. 2, in the case of *Marby* v. *Scot*, "whether, and in what cases, the husband is bound by the contract of the wife." We quote as follows now:

Page 46: "A man steals his wife against her friends' consent. and after sues in equity for her portion, but denied relief by Egerton Chancellor, who said, *He that steals the flesh, let him provide bread how he can.*"—Cary's Rep.

Page 175: "A *feme covert* purloined her husband's goods and money, and put the money into other men's hands, who bought lands to her use therewith. The heir and executor of the husband sued in equity to have the land or money restored. But Egerton, Chancellor, denied relief. He said he would not relieve the husband were he living, *for he sate not there to give relief to fools or buzzards who would not keep their money from their wives.*"

* * * * * * * * *

"Elopement, says a writer of antiquity, by the sound of the word and nature of the offence, seems to be derived *a lopex* a fox; for it is when a woman goes away from her husband and seeks her prey far from home, which is the fox's quality."

Page 27; "A promise of matrimony must be mutual; and, therefore, if the man say to the woman, I do promise that I will marry thee, but the woman makes no promise to the man; or, contrariwise, the woman doth promise, but not the man; this is a *lame* contract, and not of any force in law; neither is the silent party in this case (being present and hearing the same) taken for a consent and approbation; but it is otherwise, if any other person than the parents promise for the child."—Swinb. Matr. Cont., p. 5. * * *

Page 31: "If a promise of marriage be made without any limitation of time, then (if there appear not any weighty cause of stay) if both the parties are resident in one province, the woman may, after two years, marry to whom she pleases; but if the man does not reside in the same province, it is said she must tarry three years," * * *

Page 39: "By our law marriage being once lawfully solemnized, and without impediment, by one of the Holy Orders, all the world cannot dissolve it, let it be at what time and place it will."—Sid. Rep., 64.

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THE

VIRGINIA LAW JOURNAL.

AUGUST, 1879.

EVIDENCE.

How a witness may be impeached by evidence of his general character, and the proper questions to be asked.

1st. In impeaching the credit of a witness, should the examination be confined to his general reputation, and not be permitted as to particular facts?

2d. Should it be as to veracity alone, or as to the whole moral character of the witness?

3d. Should the impeaching witness be allowed to state whether he would believe the person sought to be impeached on oath?

As to the first and second inquiries, although they have in the past been much and ably discussed, and diverse opinions held, the law now regarding them seems harmonious, that the inquiry should be as to *general* reputation for *truth* and *veracity*. 1 Geenl. Ev., § 461; Sharswood's Ed. Star. Ev., note 1 to side p. 238; *Queen* v. *Brown & Hedly*, L. R., 1 C. C. R., 71. First query settled in Virginia by *Rixey* v. *Bayse*, 4 Leigh, p. 330; second by Uhl's Case, 6 Gratt., 706. Of course, these two questions have grown too plain to be of any interest, and would not here have been mentioned, but for their intimate relation to the third question. The use of one generally involves the use of all. But, to the writer's mind, the third branch of inquiry has now grown to be an important one; and when it has not been decided by a court of last resort, and thereby become binding authority, it seems to be a vexed question, and necessary to be settled. There are diverse opinions upon the question; nor are they narrow and

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unimportant, but are productive of widely different results, and which is the true course should, if possible, be known.

"The proper question to be put to a witness for the purpose of impeaching the general character of another witness is, Whether he could believe him upon oath?" Ed. Starkie above referred to, side p. 238, top p. 210; Roscoe Crim. Ev., side p. 177, top 176; Swift's Ed.

"The regular mode of examining into the general reputation, is to inquire of the witness whether he knows the general reputation of the person in question among his neighbors, and what that reputation is. In the English courts, the course is further to inquire whether, from such knowledge, the witness would believe that person on oath. In the American courts, the same course has been pursued; but its propriety has of late been questioned, and perhaps the weight of authority is now against permitting the witness to testify as to his own opinion." 1 Greenl. Ev., §461; 1 Whar. Amer. Crim. L., §814–816.

These are the widely different views of our great standard text-writers upon civil and criminal law, whose power and influence are justly so great on both sides of the Atlantic. Law, if it is termed "the perfection of human reason," is a progressive science, for human reason is itself progressive; so we cannot wonder at the course adopted by the English courts being disturbed in the "even tenor of its way," by the opinion of so great a writer as Mr. Greenleaf, one of the most recent authors, and the peer of any predecessor or cotemporary. The writer may not be far mistaken when he asserts that the work of Mr. Greenleaf is among the most popular, with the American practitioner, and his influence is truly powerful. The law of evidence, by the hard-worked practitioner, is often neglected, and only studied when needed; yet we cannot help but feel its importance, for by it we measure and control the facts of a case—at last the medium of truth and justice; therefore, it is pardonable to watch it with a jealous eye.

It is humbly believed that the English practice prevails in the inferior courts of this State, and ought to prevail in our court of last resort. It is true the writer considers the court of last resort in Virginia independent and supreme in its own sphere, and not bound to follow with blind submission the decision of any court; but still a Virginia court might rest with abiding confidence and safety upon this rule established and adhered to by the English courts, for it is a doctrine founded upon practical utility and observation, and the

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judges of no courts on earth are so practical as the English judges. Now, every active lawyer and judge knows how difficult it is to get the impeaching witness to understand the full meaning and import of the question asked; that the questions are often misunderstood, and how provokingly, in spite of caution, they base their answer on bad character generally, which may or may not be of such a nature as to impair testimony. When the question of credit under oath is directly presented, the conscience watches, and the answers will be more cautious; so we are forced to it by actual, practical necessity. It is said in *Phillips* v. *Kingfield*, 1 Appleton's (Me.) R., 375, that "To permit the opinion of a witness, that another witness should not be believed, to be received and acted upon by a jury, is to allow the prejudices, passions and feelings of this witness to form in part the elements of their judgment." This reasoning won't do. If it is nearly an impossibility (as it is) to make a witness confine his answer to general reputation for veracity, then is it not a perversion of the law to stop at the inquiry of general reputation. A man may have a bad moral character and yet be truthful; then we have this prejudiced witness palliating his conscience by taking advantage of this general moral character, or swearing to this character, framed, perhaps, by prejudiced neighbors. Furthermore, the man who has a good character is never much talked of; then if a witness never heard aught of his character for truth, shall he be allowed to stop there? The same case holds that this mode of evidence is violative of "sound principles and well-established rules of law," that "the opinions of witness are not legal testimony except in special cases," &c. This seems to me humbly to be a fallacious objection. "The proper study of mankind is man," and each man may be said to be an *expose* of his neighbor's character. It is the same sort of testimony constantly admitted by courts, to prove a man sane or insane, sick or well, drunk or sober, strong, intelligent, his disposition, temper, and distances and velocities. The witness gives the ground upon which he bases it, and then his opinion. How strong? how weak? how drunk? Is he so steeped in moral turpitude as not to be believed on oath? In active experience, how many men have we seen who are common jesters—jockies—and who have reputations for "white lying?" Yet our opinion is that their character for such lies is not sufficient to make us believe they would swear a lie.

In *Hamilton* v. *People*, 29 Mich., 175 (court composed of

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Ch. J. Graves, JJ's. Cooley and Campbell), it is said: "Until Mr. Greenleaf allowed a statement to creep into his work on Evidence, to the effect that the American authorities disfavored the English rule, it was never very seriously questioned. See 1 Greenl. Ev., §461. It is a little remarkable that of the cases referred to to sustain this idea, not one contained a decision upon the question, and only one contained more than a passing dictum not in any way called for.—*Phillips* v. *Kingfield*, *supra*. The authorities referred to in that case contained no such decision, and the court, after reasoning the matter out somewhat carefully, declared the question not presented by the record for decision." These are deathly strokes.

It seems that Mr. Greenleaf had no right to assert that the weight of American authority disfavored the English rule, unless the cases referred to by Mr. Greenleaf, and commented upon by the court in *Hamilton* v. *People*, *supra*, outweigh the following opinions of highly learned courts: In New York (opin. Judge Oakly), *People* v. *Mather*, 4 Wend. R., 229; *People* v. *Rector*, 19 Wend., 569; *People* v. *Davis*, 21 Wend., 309. In New Hampshire, *Titus* v. *Ash*, 4 Foster, 319. In Pennsylvania, *Bogle's ex'rs* v. *Kreitzer*, 46 Pa. St., 465; *Lyman* v. *Philadelphia*, 56 Pa. St., 488. In Maryland, *Knight* v. *House*, 29 Md., 194. In California, *Stevens* v. *Irwin*, 12 Cal., 306; *People* v. *Tyler*, 35 Cal., 553. In Illinois, *Eason* v. *Chapman*, 21 Ill., 33. In Wisconsin, *Wilson* v. *State*, 3 Wis., 798. In Georgia, *Stokes* v. *State*, 18 Ga., 17; *Taylor* v. *Smith*, 16 Ga., 7. In Tennessee, *Ford* v. *Ford*, 7 Humph., 92. In Alabama, *M'Cutchen* v. *M'Cutchen*, 9 Port., 650. In Kentucky, *Mobley* v. *Hamit*, 1 A. K. Marsh, 590; also, in Judge M'Lean's Circuit, *U. S.* v. *Van Sickle*, 2 M'Lean, 219. In Michigan, *Hamilton* v. *People*, *supra*.

The writer is aware of no adjudication upon the question by a court of last resort in Virginia. In Uhl's Case, 6 Gratt., before cited, the Circuit Court refused to allow the witness to be asked what the character of the witness sought to be impeached was for other things as well as for truth and veracity; but that if he answered that his general character for truth and veracity was bad, then he might be asked, from his knowledge of the general character of the witness sought to be impeached, if he would or would not believe him on oath; the witness, in answering, might take into consideration the *whole* moral character, as well as his character for truth and veracity. This was peculiar ruling, and it is perceived, that while the witness on the general question of

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character was not allowed to consider anything but character for truth and veracity (which thus far was right), yet when asked if he would believe Fulk on oath was allowed to base his opinion on his whole character. This was an error, so far as allowing him to base his opinion on his whole moral character *unrestricted* or unqualified; but if an error it was in favor of prisoner, and not appealed from, and consequently is no authority, and is spoken of only to show a record of the practice of the inferior courts in following the English rule.

To investigate a question well settled by the law of a State, one incurs but little risk, and may be said to do a little good; but to investigate an unsettled one—backed on both sides by such strong authority—is certainly a risk, and should a mistake in judgment be made, a prayer for lenient criticism would certainly be admissible upon the ground of good intent at least. S. C. GRAHAM.

Tazewell C. H., Va., 5th May, 1879.

THE POOR MAN'S LAW.

Do the State exemptions allow a housekeeper and head of a family, actually engaged in agriculture, two or three horses?

This is a mooted question, around here at least, and the general opinion is, that they allow him only two. As I dissent, I state my reasons for doing so, hoping that if they are not sound, some one more capable will discuss this statute and point out clearly its meaning. The statute alluded to may be found in the Code of 1873, at page 476, in sections 33 and 34 of chapter 49. It is provided that the property exempted in these sections shall be subject to levy to satisfy State and county taxes, and also for the purchase price thereof (Acts 1877–'78, chap. 253). In this article, whenever it is said that property is exempted absolutely, it is meant that it is given subject to no condition save the one pointed out above. Instead of using the phrase "housekeeper and head of a family actually engaged in agriculture," I shall simply say farmer. Now, those things exempted in the 33d section are exempted absolutely, while those exempted in the 34th are exempted on the condition that the debtor is a farmer. Now, those things exempted in the 34th section must be in addition to those exempted in the 33d; they must include them, or the farmer must elect between them. Nobody will

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contend that if the farmer take those things exempted in the 34th section, he will be precluded from taking those exempted in the 33d. To illustrate, if the farmer take a drag, or a wagon under the 34th section, he will not have to give up a cow or a dish exempted under the 33d. So if he take all of those exempted under the 34th section, he will not have to give up all of those exempted under the 33d. If the farmer has to elect between the exemptions given in these two sections, then the 34th section does not confer any benefit upon the farmer, for those exemptions in the 33d section are much more valuable than those in the 34th. If this was the intention of the Legislature, then the enactment of this 34th section was worse than folly. But it is useless to argue this proposition, for this construction, I am sure, will not find an advocate. Then, if the farmer is not to elect between these sections, the exemptions in the 34th either include those in the 33d, or they are in addition to them. Do they include them? Nothing exempted in the 33d section is mentioned in the 34th except horses, therefore everything exempted in the 34th is exempted in addition to those things exempted in the 33d section, unless the two horses exempted in the 34th are an exception. But if everything else exempted in the 34th section is exempted in addition to those things exempted in the 33d, is not this *prima facie* evidence that the horses exempted in the 34th section are exempted in addition to the one exempted in the 33d? In the 33d section, too, in addition to those things exempted for every housekeeper and head of a family, a mechanic's tools and utensils of his trade, not exceeding $100 in value, are exempted. Now, those things exempted in the 34th section are very much the same to the farmer that the mechanic's tools, &c., are to him. Would the Legislature favor the mechanic more than it would the farmer? I think not; for agriculture is the foundation of all prosperity. Then, if a mechanic's tools, &c., are exempted in addition to those things exempted for every head of a family, surely those things exempted in favor of the farmer are in addition to those things exempted for every head of a family. In the 33d section, one horse is exempted absolutely, but according to the construction of this statute contended for by some, this same horse is exempted conditionally in the 34th. Can it be possible that the Legislature of Virginia would pass a law, in one section of which a horse is absolutely exempted, while in another section the same horse is exempted conditionally? Now, suppose that this 34th section simply exempted one yoke of oxen for the farmer, with-

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out saying that he might have a pair of horses or mules in lieu thereof, would any one contend that if he took the oxen under the 34th section, he could not take the horse under the 33d? I think not. Every one would admit that the farmer could have a horse under the 33d section, and a yoke of oxen under the 34th. To contend otherwise would be to say that the farmer had to elect between the horse and a yoke of oxen, for the law, so worded, would either give the farmer both a horse and a yoke of oxen, or it would give him a horse or a yoke of oxen. Now, does the insertion of the words, "or a pair of horses or mules in lieu thereof," alter the construction of the statute? Certainly not. No one, I think, will contend that if a farmer take a yoke of oxen under the 34th section, he will be precluded from taking a horse under the 33d. Then, under this law, a farmer may have both a horse and a yoke of oxen. Now let us suppose that a farmer had three horses, one yoke of oxen and two mules. He could, if he chose, claim one horse and the yoke of oxen, or he could claim one horse and the two mules in lieu of the yoke of oxen. I suppose no one will contend that the farmer could not claim two mules in lieu of his oxen, for when the 34th section says that a farmer may have a yoke of oxen or a pair of mules in lieu thereof, it simply does not mean that the horse exempted in the 33d section shall be considered as one of the mules exempted in the 34th. In other words, when the 34th section exempts two mules in lieu of a yoke of oxen, it is not intended that the horse exempted in the 33d section shall be counted for one mule in the 34th. Then, beyond all doubt, the farmer may have one horse under the 33d section, and in addition thereto one yoke of oxen under the 34th; or he may have one horse under the 33d and two mules under the 34th section; but, say some, if he take one horse under the 33d section, he can take only one under the 34th. Now, when this same law, which exempts for a farmer both a horse and a yoke of oxen, says that he may have two horses in lieu of his yoke of oxen, is it possible that it is meant that the horse exempted in addition to the oxen, is to be one of the horses given in lieu of them? In lieu of what are two horses given? Are they given in lieu of one horse and a yoke of oxen, or are they given in lieu of one yoke of oxen?

If two horses are given in lieu of one horse and a yoke of oxen, then the farmer can have only two horses; but if two horses are given in lieu of one yoke of oxen, then the farmer may have three horses; for under the statute the farmer may

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have one horse and a yoke of oxen. Now, if he have two horses in place of his yoke of oxen, of course he will have in all three horses. Now, can this statute possibly be tortured into meaning that two horses are given in lieu of one horse and one yoke of oxen? If this had been the intention of the Legislature, could they not have made the law much more explicit by giving one horse in lieu of the oxen? It is clear that under this statute the farmer debtor is allowed one horse and two mules. Can one point out a good reason why a farmer is allowed one horse and two mules, if he is allowed only two horses?

The statute, it seems to me, could not be plainer in saying that the two horses exempted in the 34th section are exempted in lieu of one yoke of oxen, therefore the debtor farmer may have three horses under the State exemptions.

Lancaster C. H. G. S. G.

P. S.—In the *Law Journal* for May, a correspondent from Charlottesville criticised a clause of the 34th section of the 49th chapter of the Code of 1873. The criticism is very just it seems to me, but if your correspondent will turn to the 253d chapter of the Acts of 1877–'78, he will see that this clause has been made law.

SUPREME COURT OF THE UNITED STATES.

BLAKE ET AL. *v.* HAWKINS ET AL.

In the interpretation of wills, the attending circumstances of the testator, such as the condition of his family and character of his property, ought to be taken into consideration.

Whether a power has been executed or not, is a question involving a consideration of the intent of the donee of the power, and such intention must be found in the acts of the donee, and not alone in any previously expressed purpose.

A declaration by a testatrix in the introduction to her will, of her intention thereby to execute all powers vested in her and enacted in certain deeds theretofore executed, and the devise of all her own property in such manner as to show an intent not to satisfy the pecuniary legacies to charitable purposes out of it, indicates an intention that such legacies, if paid at all, should be paid out of the fund over which she had the power of appointment. The will is, therefore, an execution of the power and an appointment of the fund to her executors.

STRONG J. It is a common remark that, when interpreting a will, the attending circumstances of the testator, such as

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the condition of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended. *Brown* v. *Thorndyke*, 15th Pick, 400; Poslethwaite's Appeal, 68 Penn. St., 480; *Smith* v. *Bell*, 6 Peters, 68. Such a method of procedure is, we think, appropriate to the present case.

Mrs. Devereux's will was made on the 23d day of December, 1847, about eighteen months before her death. There is no reason to believe there was any essential change in the nature or amount of her property between the date of her making this will and her decease, and it may fairly be assumed that what she had in June, 1849, the time of her death, she had when she made her testamentary disposition. At that time, her personal property consisted of her household furniture, her carriage and horses, a growing crop upon a farm she was cultivating jointly with her grandson, John Devereux, a small sum of cash in hand, some petty debts due to her, and about sixty slaves. The slaves, as appears in a subsequent appraisement, constituted the principal part in value—very nearly, if not quite, nine-tenths of the whole. In addition to this, the testatrix owned a house and lot in Chapel Hill, which she directed to be sold, and she had a power to appoint the unappropriated balance of a fund of $50,000 then in the hands of her son, Thomas P. Devereux. Such was the property of which she attempted to make a disposition. Her will commenced with a declaration of her intention "thereby to execute all powers vested in (her) and enacted in any deed or deeds theretofore executed, particularly those powers created in her favor, by two certain deeds, settling and assuring the estate of her late brother, George Pollock, to (her) son, Thomas P. Devereux, dated some time in the month of July, in the year of our Lord, eighteen hundred and thirty-nine, and executed by her late husband and herself." This was followed by her testamentary dispositions. By the first five she gave five legacies of four thousand dollars each to five several charitable institutions, to each an equal sum. By the fifth item she bequeathed five hundred dollars to her executors for a charitable purpose. By the eighth she bequeathed seven thousand five hundred dollars to her son, Thomas P. Devereux, to apply the income annually to the payment of certain annuities and charities therein specified, and by the twelfth item she bequeathed five hundred dollars for another specified charity. The will contains

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no other gifts of pecuniary legacies. The aggregate of these is twenty-eight thousand five hundred dollars. Special dispositions are made of her slaves, of her stock of horses, cattle, hogs, crops, and farming utensils, and of the proceeds of sale of her house and lot in Chapel Hill—generally, indeed, of all that she possessed in her own right.

Whether this will was an execution of the power reserved to her by the deed to her son, referred to in the introductory clause—whether it was an appointment of so much of the sum of fifty thousand dollars made subject to her appointment by the deed, as remained undisposed of by her, is the most important question we have now to consider. It must be admitted that the avowal by the testatrix in the introductory clause of her will of her purpose thereby to execute the power was not itself an execution. It is important only as it may shed light upon the subsequent dispositions. A previously expressed intention may serve to explain language afterwards used and show what its meaning is, but it is one thing to intend a future act, and quite another to carry out that intention. While it is true that whether a power has been executed or not is a question involving a consideration of the intent of the donee of the power, it is equally true the intention must be found in the acts or dispositions of the donee, and not alone in any previously expressed purpose.

Prior to the English Statute of Wills, 1 Victoria cap. 26 (which, so far as it relates to appointments by will, has been enacted in North Carolina), certain things had been generally accepted as indicative of an intention to execute a power, and as sufficient indications. As expressed in repeated decisions, these were: *first*, some reference to the power in the will or other instrument; *second*, some reference to the power or subject over which the power extends; and *third*, where the provisions of the will, or other instrument executed by the donee of the power, would be ineffectual or a mere nullity, or would have no operation if not an execution of the power. The first of these indications, however, must be understood as a reference to the power in the dispositions actually made. In *Lowson* v. *Lowson*, 3 Brown's Chac., 272, a will expressed to have been made in pursuance of a power which the testator had, was held by the Lord Chancellor not to have been an execution thereof, because the subsequent dispositions were apparently applicable only to his own estate. It may be remarked that Sir Edward Sugden expresses doubts of the correctness of this decision for the reasons given by Lord Thurlow, but he still lays down the rule that "although a will be

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expressed to be made in pursuance of the power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will."—Sugden on Powers, 364, second American edition. On the other hand, if the will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions made, that their purpose and object was to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and if made by will, the intent and its execution are to be sought for through the whole instrument.

Turning now to the will we have before us, two things are evident. The first is, that the testatrix did not intend that the pecuniary legacies given for charitable purposes, and to pay annuities, should be satisfied out of her own personal property; and the second is, that she did intend that those legacies should be paid. Substantially all her own property she devoted to other uses. Her horses, cattle, hogs, etc., crops and farming utensils, her carriage, wagon, and all personal property except negroes, in the possession of her grandson, John Devereux, she directed to be sold, and the proceeds applied to the payment of her debts, and she appears to have doubted whether they would be sufficient. Her house and lot on Chapel Hill she ordered to be sold, and directed the sum paid for it to be invested in some productive stock, ordering, however, a payment out of it, and out of the funds arising from the sale of some negroes, to satisfy an annuity of one hundred and fifty dollars during a life or lives. By these specific appropriations she negatived any right to apply these funds to the payment of the pecuniary legacies mentioned in the 1st, 2d, 3d, 4th, 5th, 6th, 8th and 12th items in the will. Nothing of her own personal property, of any considerable value, remained, except her slaves. Six of those she specifically bequeathed. One she ordered to be sold, devoting the proceeds to the distribution of tracts and religious books, and three others were directed to be sold at private sale, and a portion, if not all, the avails she appropriated to the payment of an annuity. The remainder of her slaves she provided might be taken at a valuation by her son-in-law and grandson, upon their giving bonds for payment of the appraised value in ten annual instalments. These bonds, of course, could not be applied to the discharge of the pecuniary legacies as they fell due.

Thus, it appears, that while she gave pecuniary legacies, amounting in the aggregate to more than twenty-eight

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thousand dollars, she carefully withdrew from any positive application to their payment the personal estate she owned in her own right. It seems necessarily to follow that if she intended those legacies to be paid at all, she intended them to be paid out of the fund over which she had the power of appointment. This appears from the testamentary dispositions themselves, independent of any reference to the intention to execute her power, avowed in the introductory clause in the will. And that avowal tends to support the conclusion. It is significant, also, that after she had made a specific disposition of all her own property inconsistent with any application of it to paying those legacies, she refers to their payment again, and uses this language: "Should it appear at my decease that the bequests exceed the amount of funds left, my will is that the first five only shall be curtailed until brought within the limits of the assets." This provision was a reasonable one, in view of the uncertainty there was in regard to the amount remaining of the funds of which she had the power of appointment. We conclude, therefore, that Mrs. Devereux's will was an execution of the power, and an appointment of the fund to her executors. It converted the fund into her own estate, at least to the extent of twenty-eight thousand five hundred dollars, if there was so much of it remaining.

We have considered the case thus far without reference to the North Carolina statute of 1844–'5, which is similar to the act of 1 Victoria, chap. 26 (Revised Code of N. C., chap. 85, sec. 5), for the reason that it may be doubted whether that statute is applicable to this will. Here there is no bequest of personal property *described in a general manner*, nor even a general residuary bequest, though there are general pecuniary legacies.

Whether, if the fund which remained in the hands of Thomas P. Devereux at the death of the testatrix had exceeded the sum required to pay the legacies given by her will—that is to say, the sum of $28,500—the will would have been a complete execution of the power, covering the whole fund, or only a partial appointment of so much as was needed to pay those legacies, it is unnecessary for us now to decide. In the view which we take of the other questions involved in the case, that fund had been reduced so far that there was not more than enough remaining subject to the power, to pay the sums bequeathed by the will. The execution was therefore complete, and it appointed the whole fund to the executors of this will, who took it under the ap-

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pointment as part of the personal estate of the appointer. Upon this subject, see *Milday* v. *Barnet*, Law Rep., 6 Eq. Ca., 196; *Hurlstone* v. *Ashton*, 11 Jurist, N. S., 724; *Hawthorn* v. *Shedden*, 3 Sm. & Giff., 293.

There was, therefore, error in the decree of the Circuit Court so far as it is adjudged that the testatrix, Francis Devereux, did not appoint to her executors the fund over which she had the power of appointment, "except so far as it is necessary to resort to the same to pay off the pecuniary legacies bequeathed by her in her said will, *after* exhausting for that purpose what remains of her general personal assets after payment of her debts and funeral expenses, and the costs of administering her estate."

The other questions raised by the appeal require a less extended consideration. The Circuit Court decreed that the "deed of explanation" executed by Mr. Devereux in 1845 was effectual, and that its operation was to reduce the annuity of three thousand dollars charged upon the lands in the deed of settlement of 1839, proportionably as Mrs. Devereux reduced the $50,000 charged by her appointments or outlays, so as to make the annuity in each and every year equal to six per cent. interest on so much of said fund as remained unappropriated or unexpended by her in each and every year respectively. This we think was correct. In 1845, Mrs. Devereux was *sui juris*. Her husband had died, and she was competent to release whatever rights she had under her deed to Thomas P. Devereux, or to appropriate to him any portion, or even the whole, of the fund of $50,000 then remaining. The deed of settlement gave her power to dispose of the fund, to give, grant, or direct the payment, investment or application of the same, at her discretion. If, therefore, there was no mistake in the deed, the subsequent paper ought to be regarded as a release *pro tanto* of her right to the annuity, and a partial disposition of the fund over which she had the power. If there was a mistake in the deed of 1839, it was quite competent for her to rectify it by agreement, and her deed of explanation was a solemn acknowledgment under her seal of the mistake, as effective in equity, if properly obtained, as would have been a decree of a chancellor reforming the instrument. We see not enough in the relation of the parties to each other to justify any presumption that undue influence was exerted over her. The deed of 1839 exhibits the fact that a possible benefit to her son was even then contemplated. It provided that whatever of the $50,000 fund the mother should not dispose of

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should lapse for his benefit. It was quite natural, therefore, for her to execute a declaration for his relief.

What we have said disposes of the fourth assignment of error, and shows that it is not sustained.

It is next objected by the appellants that the court erred in directing the paper dated October 20, 1846, and signed by Mrs. Devereux, to be treated as a stated account between her and her son, conclusive of all matters of account between them previous to and including the 22d of June, 1846, respecting the $50,000 fund and the annuity, excepting such matters as are by its express terms excepted out of it and reserved for future adjustment. The paper was, in fact, an account stated by a third person, selected by both parties, agreed to be correct by Mrs. Devereux, except in four particulars reserved for subsequent arbitrament. It bears on its face evidence that it was carefully examined and fully understood. After such examination, it was signed, and there is no evidence that Mrs. Devereux ever afterwards questioned its correctness. On the contrary, she, in substance, ratified it and acknowledged its correctness at least twice, more than a year afterwards. It is difficult, therefore, to see why it should not be regarded as the Circuit Court directed it to be.

It is urged on behalf of the appellants that because the statement was not pleaded nor set forth in the answer, the defendants were precluded from making use of it when ordered to account. This is overlooking the fact that it was not a bar to all claim for an account. Thomas P. Devereux's liability to account, if it existed at all, continued after the statement was made to the extent of all subsequent transactions, and for the balance ascertained by it to be due June 22, 1846. It is not set up as a full accounting, but as a partial settlement. It would have been no answer to the plaintiff's bill if Thomas P. Devereux had said: I have accounted up to June 22d, 1846. He denied his liability to account at all, and it was only when that was adjudged against him that he could avail himself of the fact that he had partially accounted, and that fact he could use only in stating the account ordered. We may add that we see nothing in the circumstances attending the statement sufficient to cast suspicion upon it, or to call upon the defendants to support it by extraneous proofs. The relation between Mrs. Devereux and her son, created by the deed of 1839, was more like that of debtor and creditor than that of trustee and *cestui que* trust. It was no relation of confidence reposed. Similar remarks may be made respecting the second statement, which ascer-

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tained the balance due from June 21, 1847. The decree of the court respecting its effect was right.

The remaining exception to the decree of the court is that it denied the liability of Thomas P. Devereux to account, as executor of the last will and testament of Mrs. Devereux, for "all her personal estate, especially for so much as came into the hands of Seymour Whitney, as administrator, *pendente lite* or *cum testamento annexo.*" We think this part of the decree was correct. He was required to account for all the estate that came to his hands, and correctly so required, for he had made himself an executor *du son tort* by intermeddling with the estate of the testatrix, and by taking most of it into his possession, and undertaking to dispose of it. But he never qualified as executor of the will, or administrator *cum testamento annexo*, nor was he even administrator *pendente lite.* As such, therefore, he did not become responsible, and as executor *du son tort*, he was only liable for what came into his hands (*Mitchell* v. *Lunt*, 4 Mass., 658; *Kinnard* v. *Young*, 2 Richardson's Eq., S. C., 247; *Leach* v. *House*, 1 Bailey, 42). This is clear upon both reason and authority.

Our conclusion, therefore, is, after reviewing the whole case, that there has been no error committed, except the single one which we first noticed. For that, however, the decree of the Circuit Court must be reversed, and the case sent back with instructions to direct a new accounting, and to enter a decree in conformity with this opinion.

It is so ordered.

SUPREME COURT OF APPEALS OF VIRGINIA.

CITY OF RICHMOND *v.* A. Y. STOKES & CO.

April 10, 1879.

1. In this State there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public of the *locus in quo*, will not, of itself, constitute an acceptance, without regard to the character of the use, and the circumstances and length of time under which it is claimed and enjoyed. But where property in a town is set apart for public use, and is enjoyed as such, and public and private rights acquired with reference to it and to its enjoyment, the law presumes such an acceptance on the part of the public as will operate an estoppel *in pais*, and preclude the owner from revoking the dedication.
2. A street of the city having been used according to a certain line from

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1817 to 1847, and having been graded and paved by the city authorities, without any objection or claim by the owners of the soil on which a part of the street was laid, and public and private rights having been acquired with reference to it and its enjoyment, its dedication to the public will be presumed, and the owner of the soil cannot revoke it.

This was an action of trespass *quære clausum fregit* in the Circuit Court of the city of Richmond brought in July, 1876, by A. Y. Stokes and two other partners, under the name and style of A. Y. Stokes & Co. against the city of Richmond. The subject of the action was a parcel of ground extending from Cary street to Basin street forty feet, and twenty-one feet wide, which was covered by a part of Twelfth street as then used. This piece of ground had been a subject of controversy for years between the parties under whom the plaintiffs claimed and the city of Richmond—the claimants insisting that Twelfth street properly laid down did not cover it, and the city resisting the claim. In 1858 or 1859, Warwick & Barksdale, under whom the plaintiffs derived title, recovered the ground in an action of ejectment, and enclosed it; but the enclosure was removed, upon an agreement with the Council of the city, that this was not to affect the rights of either party. The question in the cause was, Whether the public had acquired an easement over the ground?

On the trial after the evidence had been introduced, both the plaintiffs and the defendant asked for a number of instructions which the court refused to give, and gave the following;

The jury are instructed that they cannot, from the evidence in this cause, find that Warwick & Barksdale, or any parties claiming under them, have dedicated the premises in question to the public, or that by any omissions or laches they have lost the rights they had as against the city at the date of their first communication to the City Council in September, 1847.

But the jury are further instructed that if prior thereto the city of Richmond had, with the knowledge and consent of the then owners of the property, assumed control of the premises in question, claiming the same as a part of Twelfth street, and had with such knowledge and consent continuously and notoriously occupied the same as a public highway up to the time of the assertion of the claim of Warwick & Barksdale before the Common Council September 13th, 1847, and that such use had continued so long

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that private rights and public convenience would have been materially affected by an interruption of the enjoyment of such part of the highway, they should find for the defendants.

To which action of the court in rejecting the instructions asked by the defendant, and in giving said instructions of the court, the defendant excepted, and prayed that this bill of exceptions might be signed, sealed, and made a part of this record; which is accordingly done. This bill contained all the evidence.

The jury found a verdict for the plaintiff, and assessed their damages at five hundred dollars; and the city of Richmond moved the court to set aside the verdict on the ground that it was contrary to the evidence. But the court overruled the motion, and entered a judgment in accordance with the verdict; and the city again excepted. And the court certified that all the facts proved on the trial appear in the first bill of exceptions, which was made a part of this, there being no conflict in the evidence. And thereupon the city of Richmond applied to a judge of this court for a writ of error and *supersedeas*, which was awarded. The facts are stated by Judge ANDERSON in his opinion.

Keiley for the appellant.

Kean & Davis and *Ould & Carrington* for the appellees.

ANDERSON J. The dedication of a street or public highway may be made either with or without writing, by any act of the owner, such as throwing open his land to the public travel, or an acquiescence in the use of his land as a highway.—Angel on Highways, § 142. When streets and alleys have been opened by the owners of the soil, and used by the public with his assent, as a public thoroughfare for years, a dedication of the easement may be presumed, and the continued and uninterrupted use, with the knowledge and acquiescence of the owner, will justify the presumption of a dedication to the public, provided the use has continued so long that private rights and the public convenience might be materially affected by an interruption of the enjoyment. But any acts of ownership, by the owner of the soil, would repel the presumption.—Allen J. in *Skeen* v. *Lynch, &c.*, 1 Rob. R., 202. But there must be not only a dedication, but acceptance by the public.

In England, it is held, that the presumption of the dedica-

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tion by the owner, from his acquiescence in the use of the land as a highway by the public is sufficient. But in this State it was held by the General Court in *Kelly's Case*, 8 Gratt., 632, that this doctrine, as applied in England, is inapplicable to county roads in this country; and that in this State there must be not only a dedication presumable from the user, but an acceptance by the County Court, evidenced by some act of record. But Judge Leigh, who delivered the opinion of the court, excepted expressly streets and alleys in towns from the operation of this principle. As to them, the acts of corporation officers may have the same effect as the acts of the county courts.

In *Harris' Case*, 20 Gratt., 833, the doctrines on this subject were considered, and Judge Staples, in whose opinion all the judges concurred, states the doctrine as held by this court with as much clearness and precision as can well be done He says, "It is well settled there must be not only a dedication by the owner, but an acceptance by the public. Whether some act on the part of the authorities charged with the control or repair of the highway, is necessary to constitute an acceptance, or whether it may be effected by a mere user of the property, is a question upon which the authorities are not agreed." After a brief notice of *Kelly's Case*, he says, "It may be safely assumed, that in this State there may be a valid acceptance of an easement in a town, without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public of the *locus in quo*, will not of itself constitute an acceptance, without regard to the character of the use, and the circumstances and length of time under which it was claimed and enjoyed." And he concludes, that "where property in a town is set apart for public use, and is enjoyed as such, and public and private rights acquired with reference to it, and to its enjoyment, the law presumes such an acceptance on the part of the public as will operate an estoppel *in pais*, and preclude the owner from revoking the dedication. Numerous other cases (than those which he had cited, he says) maintain the principle that the owner is estopped to assert there has been no formal acceptance, where the public, relying upon the manifest intent of the party to dedicate the property, have entered into the occupation of it in such manner as renders it improper and unjust to reclaim it, and cites *State* v. *Nash*, 6 Ver. R., 355: *Badeau* v. *Mead and al.*, 14. Barb. R., 328, and *Cincinnati* v. *White, lessee*, 6 Peters, U. S. R., 431.

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This is an action of trespass *quære clausum fregit*, brought by A. Y. Stokes & Co., defendants in error here, against the city of Richmond, and involves the right of the city to a section of Twelfth street, which is embraced by parallel lines twenty-one feet east of the western line of Twelfth street, and forty feet south of the southern line of Cary street. There is also another suit depending in which the Gallego Mills were plaintiffs below, and are defendants here, which involves the right of the city to another section of the said Twelfth street, lying between the intersection of Twelfth street with Basin street, and a street thirty feet wide south of the basin, in parallel lines with Cary street, and a line parallel with the western line of Twelfth street, and twenty-five feet east of it. Precisely the same questions are involved in both suits.

Twelfth street is thirty-two feet six inches in width, crosses Main and Cary streets at right angles, and now extends in a direct line and uniform width in a southward direction, crossing Cary street to Canal street, and embracing both of the sections now in dispute.

The following are established as facts in the cause: That seventy years ago, or more, one Bullock erected buildings on the east line of Twelfth street as now used, which buildings extended southwardly from Cary street to an alley about half way between Cary and Canal streets. This alley is a little south of the entrance of the street south of the basin, before referred to, into Twelfth street. These buildings were substantial brick stores, three stories high, and there was a narrow sidewalk, some five feet wide, in front of them, but which extended no further south than the said alley.

The property adjoining Bullock's buildings on the south, extending on the eastern line of Twelfth street to Canal street, was owned by Randolph Harrison, and upon it was a warehouse used for tobacco, formerly owned by Wm. J. Morris. And the property opposite Harrison's, on the west side of Twelfth street, was used as a coal office, on which Peter Chevallie built his mill in 1833, where the Gallego Mills now stand. Twelfth street was not open further than the aforesaid alley. Between Harrison's lot and Chevallie's mill, no street had been opened, but there was a ravine between them; and Harrison's property was approached by Thirteenth street. But, at least, as far back as 1817, Twelfth street was open in front of the Bullock buildings, which extended to the said alley, as it was then used, and has been ever since, except for the short time it was obstructed in 1858 or 1859 by the grantors of the plaintiffs below erect-

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ing a fence on a part of it. It is true that the whole space west of the aforesaid sidewalk of Twelfth street, was an open space as far as the basin, a distance of about one hundred yards; and was used by the James River Company, the then owner of the soil, for receiving and delivering goods; but it is a fair inference from the evidence, that the street, the eastern limit of which was indicated by the Bullock storehouses, and the sidewalk was also used by them and their customers in conveying goods to and from the basin, and by the public in general who had dealings with them, or the occupants of the Bullock storehouses, as far back as the year 18 7; and since the opening of the southern section of Twelfth street in 1834, it must have been the great thoroughfare of transit and transportation to and from the Chevallie or Gallego Mills and the Harrison tobacco warehouse, and for the freights of the James River and Kanawha Canal brought to or carried from the city of Richmond, and which were conveyed to or from Twelfth street along Basin street to or from the boats in the basin.

In 1833, the subject of opening the southern section of Twelfth street, which had become an important thoroughfare, and connecting it with Canal street, engaged the earnest attention of the city fathers. A difficulty met them at the threshold. Twelfth street, then used, had been used since 1817, and probably for many years before. As Bullock had erected costly brick buildings along its eastern margin, it must have been the eastern line of the street then, and for years before, as it cannot be presumed that he would have erected such buildings in the middle of a public street. And, in fact, there is no evidence in this record that there ever had been a street in use there upon any other location; but it appeared from the report of their surveyor that as Twelfth street was designated in the original plan of the town, its eastern limit along the southern line of Cary street was 21 feet east of its location as then used; so that Bullock's buildings occupied twenty-one feet of the street as designated in the plan of the town, and Harrison's warehouse considerably more. If the report of the surveyor was correct, the city could not open and extend Twelfth street through to Canal street upon its present line without acquiring the right from the owner of the soil on which it would be located. All difficulty was removed, and the way made clear by the proposition of Mr. Harrison, to purchase from Chevallie the land upon which the extension of Twelfth street would be located, and to convey it to the city to be used for this purpose, if the city would

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release to him any claim it might have to the land, or the right of way over it, upon which his buildings were erected. This proposition was accepted by the city, and Twelfth street was opened and graded and extended through to Canal street, on the line of its location and use in front of the Bullock buildings; and the whole street, from its intersection with Cary to its intersection with Canal street, was graded and paved its whole width of thirty-two feet and six inches. This was done openly, with the knowledge and in the presence of the owner of the soil, and, so far as appears, without objection or question as to the right of the city to do what she did. We think it is fair to presume, that the City Council would not have accepted the proposition of Mr. Harrison, and incurred the expense of filling the ravine and opening and grading the street between his buildings and Chevallie's Mill, and of grading and paving the whole street from Cary to Canal, if any question had been raised by the owner of the soil, to its right to the street in front of the Bullock buildings, until such question was definitely settled, or if its counsel had any doubt as to its right; and it being done in the presence and with the knowledge of the Canal Company, or its agents, who stood by and allowed the city to lay out and incur the expense of grading and paving this street, as and for a public street, without objection, it is estopped thereby afterwards to set up a claim to it, and its grantees can have no better rights.

They claim under a deed of conveyance from John A. Lancaster and S. S. Baxter, as trustees of the James River and Kanawha Company, bearing date the 2d of June, 1845, which described the first lot conveyed, which embraced the section which is involved in this suit, as bounded on one side by Cary street, on another side by Twelfth street, and on a third side by a street thirty feet wide called Basin street, running along the northern margin of the basin, and extended eastwardly until it meets Twelfth street, and describes the other lot which is involved in the other suit, depending in this court upon a writ of error, hereinbefore referred to, as bounded on one side by Basin street, on another side by Twelfth street, and on the third side by a street thirty feet in width, to be laid out between the ground then sold, as now designated, and the building belonging to the grantees, Warwick & Barksdale, called the Gallego Mills, sometimes called Chevallie's Mills.

This deed was made to parties who were the owners of the Gallego or Chevallie's Mills, which bordered on Twelfth

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street, as it was laid off, graded and paved by the city, to the exact width of Twelfth street, eleven years before, of which they must be presumed to have had cognizance; and the part of which street lying west of the Bullock buildings, to sections of which they set up claim under said deed, had been used by the said city as a continuation of Twelfth street, south of Cary, at least for twenty-eight years prior to the date of said conveyance to them, with the acquiescence of their grantors. They purchased, therefore, with the knowledge that the city claimed thirty-two feet six inches west of the Bullock buildings, as shown by the paving of that width, as a continuation of Twelfth street south of Cary; and by inquiry, they might have known that it had been used as Twelfth street south of Cary for more than twenty-eight years prior to the date of said deed of conveyance to them; and that there was not, and most probably never had been, any other Twelfth street in use, south of Cary street; and consequently, that in purchasing they purchased subject to the city's easement. And such, indeed, is the import of the deed read in the light of the surrounding circumstances, of which they must have been cognizant; that if it was designed to convey any part of the street, the conveyance was intended to be subject to the easement; and without looking to the map, the deed upon its face does not import a conveyance of any part of the street, the location of which was then well defined, and understood by all the parties. And the map referred to seems to have been carelessly and imperfectly prepared, for, among other errors, it lays down Twelfth street as having a width of thirty six feet six inches, when its width is only thirty-two feet six inches, adding about one-eighth to its actual width. Angel, § 142, *supra*, says, that the platting of land by the owner, and selling lots bounded by streets designated by the plat, thereby indicates a clear intention to dedicate, or an acquiescence in the use of his land as a highway. The deed to Warwick & Barksdale not only describes the lots sold to them as bounded on one side by Twelfth street, but also on another side by an existing street called Basin street, which it describes as thirty feet wide, and running along the northern margin of the Basin, and extending eastwardly until it meets Twelfth street. Now this street is described as an existing street, and as then extended eastwardly until it meets Twelfth street. This language could apply only to Twelfth street as it then existed and was in use. It could not apply to any other Twelfth street, for there was no other, and never had been, except that which was designated on paper, it is

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said, in Byrd's original plan of the town, and never had been an actual street, never had been opened, and could not have been meant in this conveyance, as Basin street did not extend eastwardly to meet it, but only to meet Twelfth street as it was then used and paved and well defined, and beyond it eastwardly there was no street, but a block of the Bullock buildings.

And so as to the boundaries of the other lot conveyed; it was bounded on one side by Basin street, on another by Twelfth street, and on a third side by another street thirty feet, which it was agreed by the parties was to be opened, and which was described, and which must necessarily connect with Twelfth street. This was a recognition of the existing Twelfth street. The parties to this deed could hardly be understood to have covenanted to open a new street, whose necessary outlet would be Twelfth street, upon the haphazard that another Twelfth street would be opened by the removal of the Bullock buildings, and which, if it were done, could not then be extended through Harrison's lot to Canal street, as the city, eleven years before, had solemnly released to him any claim it might have to a right of way through his lot. If we turn to the map, we think it plainly shows, by the shaded or black lines, the actual eastern terminus of each of the streets on the margin of the basin to be the western line of Twelfth street as then established and in use. It is true that the boundaries of the lots sold are indicated by dotted lines running into Twelfth street, which may indicate that the fee in the soil is embraced in the conveyance, though subject to the easement. How else can the change from a solid to a dotted line be accounted for.

In *Denning* v. *Room*, 6 Wend. R., 651, cited by Angel on Highways, § 143, it was held that if a street has been used and built up along a particular line, and the adjoining owners have acquired in the line so built upon, and treated it as the true line of the street for forty or fifty years, they will not be permitted to deny the effect of their acts as a dedication, and to contract the lines of the street, on the ground that by so doing they make them conform to the original survey, and lay out of the street. But the fact of an acquiescence of the owner in the free use and enjoyment of the way as a public road for the period of twenty years, would undoubtedly be sufficient evidence in any case, though there were no further proof of an intention to dedicate.—Angell, § 142, citing Kent's Com., 451, and decisions of New Jersey, New York, North Carolina, Wisconsin and Kentucky.

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But time, though it is often a very material ingredient, is not indispensable in the act of dedication.

When a street in the city of New York was widened from forty to sixty feet, and used by the public for nineteen years, with the acquiescence of the owner, who paid an assessment for paving it to its full width, it was held that the circumstances were abundantly sufficient to warrant the presumption of dedication. (Angel, §143, citing *Smith* v. *The State*, 3 Zabriskie, 130; *Maxwell* v. *East Bar Bank*, 3 Bos., 124.)

But the principle enunciated by this court in the cases cited, *supra*, as to the influence of time upon the question of dedication, we think is clear and definite, to wit: That the use of the property by the public, with the assent of the owner, will justify the presumption of dedication, if the use has continued so long that private rights and the public convenience might be materially affected by an interruption of the enjoyment. This is upon the principle of equitable estoppel. How does this principle apply to the case in hand?

That the public convenience would be materially affected by an interruption of the enjoyment, clearly appears from what has been said. And now as to private rights.

As we have seen, the Bullock buildings were erected as far back as 1817, more than sixty years ago. They were doubtless erected upon what, at that time, was the eastern line of Twelfth street as it was then used, and, in all probability, had ever theretofore been used since it had been a street. The buildings were destroyed by the great fire in 1865, and have been rebuilt since upon the old line. It is easy to see how injuriously private rights would now be affected by permitting the obstruction of the street in front of those buildings, and yielding to the demand of the present owners of the soil to reclaim it. From this view of the case, it is plain that upon the repeatedly recognized and established principle of this court, the dedication of this section of Twelfth street by the owners of the soil, ought to be presumed, there having been an acquiescence in its long-continued and uninterrupted user, and no adverse claim ever asserted by the owners of the soil until the year 1847. Since that time, the right of the city to the easement has been disputed and contested by the owners. But the city, through its Council has, from time to time, directed inquiries, has persistently continued in the possession and enjoyment of the easement, except the temporary interruption by the then owners of the soil, in 1858 or 1859, which was promptly resisted by the city. The city has never yielded her right to

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it as an easement; but after various investigations through her constituted authorities, came to the conclusion that the city had a right to it as an easement, which was formally announced, and the claim of the owners denied. Consequently no presumption of dedication can arise from the continued user of the ground as a street, subsequent to the assertion of the claim by the owners in 1847. But the court is of opinion that the right of the city to the easement by the long and continued and uninterrupted user, with the assent and acquiescence of the owners of the soil, prior to that time, justifies the presumption of a dedication, and that they, the owners, were then estopped to reclaim it.

It would protract this opinion too much to pass on the instructions *seriatim* which were tendered by the defendant, and overruled by the court, and the instructions given by the court, and we deem it unnecessary. It will suffice to say that the instructions tendered by the plaintiff and defendant, or as given by the court, so far as they are in conflict with the principles declared in this opinion, are erroneous, and so far as they are in conformity with them, they are right. But we think the verdict is in conflict with the instructions as given by the court. We are of opinion, therefore, to reverse the judgment of the Circuit Court, and to remand the cause for a new trial to be had therein, in conformity with the principles declared in this opinion.

JUDGMENT REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

MOSBY *v.* ST. LOUIS MUTUAL INS. CO.

March Term, 1879.

Absent, BURKS J.*

1. The act Code of 1849, ch. 16, § 18; Code of 1873, ch. 15, § 13, which provides that if in a new law repealing a former law, any penalty, forfeiture or punishment be mitigated by any provisions of the new law, such provisions may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect, applies to forfeitures in civil as well as criminal cases.
2. Though the statute of usury at the time a contract was made declares

*He had been counsel in the court below.

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the contract to be null and void, if at the time of the decree in the case, the statute has been amended, and only avoids the contract for the interest, the decree should be for the principal loaned, with interest from the date of the decree.

This was a suit to enjoin a sale of land under a deed of trust in the Circuit Court of Bedford county, brought by Thomas Y. Mosby against the St. Louis Mutual Insurance Company and others. The ground relied upon was that the debt secured by the deed was usurious. The case is stated by Judge CHRISTIAN in his opinion.

E. C. Burks for the appellant.

Haymond and *R. G. H. Kean* for the appellees.

CHRISTIAN J. delivered the opinion of the court.

This case presents a single question and must be determined by the true construction to be given to our statutes on the subject of usury.

The facts disclosed by the record, so far as it is necessary to refer to them, are as follows:

The St. Louis Mutual Life Insurance Company is a foreign corporation, having its chief office in the city of St. Louis, Missouri.

Its principal business was that of life insurance. In connection with this insurance business, it also had authority under its charter to loan money, and its agents were authorized to make loans of money to those who might take out policies of life insurance in said company.

The loans were to be negotiated upon certain conditions and stipulations prescribed by the rules of the company to its agents, among which conditions it was stipulated that the loanee should take out policies of insurance from said company at its usual rates of insurance, pay the premiums on such policies promptly, pay interest on the proposed loan after the rate of ten *per centum per annum* semi-annually, and secure the payment of the loan by deed of trust or mortgage on unencumbered real estate double the value of the amount of the loan, and execute bonds for the loan to run one year, but renewable upon prompt payment in advance of interest for the next ensuing year, so that such loans should not continue for a period exceeding five years.

John A. Otey was the local agent for the company in the

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county of Bedford, to solicit insurances, negotiate loans and forward applications.

From this agent the appellant borrowed the sum of $2,500, to bear interest at the rate of ten *per centum per annum*. At the same time he took out two policies of insurance (which it seems was one of the conditions of the loan of that amount), one on his own life for the sum of $10,000, and the other on the life of his wife for the sum of $5,000. Upon the former, he was to pay a premium of $318.80, and on the latter, a premium of $132.45. The interest upon this loan was to be paid semi-annually in advance. The premiums and the first half year's interest were to be deducted by the company from the amount of the loan. By the terms of the agreement between the parties, the premiums on the two life policies, and the first half year's interest being deducted from the sum loaned ($2,500), left a balance of $1,923.25. A draft for this amount, and the two policies of insurance were forwarded to Otey, the agent, at Liberty, to be delivered to Mosby whenever he should execute a deed of trust upon his farm of six hundred acres, free from other encumbrance. Upon this farm there was a pre-existing deed of trust to secure one McGhee for the sum of $2,000, which amounted at the time of the above transaction to about $2,200. It seems the object of the loan secured by Mosby was to lift this lien in favor of McGhee, who was pressing for the payment of his debt, and threatening to sell the land under his trust deed. The amount borrowed from the company, after deducting premiums, &c., was not sufficient by some $200 to pay off McGhee's lien; and he was unwilling to release his lien until this balance was paid. This caused some delay in the consummation of the negotiations between Mosby and Otey, the agent of the company, and it was not until the 31st of August, 1872, that a release deed was executed by McGhee; and on that day the net amount of the loan was paid over to McGhee and the policies delivered to Mosby.

Two bonds were executed by Mosby to the company, one for $2,500, the principal amount agreed to be loaned, which was payable twelve months after date, and one for $125, half year's interest, payable six months after date. Both of these bonds were secured in the deed of trust, and there was a stipulation in said deed that upon default in the payment of either, the land should be sold upon certain terms set out therein. Mosby failed to pay at maturity the bond for $125, which became due on the 14th December, 1872, and on the 28th March, 1873, the trustee advertised a sale of the land to

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be made on the 28th April, 1873, for cash, sufficient to pay the whole of the two bonds, to wit, $2,625 with ten *per cent.* interest on $125, from 14th December, 1872, and for the residue of the purchase money on such credit as the grantor, Mosby, might designate. The terms of sale thus advertised were in strict conformity with the provisions of the trust deed.

On the 19th April, 1873, Mosby filed his bill of injunction in which he charged that the contract made with him by the St. Louis Insurance Company was usurious, and prayed "that an issue be directed to be tried by a jury, to try and determine whether or no the transaction aforesaid be usurious, and if found usurious, that the said debts and obligations be declared void; and that defendants be restrained and enjoined from selling said tract of land or any part thereof by virtue of said deed of trust," &c. The defendants, the St. Louis Ins. Co., and their agent, Otey, answered the bill of injunction, in which they deny the allegation of usury, and set out with much detail the whole transaction—not necessary to be further referred to, as the material facts are set out in the foregoing statement.

The cause came on to be heard in the Circuit Court of Bedford on the bill and answers, and replications thereto, when it was ordered that the following issue be tried on the common law side of the court, viz.: "Whether or no the contract in the bill mentioned for the loan of the sum of $2,500 to the complainant by the defendant, the St. Louis Mutual Life Insurance Company, is usurious." Upon the trial of this issue, the jury returned the following verdict: "We, the jury, find that the contract for the loan of the sum of $2,500 in the bill mentioned, to the complainant, the St. Louis Mutual Life Insurance Company, was usurious."

A motion was submitted by the defendant (the Insurance Company) to set aside the verdict and grant a new trial, which motion was overruled, and it was ordered to be certified to the chancery side of the court, that the court was satisfied with and approved the said verdict. And thereupon it was decreed and ordered by the said Circuit Court on the chancery side thereof, that unless the plaintiff, Thomas Y. Mosby, do pay to the St. Louis Mutual Life Insurance Company the sum of $1,923.25 within sixty days from the date of said decree, with six *per cent.* interest thereon; then, that certain commissioners therein named should sell at public auction the tract of land in the bill and proceedings mentioned, for so much cash, as shall be sufficient to pay the expenses of said sale and for the residue, on a credit of one, two

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and three years, in equal instalments, bearing six *per cent.* interest from the day of sale. From this decree the complainant, Mosby, applied for and obtained an appeal and writ of *supersedeas* from one of the judges of this court.

The court is of opinion that there is no error in the said decree to the prejudice of the appellant. Admitting that the transaction was usurious, as found by the verdict of the jury and approved by the judgment of the court, the question is, What is the penalty or forfeiture incurred by the appellee? Is it the forfeiture of the whole amount, principal and interest, or is it the forfeiture of the interest only? It is true, at the date of the contract (June 14th, 1872), the statute as it then stood declared that "all contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is allowed by law, shall be void." But at the time the decree was rendered, this statute was so amended as to declare that such contracts "shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne." Is the case to be governed by the statute existing at the date of the contract, or by that which was in force at the date of the decree? It is insisted by the learned counsel for the appellant that the last named statute is prospective, and not retroactive, and that it applies only to contracts made after its enactment.

It is a sufficient answer to this position to refer to the provisions of our Code upon the construction of statutes, which declares that "if any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of *the party affected*, be applied to any judgment pronounced after the new law takes effect." Now, the penalty or forfeiture under the old law was a forfeiture of the whole debt. This was certainly "mitigated" by the new law, which declares that there shall be a forfeiture of the interest only. It cannot be said that this has reference only to criminal cases, because the language used is general enough to embrace both *civil* and criminal cases. If it had been the intention of the Legislature to confine the provision to criminal cases alone, it would not have used the words "the party affected" thereby, but the word "accused" or some similar word indicating a criminal offence. Indeed, it has been held by this court, that these precise words used in another statute (Code 1860, chap. 216, sec. 2) apply to proceedings whether criminal or civil. (See Jeter Phillips' Case, 19th Gratt., 526 p. q.) Certainly the language of the statute, and the mischief to be remedied are equally to be predicated of

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civil as well as criminal proceedings and judgments. It is further insisted, however, by the learned counsel for the appellant, that the relief to which he was entitled under the plea of usury under the law as it stood at the date of the contract, was a release of the payment of the whole debt; or, in other words, that it was his right to compel a forfeiture by the appellee of the whole sum which he had borrowed from him, and that this right was a vested right which could not be taken from him by any law enacted after the date of his contract. It may here be remarked, that while the statute fixing the penalty for usury as a forfeiture of the whole debt, had not been amended at the date of the contract, yet the statute of construction above referred to was then in existence, and enters into the contract in the same degree as the first named statute. Upon this question, however, it is sufficient to refer to the able and elaborate opinion of Judge Staples in the case of the *Town of Danville* v. *Pace*, 25 Gratt., 1, and the cases there cited; also to the leading case of *Curtis* v. *Leavitt*, 15 New York Reports, quoted approvingly by Judge Staples. Mr. Justice Page said in that case (page 229) "the defense of usury is in the nature of a penalty or forfeiture, and may, at any time, be taken away by the Legislature in respect to previous as well as subsequent contracts, without trenching upon any vested right. A proposition that a party can have a vested right in enforcing a penalty or forfeiture, against which it is the office of a court of equity to relieve, is a legal solecism. Statutes of usury are highly penal in their character, and the defence of usury has always been regarded as an unconscientious defence, and has never received the favor either of courts of law or equity. No penalty can be enforced after the repeal of the law imposing it, unless saved by express words in the repealing act. * * * The repealing statute obliterates the statute repealed as completely as if it had not been passed, and it must be considered as a law that never existed, except for the purpose of those contracts which were commenced, prosecuted and concluded while it was an existing law." In the same case, Judge Selden said, "Usury being a mere statutory defence, not founded upon any common law right, either legal or equitable, it was clearly within the power of the Legislature to take it away."

Applying these principles to the case before us, we are of opinion that there is no error in the decree of the Circuit Court, and that the same be affirmed.

DECREE AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

TALBOTT *v.* RICHMOND & DANVILLE R. R. CO.

March Term, 1879.

1. C. and G., owning lots in Richmond, each bounded east by Seventeenth street, and separated by what was at one time the bed of Shockoe creek, but from which the water of the creek had been diverted, enter into a deed by which they fix the boundaries of their lots, respectively, and they covenant and agree that there shall be between their lots a street thirty feet wide, extending from Seventeenth street westwardly to the eastern boundary of their lots, and that said street shall be forever kept open as a highway and common, for the use of the persons who may be the owners of the lots or land bounded on either side of said street. The street thus provided for did not extend west to any street or alley. HELD:
   1. Looking to the whole deed and the surrounding circumstances, there was not a dedication of the street to the public generally, but only to the owners of the lots or parts of the lots spoken of in the deed; and it is not, therefore, a street over which the city authorities have control, and can authorize a railroad company to lay its track along it.

This was an action on the case in the Circuit Court of the city of Richmond, brought by Chas. Talbott against the Richmond & Danville Railroad Company, to recover damages for injury done to certain real property of the plaintiff, by a railroad track laid by the company in the street or alley in the city. The question on which the case turned is, Whether this street or alley was a public street or alley, over which the city of Richmond had authority under its charter, and could authorize the railroad to lay down a track along it? This question depended upon the construction to be given to the provisions of a deed bearing date June 16th, 1838, entered into between John G. Gamble, who owned the ground on one side of the street or alley, and George M. Carrington, who owned, or represented the parties who owned, the ground on the other side of said street.

After the evidence had been introduced, the defendant moved the court for two instructions; which the court refused to give, but gave another. These instructions are as follows:

1st instruction asked for by defendant.

If the jury believe, from the evidence, that the railroad track mentioned in the declaration was constructed with the

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assent of the Common Council of the city of Richmond, then they must find for the defendant.

2d instruction asked for by defendant.

If the jury believe, from the evidence, that the plaintiff's claim of title to the use of the alley is founded upon the deed of and possession thereunder of the property conveyed in said deed, they are instructed that this deed constituted a dedication to the use of the city of Richmond, and that the defendants are not liable in damages for constructing and using their railroad track through said alley with the assent of the proper authorities of said city; which the court declined to give, but gave to the jury the following instructions, which is in the words and figures following, to wit:

Instructions given by the court.

The jury are instructed, that under the deeds exhibited in evidence by the plaintiff, in tracing his title to the property in the declaration mentioned, taken in connection with the deed also exhibited by the plaintiff, of date of June 16, 1858, between George M. Carrington, administrator *de bonis non*, &c., and John G. Gamble, the rights of the plaintiff in and to the alley through which the railroad track of the defendants passes, were limited to the use of the same as a highway in common with the owners of lots on the other side of the alley, and subject to the control of the municipal authorities of the city of Richmond, whenever they should elect to exercise control over the same as a public highway or street. And the defendants having shown that they became, by purchase from Solomon A. Myers, the owner of a lot on the other side of said alley, and that they were authorized by the Common Council of the city of Richmond to construct a railroad track through the said alley: If the jury shall believe, from the evidence, that the defendants did construct their railroad track through the said alley, under the supervision of the authorities of said city, and in accordance with the conditions upon which they were authorized by the said Common Council to construct the same, and with reasonable care and caution to avoid injury to the plaintiff in the obstruction of the right of ingress and egress to his property, the plaintiff has no right to recover any damages in this action, and the jury should find for the defendants; to which instruction, and the opinion of the court granting the same,

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the plaintiff, by counsel, excepted, and prayed that this, his bill of exceptions, may be signed and sealed and allowed by the court, which was accordingly done.

There was a verdict and judgment for the defendant; and Talbott applied for a writ of error, which was allowed. The facts are stated by Judge BURKS in his opinion.

Steger & Pleasants and *Guy & Gilliam* for the plaintiff.

H. H. Marshall and *F. L. Smith, Jr.*, for the defendant.

BURKS J. The assignments of error in this case are based exclusively on the instruction to the jury on the trial in the court below. The foundation of the instruction rests on the assumption, that the alley on which the defendant laid its track was a highway, one of the streets of the city of Richmond, subject to the municipal authorities of said city; and that the defendant was duly licensed by said authorities to construct its road over and through the said alley. It is not claimed that there was any implied dedication of this alley to the public use, deducible from acts *in pais*, parol declarations, user, and the like. If there was any dedication at all, it was an express dedication by the deed of the 16th of June, 1838, between Carrington and Gamble—the former acting for himself, and also in behalf of the devisees of Richard Adams, deceased, their representatives and assigns, under whom the plaintiff claims title.

The court did not err, as the learned counsel for the plaintiff in error seem to suppose, in not referring the question of dedication to the decision of the jury. It was the province of the court to determine that question, as it depended upon the construction of the deed. The true inquiry for this court is, Whether there is any error in the construction adopted by the Circuit Court?

Intent is the vital principle of dedication. In a case, where acts and declarations are relied upon to shew such intent, to be effectual, they must be unmistakable in their purpose and decisive in their character; and in every case, it must be unequivocally and satisfactorily proved. *Harris' Case*, 20 Gratt., 833; *Holdane* v. *The Trustees of the Village of Cold Spring*, 21 New York R., 474, 477; Washburn on Easements, marg. pp. 133, 134; 2 Dillon on Mun. Corp., § 499, and notes. And this would seem to be the right guide to judicial interpretation in such cases; for we know that the individual owners

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of property are not apt to transfer it to the community, or subject it to the public servitude, without compensation, and such donation is not to be readily inferred.

To ascertain the intent of the parties is said to be the fundamental rule in the construction of agreements (*Canal Co.* v. *Hill*, 15 Wall. U. S. R., 94); and in such construction, courts look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Nash* v. *Towne*, 5 Wall. U. S. R., 689, 699; see also, *Maryland* v. *R. R. Co.*, 22 Wall. U. S. R., 105; *Moran* v. *Prather*, 23 Idem., 492, 501.

It appears by the recitals in the deed, which is the subject of construction, that at the time it was executed, the dividing line between the Adams lot, known in the plan of the city as lot No. 339, now the property of the plaintiff, and the Gamble lot, which lay south of it, designated in said plan as lot No. 323, was the ancient course and channel of Shockoe creek, which had been changed by certain artificial works constructed by the said city, so that it was matter of doubt and difficulty to determine where the ancient channel of the creek was. The object of the deed, as indicated by the recitals, was two-fold: 1st. To fix permanently and with certainty the boundary between the two lots, "for the purpose," as expressed, "of avoiding disputes and litigations respecting boundaries." 2d. To promote "the convenience of all parties interested" in the lots. To accomplish this double purpose, the parties agreed as follows: "The parties to this indenture have this day agreed, that the boundary between said described land of said Richard Adams, deceased, and said lot number three hundred and twenty-three (323), shall be a street thirty feet wide, extending from Seventeenth street westwardly to the eastern boundary of lot number three hundred and thirty-nine (339), which street shall be parallel to D street, and distant therefrom one hundred feet, and it is agreed that said street shall be forever kept open as a highway for the benefit of the lands and lots on both sides thereof."

The deed, after conveying to Gamble, on behalf of the devisees of Richard Adams, all the right, title and interest

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which the said Richard Adams, at the time of his death, had in and to all and every part and portion of the land and lot of ground lying south of said thirty foot street, and to the said devisees, on behalf of Gamble, all the right, title and interest which said Gamble has in and to all and every part of said land, lying on the south side of D street, between Seventeenth street on the east and lot No. 339 on the west and north of the said thirty-foot street, concludes with the following covenant, substantially the same as the agreement before recited: "And the said parties do covenant and stipulate with each other, that said thirty-foot street shall forever remain open as a highway and common for the use of the persons who may be the owners of the lots or land bounded on either side of said street."

It is upon the language of this covenant, and the preceding one before recited, that the learned counsel for the defendant in error chiefly rely as establishing the alleged dedication to the public use of the strip of land, concerning which the controversy in this case has arisen. The land is designated as a "street"—"a thirty-foot street"—and the agreement is, "that said street shall forever be kept open as a highway." This language, taken alone, might be a sufficient indication of a purpose to dedicate to the public use. The term "highway" is a generic name for all kinds of public ways—ways common to all the people of the State having occasion to pass over them.—Holt, Chief-Justice, *Queen* v. *Saintiff*, 6 Mod., 256. To constitute a highway, it must be one over which all the people of the State have a common and equal right to travel, and which they have a common, or at least a general, interest to keep unobstructed.—*People* v. *Jackson*, 7 Mich. R., 432, 446.

But seeking the intent of the parties as manifested by the instrument, we are not, under the established rules of construction, to be tied down to the terms and expressions referred to. Especially are we not at liberty, arbitrarily, to break up the intimate companionship of words and lop off one member of a sentence from another. The maxim is, *noscitur a sociis*. We must consider all the language employed—the instrument as a whole and every part of it. The general intention to be collected from the whole context; and every part of a written instrument, is always to be preferred to the particular expression. "Every deed," observes Hobart, C. J., "ought to be construed according to the intention of the parties, and the intent ought to be adjudged of the several parts of a deed as a general issue out of the evidence,

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and ought to be picked out of every part, and not out of one word only;" and such a construction should be put upon particular words as will best answer and effectuate the apparent general intention. *Ex antecedentibus et consequentibus optima fit interpretatio.*—Addison on Contracts, (2d Amer. Ed.), top p. 845, marg. 846.

The agreement of the parties is not merely that there "shall be a street thirty feet wide," and "that said street shall be forever kept open as a highway," but the purpose for which it is to be kept open is declared. It is called a highway, but it is expressly for "*the benefit* of the lands and lots on both sides thereof." While called a highway, it is not for the public accommodation—not for the public use—but, in express terms, "for the use of the persons and parties who may be the owners of the lots or land bounded on either side of said street." The common meaning of the term "highway" is explained and qualified by the language used in connection with it. If, indeed, it was used by the parties to the deed in the sense of a public way, then the attempted dedication was to a limited portion of the public, and such a partial dedication is simply void, and will not operate in law as a dedication to the whole public. There may be a dedication of a way to the public for a limited use, but there cannot be a dedication to a limited part of the public.—*Poole* v. *Huskinson*, 11 Meeson & Welsby, 827. But I do not regard any dedication, partial or otherwise, as intended. I think the language of the deed, fairly construed, manifests a purpose merely to adjust and fix with certainty the boundary between the two lots, and establish a common right of way to be annexed as a permanent easement to the lots, for the convenience of the owners, and not for the accommodation of the public.

This construction appears the more reasonable, when we consider the situation of the property in dispute. It is not a thoroughfare, but what is denominated a *cul de-sac.* It is an alley thirty feet in width, and only two hundred feet in length, with an entrance from Seventeenth street on the eastern side, and no outlet on the western. It affords no accommodation to any persons except the owners of the lots bounded by it. To them it is of great convenience. It is of no advantage to the public, and could not be unless extended westwardly so as to connect with some public street in that direction. It is most unreasonable, therefore, to suppose that any dedication of a way to the public could have been intended.—*People* v. *Jackson*, 7 Mich. R., 432, 448.

The conduct, too, of the parties, which may be looked to

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in a case like this, throws much light on the subject.—*Railroad Company* v. *Trimble*, 10 Wall. U. S. R., 367.

In 1846, the plaintiff, in conjunction with his brother, became the purchaser of one-half of the Adams' lot, upon which they immediately erected a foundry. They found the thirty-foot alley, from its condition, wholly useless, and they filled it up and improved it at their own expense, so as to make it a fit way of ingress and egress to and from their foundry. They purchased the residue of the lot in 1853, and from the date of their purchases, they had the continued use and enjoyment of the lot and the alley in the rear without any objection from any quarter, and without molestation until the defendant laid the railroad track, which was the occasion of the present suit. In 1846, when the first purchase was made, the plaintiff and his brother, who were co-purchasers, put up a high gate, closing the entrance to the alley on Seventeenth street, without objection on the part of the owners of the Gamble lot or any other person, and this gate remained until removed some time in the winter of 1865–'6. In the meantime and hitherto, so far as appears, the municipal authorities of the city of Richmond have never, in any way, recognized the alley as a public street, or exercised any control over it in the way of grading, paving, lighting, police regulation, or user of any sort.

As it thus appears that no dedication to the public was intended, there could be, of course, no acceptance, without which a dedication is incomplete, and the Common Council of the city of Richmond, if it attempted to do so, could not confer a right where it had none

It follows, from what has been said, that the instruction given to the jury is, in my opinion, erroneous, and that the judgment of the Circuit Court should be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

It appears, that the defendant has purchased from one Myers a portion of the property bounded by the alley in question, and is, therefore, a tenant in common with the plaintiff of the way over it. As such tenant, it is entitled to use said alley as a way in common with its co-tenants, but without prejudice to their rights. Whether it has the right to lay a railroad track at all in said alley and use it as such, is a question not presented by the instruction given in this case, and I express no opinion upon it.

JUDGMENT REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

BROCKENBROUGH'S EX'X AND AL. *v.* BROCKENBROUGH'S ADM'R AND ALS.

MARCH TERM, 1879.

1. A deed of trust is given in 1870, to secure a *bona fide* debt of $10,000, evidenced by four notes, payable in one, two, three and four years, and conveys a tract of land with the crops then upon or thereafter grown upon the land until said notes are fully paid, all stock of horses, mules, cattle, sheep and hogs, with the increase of the same then on the said land and thereafter placed on the same, and all farming implements used in the cultivation of the said land. HELD:
   1. The deed is not *per se* fraudulent on its face.
   2. *Quære:* If the crops thereafter grown upon the land, or the increase of the stock, or other stock or implements afterwards put upon the land, pass by the deed, and will be protected against subsequent execution creditors.
2. Pending a suit by judgment creditors to set aside the deed as fraudulent, the grantor makes a deed of quit claim to his creditor of all the property conveyed in the deed: but the notes are not given up, nor is the deed of trust released. HELD: That whether the trust is released depends upon the intention of creditor; and in this case it was held upon the evidence there was no such intention.
3. A deed of trust to secure certain debts conveys certain real estate, and the grantor reserves in it, to himself and his family, all exemptions and property allowed by the Constitution of Virginia, and all laws passed in pursuance thereof, and in addition thereto, all exemptions allowed under the bankrupt laws. HELD: The reservation is legal and valid.
4. L. brings an action on a bond against B, which is on the office judgment docket of the court at its March term, which commences on the third of the month, and the office judgment is confirmed on the fifth, which is the last day of the term of the court. On the first day of the same term of the court B. goes into court, and confesses a judgment in favor of S., no suit having been instituted against B. by S. HELD:
   1. The judgment in favor of S. is valid, though no suit had been instituted by him against B
   2. That the judgment of L. relates back to the first day of the term, and the law not regarding a fraction of a day, both judgments stand as of the same date.

This was a suit in equity in the Circuit Court of Richmond county, brought in March, 1874, by Lucy C. Brockenbrough, executrix of Littleton Brockenbrough, deceased, and Ferdinand Shackleford, administrator of Thomas R. Shackleford, deceased, judgment creditors of John M. Brockenbrough, to set aside as fraudulent three deeds of trust made by the said John M. Brockenbrough. The creditors secured, as well as John M. Brockenbrough, answered, denying the fraud.

The first of these deeds bears date the 26th of October, 1870, and by it John M. Brockenbrough and Austina, his

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wife, for the purpose of securing the payment of four notes therein described, due to J. M. Parr, of Baltimore, conveyed to Thomas Croxton, a tract of land called the Island, and personal property, &c. It appeared very clearly from the evidence that Parr lent to Brockenbrough $10,000 at twelve *per cent.* interest, and the notes mentioned in the deed were given for that loan; and certainly as to him and the trustee, Croxton, there was no fraudulent intent; and as to Brockenbrough, there was no evidence of fraud unless it was to be inferred from the provisions of this and subsequent deeds.

The second deed bore date the 28th of February, 1873, and by it John M. Brockenbrough conveyed to T. R. B. Wright, a farm called the Cottage, containing two hundred and eighty-four acres, in trust to secure to Lucy C. Brockenbrough, executrix of Littleton Brockenbrough, deceased, $3,400 due by bond, and to F. Settle, superintendent of the poor, and his successors in office, $1,327.56, with interest from 1st of February, 1872, due by bond. And the said Brockenbrough reserved to himself the right to and use of said property until the 1st of January, 1877, unless he, the said Brockenbrough, shall consent to a sale at an earlier day; and upon the further trust that the said Wright, with the consent of the said Brockenbrough, shall sell at any time; but after the 1st of January, 1877, if payment is demanded by said creditors, upon the terms and in the manner prescribed by section 6, chap. 117, Code of Virginia, in all respects, except that it shall not be for cash, but upon such terms as are provided for in the Act of the General Assembly, entitled an act to regulate judicial sales, and prevent a sacrifice of property, approved July 11th, 1870. And upon the further trust that the said Wright, with the consent and under the direction of said Brockenbrough, shall, at any time, sell the said tract of land in part or in whole, as said Brockenbrough might deem most expedient, and also cut and sell any wood and timber, and appropriate the proceeds of the same, as well as the rents and profits, to the payment of the debts secured. And it is expressly covenanted and agreed by the said Brockenbrough, that he reserves to himself and family all exemptions and property allowed by the Constitution of Virginia, and all laws passed in pursuance thereof, and in addition thereto, all exemptions allowed under the bankrupt law. This deed was admitted to record on the 6th of March, 1873.

By deed of the same date as the last named, the said John M. Brockenbrough, reciting that his wife Austina had united

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with him to convey all her right and interest in certain lands mentioned, devised to her by her father, and also in conveying her contingent right of dower in the Island, and that it was agreed between them that in lieu thereof, he should settle upon her for her benefit certain other property of adequate value and amount. And, whereas, her brother, Austin Brockenbrough, did by his will give to said Austina personal property to the amount of $6,000, which, with interest, now amounts to $8,000, to be made over to her by her husband by deed, which said sum has been received by the said John M. Brockenbrough, he, in consideration of the premises and the further consideration of the natural love and affection which he, the said John M. Brockenbrough, has for his wife, conveys to T. R. B. Wright, his farm called the Cottage, after payment of the debts due Lucy C. Brockenbrough and F. Settle, also his interest in the Island, subject to the payment of the debt to Parr, with all crops, houses, &c., &c., in trust for the use and benefit of himself and wife, and in no way subject to his debts, during their joint lives and the life of the survivor, and then to their children.

It appears that the plaintiff, Lucy C. Brockenbrough, had brought a suit on the bond held by her against John M. Brockenbrough, and that at the March term of the County Court, which commenced on the 3d day of the month, she recovered a judgment against him. And she refused to accept the deed executed for her security.

It appears further, that Settle had not instituted an action on the bond due to him, but on the first day of the March term of the court, Brockenbrough went into court and confessed a judgment for the amount of the bond, without any process having issued against him. And upon this ground the plaintiffs, in their bill, contested the validity of his judgment.

It appears further that the tract called the Island was devised by Moore F. Brockenbrough to his five sons. That under a decree for partition of the land in 1853, the commissioners allotted the whole tract to B. W. Brockenbrough, who agreed to take the same at the valuation put upon it, and he conveyed it to Richard H. Harwood and others, in trust to secure to the several parties interested in the property their proportions of the purchase-money. One of these parties was John M. Brockenbrough, and another was Littleton Brockenbrough, the testator of the plaintiff, Lucy C. Their shares were each $5,595.18¾. Another share of the

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same amount was due to Edward Brockenbrough, who seems to have died previous to the year 1870.

By deed dated the 30th of August, 1870, B. W. Brockenbrough, in consideration of the payment of all debts due by him to Edward Brockenbrough, deceased, as well as the payment by J. M. Brockenbrough of the liabilities incurred by the said B. W. Brockenbrough on account of the Island property, the release of all demands held by the said J. M. against the said B. W. Brockenbrough, in any way, and of the further consideration of $3,250 paid to the said B. W. by the said J. M. Brockenbrough, conveyed to the said J. M. Brockenbrough the tract of land called the Island, with all the personal property thereon, and his, the said B. W. Brockenbrough's interest in the estate of Edward Brockenbrough, deceased.

In the progress of the cause, the court directed commissioners to ascertain and report what moneys are still unpaid and due by B. W. Brockenbrough as purchaser of the farm called the Island, and to whom the said moneys are due, and also what liens, whether by deeds of trust or otherwise, there are upon the realty and personalty mentioned in the complainants' bill, and any other matter deemed pertinent by him, or that he may be requested to report specially by any party in interest.

In pursuance of this decree, the commissioner made a report of the debts of J. M. Brockenbrough, which were liens, and their priorities. The first is a judgment recovered by Thomas Shackleford on the 8th of April, 1867, for $300 of principal, interest and costs $154.15. The second is the four notes due J. M. Parr, secured by deed to Croxton, amounting to $132.40. He states the judgment of Settle as of March 3d, 1873, the first day of the court, and that of Mrs. Lucy C. Brockenbrough as of the 5th of March, the last day of the term, when the office judgment was confirmed.

The amount due by B. W. Brockenbrough on the purchase of the Island farm, and secured by deed of trust to Harwood and others, principal and interest $11,860.88, to Edward Brockenbrough, and to Wm. F. Brockenbrough a balance of $286.17. John M. Brockenbrough was the administrator of Edward Brockenbrough, and the estate was debtor to him on his administration account $1,048 03, and the other outstanding debts of Edward not paid were $475.76. The commissioner also makes what he calls an approximate estimate of division of the estate of Edward Brockenbrough, and after deducting the outstanding debts, including the

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amount due the administrator, and the expenses of collecting the fund, he makes the amount for division $10,030.88. One-sixth of which, $1,671.81, was due to B. W. Brockenbrough, W. W. Brockenbrough, John M. Brockenbrough, Robert Knox and wife, and W. R. Aylett and wife, and one-sixth was due to the three children of Littleton Brockenbrough, each the sum of $597.27.

While the cause was pending in the court, and after the commissioner had settled the accounts as before stated, the plaintiffs filed a supplemental bill, in which, after referring to these accounts, they charge that since the filing of their bill, the debt to Parr secured by the deed to Croxton, had been paid off and satisfied by John M. Brockenbrough, and that he has been discharged of the same by the said Parr, and the notes specified in said deed of trust have been surrendered to said Brockenbrough, but that Croxton has not executed to Brockenbrough a deed of release, but still holds the legal title to the property specified in said deed; and making John M. Brockenbrough, Parr and Croxton parties defendants to the bill, they pray that the property may be sold for the payment of their debts, and for general relief.

Croxton and Parr answered the supplemental bill; Croxton denied the allegations of the bill, that the notes due to J. M. Parr, and secured by the deed of trust, had been satisfied by J. M. Brockenbrough. Respondent had advertised for sale the Island and other property to satisfy said notes, and the sale was enjoined. In this state of matters Brockenbrough made and executed a deed of quit claim to the Island and certain personal property mentioned in said deed of quit claim, and put said Parr in possession of the same until the court shall have settled the question of the validity of various claims sought to be enforced against said property, some of which existed by virtue of a deed of trust made by B. W. Brockenbrough many years before the deed to respondent was made. The sole interest of J. M. Brockenbrough was his equity of redemption and possession, the value of the first to him being nothing; no sale could be made on account of the interdict of the court, and when that should be removed, this respondent, as well as Parr, knew that liens to the amout of from five to six thousand dollars at least, existed ahead of his claim for the notes due said Parr; the possession of the land was valueless to Brockenbrough, because of his inability to cultivate it, and hence he was anxious for a sale; but as he could not sell, he made the deed and quit claim to his largest creditor. He avers that no sale of the Island and

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other property has ever been made, nor has respondent ever heard of any arrangement to make a deed of release or surrender of the notes secured in the trust to him; certain it is, that nothing of the sort has been done.

Parr denied that Brockenbrough had paid the notes given him by Brockenbrough and secured by the deed of trust. Up to October 13, 1874, Brockenbrough had paid him $792.38, arising from sales made from the Island, as he understood, and that was all.

The deed from J. M. Brockenbrough to Parr bears date the 16th of November, 1874, and in consideration of the sum of five dollars, Brockenbrough doth grant, sell, convey and forever quit claim unto the said Parr all his right, title and interest in the farm called the Island, with the following personal property, specifying it.

Several witnesses were examined as to what had been said by Brockenbrough and Croxton in relation to this transaction.

The cause came on to be heard on the 25th of November, 1875, when the court held that the deed of trust made by J. M. Brockenbrough and wife to T. Croxton for the benefit of J. M. Parr, was good against all creditors seeking to establish liens upon the farm called the Island, except those named in the commissioner's report, secured in the deed of trust made by B. W. Brockenbrough to Harwood and others, and it appearing from receipts filed, that W. F. Brockenbrough, W. R. Aylett and wife, the heirs of Littleton Brockenbrough, and Knox and wife, have been paid the sums reported due them in said report, and it being the opinion of the court that the claims reported as due J. M. and B. W. Brockenbrough passed under the deed to Croxton; and it further appearing that J. M. Brockenbrough has, since the death of his wife, made to J. M. Parr a deed granting all his interest in said Island farm, the injunction awarded in the case of *Shackleford* v. *Croxton, &c.*, is dissolved.

The court was further of opinion that the personal property of J. M. Brockenbrough, not in existence on the Island farm at the date of the deed to Croxton, embraced in the deed to J. M. Parr of November, 1874, except such as was substituted or exchanged for that then on the said farm, is liable to the execution lien of B. W. Brockenbrough; and it was ordered that one of the commissioners of the court should ascertain and report what personal property passed under the deed from J. M. Brockenbrough to Parr of November, 1874, not embraced in said deed to Croxton, or substituted or exchanged therefor.

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The deed to T. R. B. Wright having created interests in the Island farm which could not and did not pass under the deed from J. M. Brockenbrough to J. M. Parr, it is ordered that said Croxton, trustee, proceed as directed by the deed from Brockenbrough and wife to him, to sell said land and report his proceedings to the court. And the court further orders that J. M. Parr surrender to J. M. Brockenbrough the notes taken and secured in the deed to Croxton, trustee. And the trustee, Wright, was directed to proceed to sell the Cottage farm embraced in the deed of trust to him, and report to the court. The plaintiffs thereupon applied to a judge of this court for an appeal; which was allowed.

George Walker and *Jones & Son* for the appellants.

Jones & Bouldin for the appellees.

BURKS J. delivered the opinion of the court.

HELD as stated in the head-notes.

DECREE AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

BECKWITH AND WIFE *v.* AVERY'S ADM'R, &C.

MARCH TERM, 1879.

In a suit brought in 1849, by Asa Avery's adm'r, with the will annexed, he is authorized to pay Mary and Nancy Hawthorne, legatees for life, money in his hands, upon their executing bonds with security for its return at their death, which was done. Mary dies, and by another decree made in 1853, the money paid her is collected and paid to Nancy, who had inter-married with Josiah Beckwith, upon their giving bond for its return at Nancy's death, which was done. In June, 1874, upon a suggestion that the sureties in the two bonds given by Nancy, before her marriage, and by her and her husband afterwards, are insolvent. A rule was awarded against them to show cause, if any they could, why they should not be required to give a new bond with undoubted security, for the return of the money on the death of said Nancy. Beckwith appeared and filed his answer on oath to the rule, insisting that there was no evidence on the record that the sureties on the bonds were insolvent. But upon the affidavit of E. R. Turnbull, and the statement of the administrator, the court below, on the same day, on the motion of the parties claiming to be entitled as remaindermen, made an order

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that unless Beckwith and Nancy, his wife, executed a new bond in the penalty of ten thousand dollars, with condition to pay the sum of $4,216.22, that being the sum in their hands, on the death of said Nancy, that said administrator should proceed to collect the said last named amount from them. From which decree Beckwith and Nancy, his wife, appealed. HELD:

1. The penalty of the bond required was excessive, and half of it, or at most $6,000, would have been sufficiently large.
2. Beckwith and wife having had no opportunity of excepting to the affidavit and statement, which were *ex parte* in the court below, they may object to them as evidence in the Appellate Court.
3. The object of the suit brought by the administrator in 1849 having been accomplished, so far as he was concerned, and the parties entitled in remainder not having been parties to that suit, after the long lapse of time since anything had been done in the case, it was improper to proceed by the rule against Beckwith and wife to require the new bond, but the remaindermen should be required to file a supplemental bill in the cause for the purpose, upon which the whole rights of the parties can be properly adjudicated.

From the Circuit Court of Brunswick county.

James Alfred Jones for the appellants.

L. R. Page and *H. L. Lee* for the appellees.

MONCURE P. delivered the opinion of the court, in which the other judges concurred.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

STAMPER'S ADM'R *v.* GARNETT AND ALS.

MARCH TERM, 1879.

A case in which, from the lapse of time, the death of all the parties cognizant of the transactions, the destruction of the records of the county, and loss of papers, it was held that an account of administration of an estate could not be settled without great danger of injustice to the deceased administrator, and therefore refused.

This was a suit in equity in the Circuit Court of New Kent county, brought in July, 1871, by Alpheus H. Garnett and others, as the residuary legatees of Anderson Crump, deceased, against the administrator *de bonis non*, and widow and heirs of James Stamper, deceased, who in his lifetime had been the administrator *de bonis non* with the will annexed of

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said Anderson Crump, for the settlement of the accounts of Stamper as administrator, and payment of the amount which might be found due on that account.

Anderson Crump died in 1852, leaving a will, and a considerable estate, consisting of land, slaves, stock on the farm, and debts due him; and Nathaniel L. Savage qualified as his executor. Savage died in 1853, when Stamper qualified as administrator *de bonis non*, &c. He died in September, 1856, when John S. Lacy qualified as administrator, &c., of Anderson Crump, and Robert Howle qualified as administrator of Stamper. Howle died in 1862, and there have since been two administrations on Stamper's estate.

In September, 1871, there was a decree for an account; and in April, 1874, the commissioner returned his report. To this report, the defendants filed thirteen exceptions; but the only question was, upon the possibility of settling the accounts after the lapse of time, the death of all the parties having any cognizance of the accounts and destruction during the war, of all the records of the clerk's offices and courts of New Kent county.

The cause came on to be finally heard on the 27th of November, 1876, when the court overruled the defendant's exceptions, and made a decree in favor of the several plaintiffs for the amounts reported to be due to them. And thereupon Stamper's administrator applied to a judge of this court for an appeal, which was allowed.

John A. Meredith and *B. W. Lacy* for the appellant.

J. Alfred Jones for the appellees.

ANDERSON J. delivered the opinion of the court, in which MONCURE P. and CHRISTIAN J. concurred.

STAPLES and BURKS JJs. dissented.

HELD as stated in the head-note.

DECREE REVERSED.

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CHANCERY COURT OF THE CITY OF RICHMOND.

MINOR *v.* MCDOWELL AND OTHERS.

1. A direction to a commissioner to examine a person on oath, who is not a party to the cause, or impleaded before the court, is a nullity.
2. A bond dated in August, 1858, payable five years after date in "current money of Virginia," for the value of a slave emancipated by the results of the war, is a valid contract payable, not in Confederate money, which was the only currency in circulation when it became due, but is payable after the war in United States currency.
3. The obligor and obligee both living in the Confederate lines, the interest runs on the bond during the war.

From the Chancery Court of the city of Richmond.

The facts are sufficiently stated in the notes of the opinion of the court, for a proper understanding of the points decided.

James Pleasants for the plaintiffs.

James Lyons for the defendants.

FITZHUGH J. This case comes before me now on exceptions to the report of Commissioner Leake of May 24, 1876, by the widow and child of Thomas P. McDowell.

This report has reference exclusively to the claim of Mrs. Mary B. Ross, as set forth in her petition, and the proceedings and papers connected therewith.

I will consider first what is termed in the exceptions a protest against the report of the commissioner. In the decree of December 4, 1875, as originally submitted by counsel, the following clause was inserted: "And how much money, principal and interest, is due to the estate of T. P. McDowell, deceased, by Thomas L. Preston, and in making such inquiry, he is authorized to examine the said Preston on oath if he deems it necessary, or is required to do so by any party."

This clause was stricken out by the court because T. L. Preston was not a party to any of the causes, was not in any way before the court, nor in any way impleaded before it. A decree under such circumstances against Preston would have been a nullity as to him.—See *Moseley* v. *Cocke*, 7 Leigh, 226.

I do not think Preston was a necessary party to this prc-

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ceeding. Thomas P. McDowell was the principal debtor; Preston was the surety. McDowell was dead. A creditor's bill had been filed against his estate, and Mrs. Ross came in by petition to assert a claim against McDowell's estate. Wright, the administrator of Thomas P. McDowell, answered the petition. When he did so, the petition of Mrs. Ross was ready for hearing. In this state of the case, the decree of December 4, 1875, was made. It is endorsed as asked for by Mrs. Ross, and concurred in by counsel for McDowell's administrator. But upon the face of the decree it is one ordered by the court upon the petition and answer, and not by consent. Upon the petition and answer, it was a decree which, I think, might properly have been made by the court, even if it had been made *in invitum*. In the answer of the administrator, allusion is made to some transactions between Thomas P. McDowell's estate and T. L. Preston, that is, to a fund alleged to be in the hands of Preston, and due to the estate of McDowell, placed there with the consent of Mrs. Ross. But I do not think this affirmative allegation of the answer is sufficient to arrest Mrs. Ross in the pursuit of her rights against the estate of McDowell, the dead principal debtor, or that it makes Preston, the surety, a necessary party to this proceeding. The rights of McDowell's estate as against Preston, arising on the fund alluded to, or from any other cause, are not affected or prejudiced by this proceeding against McDowell's estate.

This objection to the report of May 24, 1876, is therefore overruled.

The exceptions marked 1 and 2 will be considered together.

The points involved in these two exceptions seem to be embodied in five several specifications of the grounds upon which it is asked that this cause be recommitted, and are to be found at the close of the second exception.

The first is:

1. "What is the proper interpretation of a contract to pay in current money (not in lawful money, which he (the commissioner) has interpolated in his report) upon the contract?"

This was not a confederate contract. The evidence of the claim of Mrs. Ross is a bond, of which the following is a copy:

"Five years after date, with interest from date, we promise and bind ourselves, our heirs, executors and administrators to pay to Charles S. Carrington, trustee for Mrs. Mary B.

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Ross, the just and full sum of one thousand and fifty dollars ($1,050) current money of Virginia for value received. As witness our hands and seals this 11th day of August, 1858.

(Signed) THOS. P. MCDOWELL [Seal.]
THOS. L. PRESTON [Seal.]"

It is judicially known, that in 1858 there were notes of the banks of Virginia in circulation which were then the common, and practically the exclusive currency.—*Omohundro* v. *Crump*, 18 Gratt., 706. That, I think, was the "current money of Virginia" to which the parties to the bond referred; and I am of opinion, that this expression excluded the idea of coin. They intended that a payment in such currency should satisfy the contract, and I think a tender of such currency, while it was a currency or circulating medium, would have been good. It must be observed, however, that the subject of contract in this class of cases is paper circulating as currency. It is not merely the paper itself without its attribute as a currency or circulating medium. If at the date of payment fixed in such a contract, Virginia bank notes had ceased to circulate, or to have value as a currency, a tender of such notes in payment would not satisfy the contract. See remarks of Joynes J. in *Dearing* v. *Rucker*, 18 Gratt., 447. His remarks were made with reference to Confederate notes, but the principle he announces is applicable here.

The evidence in this case shows that the current money of Virginia contemplated by the contract in this case had practically ceased to exist as a currency. Virginia bank notes in August, 1863, when the bond matured, had ceased to circulate. See Goddin's deposition. Does it follow, then, that the creditor is to get nothing? Judge Joynes' attention was called to this question in the case just referred to, and at pp. 447, 448, he says: "It does not follow, therefore, from what I have said, that in the case supposed the creditor would recover nothing. A different rule must be applied in such cases from that which applies in the cases I have been considering, where, at the day agreed for payment, the notes continue to circulate and to have value as a currency. There may be some difficulty in saying what rule should be applied in such cases." It was not decided in that case, and so far as I know, the point I am now called on to decide in this case—viz., to what recovery the creditor is entitled, on an *ante bellum* debt payable in current money of Virginia, and

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maturing and becoming due and payable in August, 1863?—has not been decided by our Supreme Court of Appeals.

After the best consideration I have been able to give to the question, I am of opinion that the conclusion of the commissioner—namely, that the bond, principal and interest, is payable in the legal currency of the United States—meets the substantial justice of the case, and is right.

The currency of the United States is one which bears the same relation to coin now that "current money of Virginia"—in other words, Virginia bank notes—did to coin in 1858, when the contract was made, except that, perhaps, in 1858 Virginia bank notes were at par as compared with specie, while the United States currency is below par. But that is in favor of the debtor, for it enables him to pay in depreciated currency, and he cannot complain of that.

2. "What was current money at the time of the maturity of the note in question?"

In August, 1863, when this bond matured, I have no difficulty in finding that Confederate States treasury notes were the only medium of circulation.

5. "Whether the tender was made, which is alleged in the answer of the administrator of McDowell was made, and in what kind of currency it was made."

As to this question, I remark that, in my opinion, no tender was made at all.

Mr. Chas. S. Carrington says that some time during the war, at what time he cannot remember, he received a communication from Mrs. McDowell, either by letter or verbally, through a friend, desiring to know whether he would receive Confederate money in payment of the bond, and that he replied, either verbally or by letter, declining to do so. And in the deposition of Mrs. L. Constance Robinson, taken April 5, 1876, her impression is that the communication referred to was made before the bond was due. I think, from the evidence returned with the commissioner's report, there was no tender; and I think it would not have been good if made in Confederate States treasury notes in August, 1863.

The third point is:

3. Whether any money has been placed in the hands of Thomas L. Preston, one of the obligors for the payment of the debt? And

4. Whether that was done at the instance and request of the plaintiff, Mrs. Ross, or not?

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The reply to these two questions has already been made in disposing of the first objection to the commissioner's report.

For these reasons, I am of opinion that the exceptions must be overruled.

But, besides the points raised by the exceptions, several are made by counsel in argument, which, perhaps, should be disposed of.

It is claimed that interest during the war should be remitted.

I do not think it should be remitted in this case. Carrington, the trustee, to whom the bond was payable, and the obligees, were all in Confederate lines. They were not alien enemies.—See *Ward* v. *Smith*, 7 Wall. 447, 452.

And I do not think it ought to be remitted under the statute.—Sec. 14, chap. 173, Code 1873. The contract was to pay interest, and in such case the court has no power to remit.—*Siegfried* v. *Crenshaw*, 24 Gratt., 276–7.

As to the objection that the bond having been given for a slave, who was emancipated by the results of the war, there was a total failure of consideration, and that there should not be any recovery for the debt. I reply that the case of *Osborne* v. *Nicholson*. 13 Wall., 654, and *Henderlite* v. *Thurman*, 22 Gratt., 466, settle the question the other way. The emancipation of the slave is no bar to a recovery on the bond.

Let the exceptions be overruled, and confirm report of Commissioner Leake of May 14, 1876.

SUPREME COURT OF APPEALS OF WEST VA.

WHEELING.

SPEIDEL & CO. *v.* SCHLOSSER.

Decided April 26, 1879.

1. Section 48, Art. 6, Constitution, does not *ex proprio vigore* confer a right to a homestead. It simply imposed on the Legislature the duty to pass an act, whereby a homestead of not less than $1,000.00 might be claimed by any husband or parent, residing in this State, or the infant children of deceased parents, which should be exempt from forced sale for debts or liabilities, other than those named in the said section 48, as deemed proper by the Legislature.
2. The Legislature had the right to require the making, acknowledging and recording the declaration of homestead, as prescribed in section 9 of the homestead act of December 20th, 1873.

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3. Section 10 of said act, in prescribing that after the first day of March, 1874, no person, who has not made and recorded such declaration of intention, shall have the benefit of such homestead as to debts contracted before the recording of such declaration, is constitutional; but whether if recorded before or on the first day of March, 1874, he could have had the benefit of homestead exemption as to debts contracted before that date but subsequent to the adoption of the Constitution, is a question not presented by this case, and will not be decided in this case.
4. The court should have decreed a time within which the defendant should pay the judgment, and upon his failure so to do, then sale to be made.
5. The court erred in confirming the report of the commissioner, as there were fatal defects apparent on its face, not remedied by the pleading or evidence.

Appeal from and *supersedeas* to a decree of the municipal court of Wheeling, rendered on the 21st day of August, 1875, in a cause in said court then pending, in which Joseph Speidel & Co. were plaintiffs, and Christian Schlosser and others were defendants, granted on the petition of said Schlosser.

Hon. G. L. CRANMER, Judge of the Municipal Court of Wheeling, rendered the decree appealed from.

MOORE J. furnishes the following statement of the case:

The plaintiffs filed in the Municipal Court of Wheeling a bill in chancery against the defendant, to enforce a judgment lien. The bill alleges that the judgment was recorded on or about November 27, 1874, in said Municipal Court against defendant for the sum of $313.75, and costs $16.35; that *fi. fa.* issued thereon December 8, 1874, which was levied on the goods and chattels of defendant; from the sale of which goods and chattels, under said *fi. fa.*, the sum of $58.13 was realized to be applied in part satisfaction of said judgment and costs, and costs of execution. That on or about January 13, 1870, George Crumbacker, and Elizabeth C. his wife, executed a deed of conveyance in fee simple to defendant, conveying to him the west twenty-five feet of lot 174, situated on the north side of Zane street, in East Wheeling, in consideration of $1,800.00; that on or about January 13, 1870, defendant and his wife executed a deed of trust, conveying said lot to A. J. Clarke, trustee, to secure said Crumbacker the payment of $1,500.00, balance of purchase-money on said lot. Plaintiffs aver that at the time of awarding the judgment, and issuing the execution thereon, defendant was lawfully seized in fee simple of said real estate, and still remains so seized thereof; and that by said judgment they have ac-

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quired a lien on said real estate, and pray the enforcement thereof.

The court heard the cause upon the process, &c., the bill and exhibits taken for confessed, and on the 22d day of March, 1875, decreed that the cause be referred to master commissioner Lewis S. Jordan, to inquire into, ascertain and report: 1st. The value of the real estate mentioned and described in the bill; 2d. The liens upon the same, to whom due, their amounts and respective priorities; 3d. Any other matters deemed pertinent by the said commissioner, or demanded by any of the parties.

On the 8th day of July, 1875, defendant was allowed to file his answer to the bill. He admits the allegations of plaintiffs' bill, but further answering, says: That on the 25th day of August, 1874, he, under section 48, article 6, of the Constitution and laws of the State, made under such section, filed his declaration of intention to hold the said real estate as a homestead of the value of $1,000.00 exempt from forced sale; that said declaration was made in due form of law, and recorded on the 26th day of August, 1874, in the clerk's office of the County Court of Ohio county, in Homestead Book No. 1, page 3 (which declaration is filed with the answer as exhibit A), and insisting upon his right to hold the property mentioned as a homestead, &c., prays the court, that in any order or decree for the sale of said property, his homestead to the value of $1,000.00 may be reserved and protected.

The plaintiffs excepted to the filing of the defendant's answer, "for the reason that it sets up no grounds, and sets forth no facts, which would prevent the court from granting the relief prayed for in the bill." On the 24th day of July, 1875, the court sustained the exceptions to defendant's answer.

Commissioner Jordan reported the value of the real estate to be $1,200.00; that there is a deed of trust on said property, executed by defendant and wife, to secure Geo. Crumbacker $1,500.00, the balance of the purchase-money, but that the $1,500.00 has been paid with the exception of $600.00, with interest, which is still due, and is the first lien. That the plaintiffs have a lien against the real estate for $313.75, with interest thereon from November 27, 1874, till paid, by virtue of their judgment rendered November 27, 1874, subject to a credit December 21, 1874, of $58.13, money received on execution on said judgment, out of which is to be deducted $16.35 costs taxed by the clerk, leaving a clear credit on said

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judgment of $41.78, which leaves a balance as a lien against the said property of $271.97, which is the second lien on said real estate.

He further finds that the debt on which the judgment was rendered, was contracted before the recording of the defendant's declaration of homestead on the property mentioned; and that the defendant recorded his declaration of intention to hold the said premises as a homestead, August 26, 1874.

The court, on the 21st of August, 1875, confirmed said report, no exception having been taken thereto, and decreed that the said real estate be sold for the satisfaction of said judgment lien, and the discharge of the liens upon the same.

From this decree Christian Schlosser obtained an appeal and *supersedeas* to this court.

J. M. Mason for the appellant.

Geo. O. Davenport, Taylor & Barr for appellees.

MOORE J. delivered the opinion of the court.

HELD as stated in the head-notes.

SUPREME COURT OF WEST VIRGINIA.

STATE OF WEST VIRGINIA *v.* B. & O. R. R. CO.

Decided July 9th, 1879.

1. A corporation may be indicted for "Sabbath breaking" under the 16th and 17th sections of chapter 149 of the Code of West Virginia.
2. In an indictment against a railroad company for being found laboring at its trade and calling on a certain Sabbath day, it is proper and necessary to allege that such labor was not in household work, or other work of necessity and charity, but it is not necessary to allege that the defendant did not conscientiously believe that the seventh day of the week ought to be observed as a Sabbath, or that it did not refrain from all secular labor on that day, or that the labor was not done in the transportation of the mail, or of passengers or their baggage.
3. Such an indictment is not sufficiently sustained by proving that a part of a load of coal was transported over the railroad on the day named in the indictment, but the assent of the corporation to this "Sabbath breaking" must be shewn by proving that such "Sabbath breaking" was habitual, or by other satisfactory evidence, and such assent cannot be inferred from a single breach of the Sabbath by the authorized agents of the company while acting within the scope of their employment.
4. The jury for the trial of such a case should be formed in the manner in which juries in civil suits are formed under our statutes.

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5. Under what circumstances a court properly refuses to continue a cause.
6. A grand juror, who is witness on the trial of an indictment, cannot, with a view of showing his prejudice, be asked anything which occurred in the grand jury room.
7. If, on the trial of such an indictment, the defendant proves that by a general order it had directed its agents and employees not to ship anything except live stock and perishable freight on the Sabbath day, the jury may nevertheless find the defendant guilty, if by proof of the habitual running of freight trains about the time the offence was committed, or from other satisfactory evidence, the jury are satisfied that the running of such trains, in violation of such general order, met the assent of the corporation.
9. It is not necessary in such a case to prove by positive affirmative evidence that the cars run over the track of the defendant belonged to or were under the control of the defendant; this may be legitimately inferred from their being run over the railroad of the defendant.
10. The court takes judicial notice that the Baltimore and Ohio Railroad Company is a corporation.
11. It is not necessary to sustain the indictment to prove that the acts charged were done on the particular day named in the indictment. It is sufficient to prove that the defendant labored in its trade or calling, as alleged in the indictment, on the Sabbath day, within one year before the finding of the indictment against it, and that such labor was not in household or other work of necessity or charity, unless it appears that the defendant is within one of the exceptions of the 17th section of chapter 149 of the Code of this State.

POINTS ADJUDICATED.

SUPREME COURT OF GEORGIA.

HAWLEY *v.* SCREVEN ET AL., RECEIVERS.

(February Term, 1879.)

A passenger purchased of the A. & G. R. R. at Savannah, Ga., a through ticket by rail to Jacksonville, Fla., and at the same time a check for his trunk was delivered to him. Between the two points mentioned there were three connecting railroads; on arriving at the terminus of one, its engine was detached from the cars, which were then carried forward by the engine of the next road: *Held*, that the contracting road was liable for loss of the trunk at any point between the starting and termination of the route, although it showed delivery in good order to the road next connecting with it.

Complaint from the City Court of Savannah.

R. R. Richards, for plaintiff in error, cited 48 N. H. 339; 2 Redfield's Am. R'y Cases, 277–280, 290, 316–324; 78 N. C. 294; 22 Wall. 123; 11 Am. R'y R. 442; 38 Ga. 519; 5

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Am. R'y R. 333; 16 Ib. 206; 38 Ga. 519; 56 Ib. 376; 55 Ib. 481.

Jackson, Lawton & Basinger, for defendants, cited 25 Ga. 228; Code, § 2084; 39 Ga. 636; 42 Ib. 642; 44 Ib. 278; 55 Ib. 481; Code, §§ 2083, 2202, 3036; Acts 1876, p. 122.

WARNER, C. J., in delivering the opinion of the court, said: The plaintiff brought his action against the defendants as receivers of the Atlantic and Gulf Railroad Company to recover the value of a trunk and its contents alleged to have been lost by the company's negligence as common carriers between the city of Savannah, Georgia, and the city of Jacksonville, Florida. On the trial of the case the jury, under the charge of the court, found a verdict for the plaintiff. A motion was made for a new trial on the grounds therein stated, which was granted by the court, and the plaintiff excepted.

It appears from the evidence in the record that the plaintiff, on the 6th of November, 1877, purchased a through ticket of the company's agent at Savannah for a passage by railroad from the latter place to Jacksonville, Florida, and that he paid full fare for the same; that he took passage on its cars with his trunk at Savannah for Jacksonville, the place of destination, the company's agent having delivered to him the customary through ticket for himself, and a brass check for his trunk marked "Atlantic and Gulf Railroad, 998." On his arrival at Jacksonville he presented his check and demanded his trunk, which the company's agents failed to produce, and have continued to do so. The defendants proved at the trial that the route from Savannah to Jacksonville is over three different roads—the Atlantic and Gulf Railroad, the Jacksonville, Pensacola and Mobile Railroad, and the Florida Central Railroad. The Atlantic and Gulf Railroad has its terminus at Live Oak in that direction. The train of the Atlantic and Gulf Railroad went to Live Oak, where its engine was detached and the rest of the train went on, drawn by the engine of the Jacksonville, Pensacola and Mobile Railroad, and the conductor of the latter road receipted to the conductor of the Atlantic and Gulf Railroad for thirteen pieces of baggage at Live Oak as being "in good order, checked as follows," etc., including 998, the number of the plaintiff's check. The defendants sought to protect the road from liability for the loss of the plaintiff's trunk as a passenger on its road under two decisions made by a majority of this court in *Baugh* v. *McDaniel*, 42 Ga. 641; *R. R.* v.

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Montgomery, 44 Ib. 278, giving a construction to the 2084th section of the code as to the liability of a railroad company in this State for the loss of goods beyond the terminus of its own road, and the only question made in the case now before us is one of law. If the company was liable under the law for the loss of the plaintiff's trunk when applied to the facts contained in the record, then the verdict was right, and the court erred in granting a new trial. The two cases cited and relied on by the defendants do not necessarily control the decision of the court in this case, which is a suit by a passenger for the loss of his baggage as such passenger, for which he held the company's check, which was evidence of a contract of some sort at least, and the jury have found, under the evidence, that it was a contract on the part of the company to transport safely the plaintiff's trunk, either by itself or competent agents, from Savannah to Jacksonville, the place of destination; and in our judgment that finding was in accordance with the law. There is no evidence going to show that the company offered to deliver to the plaintiff his trunk at Live Oak and demanded his check therefor at that place, which goes to show what was the construction put upon the contract by both parties as evidenced by the check delivered by the company's agent to the plaintiff. In view of the facts disclosed in the record, and of the law applicable thereto, the court erred in granting a new trial.

JUDGMENT REVERSED.

MISCELLANY.

THE HOMESTEAD.—We are informed that the Court of Appeals of Virginia, now in session at Wytheville, in the case of *Calhoun* v. *Williams*, has just decided that a *Bachelor, who was a housekeeper, and without family, except his employe·s and domestics*, is *not* entitled to the exemption allowed to a "Householder, or head of family" under the Constitution of Virginia; that the alternate branches of the phrase above, are the equivalents of each other, and the word "householder" is to be taken in the sense of "one who has a household," and not in that of one who "holds a house."

We think this decision is right, and in accordance with the generally accepted views of the profession in Virginia, although we are aware of the fact that some of the Bar entertain a different view, and that some of the lower courts have even decided differently. We are glad that the question is now settled.

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THE SUPREME COURT OF APPEALS OF VIRGINIA.—This Court is now in session at Wytheville. Judge Christian presiding, and Judges Anderson, Staples and Burks being present. Judge Moncure is, we are gratified to learn, improving in health by the needed rest which he is now taking at the Rawley Springs. We sincerely trust that he will be able to renew his labors, with the Court at Richmond, restored to his usual health and vigor. The Commonwealth can never afford to lose such a public servant as he. We see that the Court is rendering some very interesting and important decisions, which we hope to lay before our readers shortly.

A SQUARE-TOED WITNESS.—A lawyer sometimes picks up a witness that he is quite willing to drop as soon as possible, as witness the following:

A Mr. Lawrence was on the stand in Milwaukee, during the trial of Russell Wheeler for murder, and had stated that he knew the prisoner well, and knew him to be a peaceful, law-abiding citizen. When cross-examined by the District Attorney, the following colloquy occurred:

District Attorney—You have testified, Mr. Lawrence, that you consider the defendant a law-abiding citizen?

Mr. Lawrence—I have, and I do so consider him.

District Attorney—You know that he has been a gambler?

Mr. Lawrence—I know he has.

District Attorney—Do you consider it exactly proper to call a professional gambler a law-abiding citizen?

Mr. Lawrence—So long as the District Attorney allows gambling to be carried on in the city, without restraint of or punishment by law, I consider it perfectly proper to describe a professional gambler as a law-abiding citizen.

When the laugh had subsided, the District Attorney blushed "loudly" and said to the witness, "That is all."—*Pitts. Legal Journal.*

"CANDID CONFESSION."—A lawyer was seen drunk on the street, and soon thereafter, was arraigned before the bar of his church, the leading members of which were merchants, doctors, and capitalists The culprit hung his guilty head, and asked for permission to make a confession, and render an excuse. The privilege was granted him.

Demurely he began—I confess that I do not give short weights and measures, nor do I have several prices for my goods, nor do I sell them at a large profit and give my word of honor that I put them down about cost. Nor do I sell whiskey to all who have the money to buy, nor tell lies every day of my life when I am behind the counter. I confess I do not give patients colored drops and useless medicine, and after nature has done its work, or imagination has relieved the disease, which never existed, claim that I cured the victim and charge exorbitant fees for my visits; nor do I talk wild-cat Latin, look wise; and jump up and leave church as if I had a call. I do not keep rich patients in bed as long as they willingly pay my charges, nor do I covet my neighbor's wife or maidservant. I confess I do not loan money at usurious interest, and oppress the poor and needy, nor do I worship Mammon as my God. I have not a heart that would rattle in the shell of a mustard seed, or dance upon the point of a cambric needle.

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I do not think about money all day and dream about it at night. I confess that my heart is not filled with avarice, envy, malice, or covetousness during the week, while I go to church on the Sabbath with a face as solemn and pious looking as a doxology or benediction. I confess I do not give to the church for display, and not only let my left hand know, but the world as well, what my right hand is doing in the way of charity. I confess I was drunk; indeed, quite drunk, on the public street, and I am very sorry for it. I owed debts, the merchants dunned me, my clients failed to pay, and I unfortunately resorted to whiskey to keep my spirits up. I confess that I went into a gin-shop to drink, and as I entered the front door, I confess that one of the leading members of this church dodged out of the rear entrance.

When the confession ended, the church was nearly empty, and the remaining few concluded to give the backsliding lawyer another trial.—*Southern Law Journal.*

POETICAL REPORTING.—The following appears as a foot note to the case of *State* v. *Lewis*, reported in 19 Kansas. The facts as stated in the case were, that the defendant Lewis, imprisoned in the common jail on a charge of burglary, while awaiting his trial, broke jail and escaped. He was afterwards arrested on a warrant for breaking jail, waived examination, and was again committed. After his second incarceration he was tried on the charge of burglary and acquitted; and on being arraigned for trial upon the second charge, he plead that he had been acquitted of the charge of burglary, and hence had been unlawfully confined, and was not guilty of the latter charge. To this plea a demurrer was interposed by the State, and sustained by the Supreme Court on appeal, whereupon the defendant was sentenced to two years in the penitentiary on the last charge. The following "report," by E. F. Ware, of the Fort Scott bar, was written at the time of the hearing in Supreme Court:

IN THE SUPREME COURT STATE OF KANSAS,

George Lewis, Appellant, ads. the State of Kansas, Appellee.

Appeal from Atchison County.

SYLLABUS.

LAW—PAW; GUILT—WILT. When upon thy frame the law places its majestic paw, though in innocence or guilt, thou art then required to wilt.

STATEMENT OF CASE.

This defendant, while at large,
Was arrested on a charge
Of burglarious intent,
And direct to jail he went.
But he somehow felt misused,
And through prison walls he oozed,

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And in some unheard of shape
He effected his escape.

Mark you, now: Again the law
On defendant placed its paw,
Like a hand of iron mail,
And resocked him into jail—
Which said jail, while so corraled,
He by sockage-tenure held.

Then the court met, and they tried
Lewis up and down each side,
On the good old-fashioned plan;
But the jury cleared the man.

Now you think that this strange case
Ends at just about this place.
Nay, not so. Again the law
On defendant placed its paw.
This time takes him round the cape
For effecting an escape.
He, unable to give bail,
Goes reluctantly to jail.

Lewis, tried for this last act,
Makes a special plea of fact:
"Wrongly did they me arrest,
As my trial did attest;
And while rightfully at large,
Taken on a wrongful charge.
I took back from them what they
From me wrongfully took away."

When this special plea was heard,
Thereupon The State demurred.

The defendant then was pained
When the Court was heard to say,
In a cold impassive way,
"The demurrer is sustained."

Back to jail did Lewis go;
But as liberty was dear,
He appeals, and now is here
To reverse the judge below.
The opinion will contain
All the statements that remain.

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ARGUMENT AND BRIEF OF APPELLANT.

As a matter, sir, of fact,
Who was injured by our act—
Any property or man?
Point it out, sir, if you can.

Can you seize us when at large
On a baseless, trumped up charge;
And if we escape, then say
It is crime to get away—
When we rightfully regained
What was wrongfully obtained?

Please the Court, sir, what is crime?
What is right, and what is wrong?
Is our freedom but a song,
Or the subject of a rhyme?

ARGUMENT AND BRIEF OF ATTORNEY FOR THE STATE.

When The State—that is to say,
We take liberty away,—
When the padlock and the hasp
Leaves one helpless in our grasp,—
It's unlawful then that he
Even dreams of liberty—
Wicked dreams that may in time
Grow and ripen into crime—
Crime of dark and damning shape;
Then, if he perchance escape,
Evermore remorse will roll
O'er his shattered, sin-sick soul.

Please the Court, sir, how can we
Manage people who get free?

REPLY OF APPELLANT.

Please the Court, sir, if it's sin,
Where does turpitude begin?

OPINION OF THE COURT. PER CURIAM.

We—don't—make—law. We are bound
To interpret it as found.

The defendant broke away:
When arrested he should stay.

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This appeal can't be maintained;
For the record does not show
Error in the Court below,
And we nothing can infer.
Let the judgment be sustained—
All the justices concur.

[NOTE BY THE REPORTER.]

Of the sheriff—rise and sing,
"Glory to our earthly king!"

OF JUSTICE AND RIGHT.—"Since all rights arise out of justice, as out of a fountain, and what justice wills, right promotes the same; let us see, then, what is justice, and whence it is so termed; likewise, what is right, and whence it is so termed, and what are its precepts; likewise, what is law, and what is custom, without which a person cannot be just, so as to execute justice and a just judgment between man and man."

"Justice, then, is a constant and perpetual will to award to each his right, the definition of which may be understood in two manners; in one manner as it is in the Creator, in another as it is in the creature. And if it be understood as it is in the Creator, that is, in God, all things are plain, since justice is the disposal of God, which orders rightly and disposes rightfully in all things. For God himself awards to each according to his works. He himself is not variable, nor temporary in his disposition and will. His will is rather constant and perpetual, for he himself had no beginning, nor has, nor will have any end. It is understood in another manner according as it is in the creature, that is, in a just man. For a just man has the will of awarding to each his right, and so his will is termed justice, and it is said to be the will to award to each his right, not as regards the result, but as regards the intention; as an emperor is called August, not that he always augments his empire, but that he designs to augment it. As it is said of matrimony, that it is an inseparable union, for the parties are of a mind never to be separated, they are, however, separated afterwards when cause arises. Likewise, justice is termed constant, according to the definition, when justice is in the creature, that by the word "will," intention may be understood, and by the word "constant," good may be understood. For constancy is always taken in a good sense. Whence also the saints are termed constant, when it is said, "Oh! the constancy of the martyrs." Likewise, "be ye constant," for constancy does not admit of variableness. By the phrase "perpetual," also is meant a habit, for justice is a good habit of mind, or the habit of a mind well constituted; or justice is a voluntary good, for it cannot be called good properly, unless the will intervenes, for take away the will, and every act will be indifferent; your agency, however, imposes a name upon your work. So a crime is not committed, unless the will to do harm intervenes. So the will and the purpose distinguish bad acts. But as regards the words "his right," the merit of a man is thereby intended, for a person is deprived of his right by means of an offence, or a breach of contract, or the like; but as regards the words "to each," that is, to himself,

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that he may live honestly; likewise to God, that he may love God; likewise to his neighbour, that he may not harm him; but as regards the words "his right," that is, of justice, and right is thus called justice, because all right is included in justice."

BRACTON.

PUNISHMENT OF EVIL JUDGING.—"And when a person is obliged to judge and to be a judge, let him take care for himself, lest by judging perversely and against the laws, through entreaties or for a price, for the advantage of a paltry temporary gain, he presume to bring upon himself the sadness of eternal grief, and lest in the day of the fury of the Lord he feel the vengeance of him, who has said, "Vengeance is mine, and I will repay," and when kings and princes of the earth shall weep and bewail, when they behold the Son of Man, through fear of his torments, when gold and silver will not avail to set them free. Who, indeed, would not fear that examination in which the Lord will be the accuser, the advocate, and the judge, and from his sentence there shall be no appeal possible. For the Father has given all judgment to the Son, who shuts and no one can open, who opens and no one can shut. Oh! strict judgment, in which men shall have to render account, not only for their acts, but for every idle word that they have unrighteously spoken! Who then shall escape from his coming wrath? For the Son of Man shall send his angels, who shall separate from the kingdom of God all scandals, and those who work iniquity, and shall bind them into bundles to be burnt, and shall send them into a furnace of fire, where there shall be weeping and gnashing of teeth, groans and howlings, cries, weepings and tortures, hissing and screaming, fear and trembling, pain and labour, burning heat and fetid smells, darkness and anxiety, bitterness and roughness, calamity and want, straitness and sadness, forgetfulness and confusion, twistings and prickings, sorrows and terrors, hunger and thirst, cold and heat, sulphur and blazing fire for ever and ever. Let each, then, beware of that judgment, when the Judge will be terribly strict, intolerably severe, immoderately offended, vehemently angered, and his sentence will be unchangeable, his prison without any return from it, his torments without end, without interval, and without assuagement, his tormentors horrible, who never grow weary, who never pity when fear disturbs the accused, his conscience condemns him, his thoughts reproach him, and he may not flee away, whence the blessed Augustine, "Oh! how far too great are my sins;" wherefore, when one has God as a rightful Judge, and one's own conscience as a witness, one has nothing to fear but one's own cause."

BRACTON.

PROTECTION OF WOMEN IN ANCIENT TIMES.—(From "Lady's Law," page 51): "Bracton tells us, that by the law of King Athbelstan: If a person meeting a virgin, did touch her dishonestly, he was guilty of breaking the king's edict; if against her will he threw her on the ground, he lost the king's favor; if he discovered her nakedness, and cast himself upon her, he forfeited all his possession; if he lay with her, he suffered judgment

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of life and member; and if he were a horseman in the wars, his horse lost his tail and main, and the virgin had in recompense all his lands and money by the king's warrant."

"The punishment of the horse, by loss of tail, seems a little contrariwise; but, perhaps, it was necessary to add to the disgrace and infamy of the rider and his family for the foul act committed; and though the punishment of the ravisher hath undergone great variations by the statutes and ordinances of our kings, yet, by the common law, it was always death, at the election of the woman ravished."

"In the book *De friscis legibus*, it is set down for a law, made by William the Conqueror, that a ravisher should not be hanged, or otherwise put to death, but his eyes were to be pulled out, and his privy members, feet or hands cut away, that the trunk or mutilate body, still left alive, might remain as a testimony of his prodition and lewdness."

"This was a very mangling law, and the Statute of West 1 reduced the crime to trespass, subjecting the offender to two years' imprisonment and a fine. But this easy punishment very much increasing the offence, it was again made felony, as it now stands."

BOOK NOTICES.

THE AMERICAN DECISIONS, *Containing all the Cases of General Value and Authority Decided in the Courts of the Several States, from the Earliest Issue of the State Reports to the year* 1869. Compiled and annotated by JOHN PROFFATT, L L. B., Author of "A Treatise on Jury Trials," &c., Vol. X. San Francisco: A. L. Bancroft & Co., Publishers. 1879. Through J. W. Randolph & English, Richmond, Va.

We have received this volume of this excellent series, together with a complete index and table of cases of the first ten volumes, which have been issued with so much rapidity, and excellence from the enterprising publishers. We continue to commend this work in the highest terms. By the use of the index, which is furnished gratis to subscribers, the first ten volumes can be consulted with the greatest facility and practical benefits, and will prove to be almost a library of useful reports for the practitioner. The cases embraced in this volume are from the following reports, viz.:

1 Greenleaf (Me.), 4 Conn., 19 Johnson (N. Y.), 6 Johnson Ch'y. Reports. 1 Halstead's (N. J.), 7 Sergeant and Rawle (Pa.), 1 Randolph (Va.), 2 Nott and McCord (S. C.), 1 McCord (S. C.), 1 A. K. Marshall (Ky.)

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THE

VIRGINIA LAW JOURNAL.

SEPTEMBER, 1879.

BROWN v. BURTON.

TENANCY IN COMMON AND SURVIVORSHIP.

This case was decided at the January Term of the Court of Appeals, and the principles therein established have become part of the jurisprudence of the State. A discussion of these may not be uninteresting, and has already been commenced in this journal. In the July number there appeared an article from the pen of Mr. Wm. L. Royall, reviewing the opinion of the court with earnestness and force, and protesting vigorously against the correctness of its decision in this cause. The reviewer contended that it was in conflict with established canons of legal construction, and in combatting the views of the Court in detail, it was apparent that he had bestowed much reflection and labor upon the questions involved, and upon the authorities on which the points of law at issue rested.

With the hope that it may not be deemed presumptuous, the writer undertakes to demonstrate that the case was decided upon sound legal principles, and justly and equitably upon its facts, and after much discussion, both written and oral, by counsel on both sides.

The marriage contract, the true interpretation whereof was under consideration by the court, will be found at page 415 of the July number of this journal, and it is to this contract in its *entirety* that reference will be had throughout this article. The facts of the case are sufficiently set out in Mr. Royall's review of it in that number, from which it will be seen that the controversy turns upon the construction of

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these words in the contract—"*to be held by them as tenants in common, with benefit of survivorship.*" But it must be borne in mind that these words occur in a contract containing many other provisions, and in the middle of a sentence, and are to be considered with reference, not only to what immediately precedes and follows, but with reference to the general intention to be gathered from the whole instrument. Mr. Royall insists that these words import, absolutely and *proprio vigore*, that the tenants shall take and hold their estate with the right of indefinite survivorship, as they would in a joint tenancy, while the court declared that though there was a right of survivorship, it existed only up to a certain, fixed period, viz.: the death of Mrs. Brown, upon which event the estate vested in all of the children of the marriage then surviving, as tenants in common. There is no case on record, or if there be, none has been produced, in which a survivorship, attached to a tenancy in common, has been held to vest the fee absolutely in the longest liver of the tenants, which would be the effect of an indefinite survivorship. There is a class of cases in Virginia which denotes the tendency of our courts to limit as much as possible the period during which the survivorship attached to a tenancy in common, shall take effect among the tenants, and these will be discussed later. It is proposed now to analyze some of the numerous cases cited by Mr. Royall, with a view to their classification according to the principle or principles which they decide, and to attempt to extract from them the exact state of the doctrine touching "survivorship," at the date of the marriage contract, in 1807, and its state when the decision under review was pronounced.

I. As long as the Feudal system exercised an influence upon English law, joint tenancies were in great favor in England, and the courts invariably sought for a construction, both in deeds and wills, appropriate to their creation, but for more than a century the courts have adopted every available expression to construe estates given to several, both in deeds and wills, as tenancies in common. (2 Minor's Inst., 401; 1 Steph. Com., 326.) That is to say, as soon as the law was freed from the restrictions of the feudal tenures and their incident services, its policy became changed, and the leaning of the courts was thenceforward to the creation of tenancies in common.

Before this change of policy in the law, such phrases as "equally to be divided," and "share and share alike," were construed to create joint tenancies, but after this change, the same phrases were construed by the courts to cre-

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ate tenancies in common. The prominent and peculiar feature of joint tenancy, that which distinguishes this estate more particularly from tenancy in common, is the right of survivorship to the longest liver always incident thereto. Hence, if words of survivorship were attached to the above phrases, while they were being construed to create a joint tenancy, no difficulty would be experienced in the interpretation of the instrument, the words of survivorship being merely expressive of that incident of joint tenancy. But, when after the change of policy above alluded to, instruments were presented to the English courts for construction, containing such language as this, "to several share and share alike, *and to the survivor of them*," a new question arose, that is, how should the courts treat these words of survivorship attached to words creating a tenancy in common, with which estate the right of survivorship was apparently inconsistent? It is the purpose of the writer to show briefly that the courts ultimately held that the right of survivorship was not inconsistent with a tenancy in common, although at first the contrary doctrine prevailed, the reason then assigned being that an estate so limited was in effect a joint tenancy, which, as we have seen, was not favored. Among the earliest cases in which this question arose are *Bindon* v. *Suffolk*, 1 P. W. 96 (1707), and *Stringer* v. *Phillips*, 1 Eq. Ca. Abr. 293 (1730), where wills containing phrases importing a tenancy in common, with words of survivorship annexed, were so interpreted by the courts that the devisees took simply as tenants in common, the words of survivorship being disregarded. Later cases, for example, *Rose* v. *Hill*, 3 Burr, 1881; *Roebuck* v. *Dean*, 2 Ves., 265, and others holding the same doctrine will be found in 2 Jarm. on Wills, p. *632 *et seq.* Mr. Jarman says that in this class of cases the courts for a long period uniformly applied the words of survivorship to the death of the testator, upon the idea that there was no other mode of reconciling them with the words of severance creating a tenancy in common. But in more recent times, this doctrine has undergone a complete change. In *Hawes* v. *Hawes*, 1 Wils., 165, decided in 1747, before some of the cases of the class just alluded to, Lord Hardwicke recognized a benefit of survivorship among tenants in common (under the peculiar terms of the will in that case) up to the age of twenty-one. In *Doe* v. *Abey*, 1 Maule & Selwyn, it was held that upon principle there was no inconsistency in attaching a right of survivorship to a tenancy in common—Bayley J. reasoning thus: "A tenancy in common with benefit of survivorship

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is a case which may exist without being a joint tenancy; because survivorship is not the only characteristic of a joint tenancy. There is one view in which it may be important to a testator to create a tenancy in common with survivorship, and yet not joint tenancy. It might be important in this view; because if it were a joint tenancy, one joint tenant might, by means of a lease made during her life, convey to her lessee a title paramount to that of the survivors. It might, therefore, be the object of the testator to obviate such a consequence, which would in effect, defeat his intention." This point was further illustrated, and *Doe* v. *Abey*, affirmed in *Jones* v. *Hall*, 16 Simons, 500; *Haddelsy* v. *Adams*, 2 Jurist (N. S.), 724; and *Taffe* v. *Conmee*, 8 Jur. (N. S.), 919, which cases reverse the ruling of the earlier decisions, and establish in England firmly and finally the doctrine that there is no inconsistency in annexing a survivorship to a tenancy in common.

II. The law being thus settled in this particular, it is now proposed to allude to an alteration in another rule of law relating to "survivorship," intimately connected with, and in fact dependent upon, the establishment of the rule just noticed. This rule of construction relates to the period to which words of survivorship are to be referred when there is some fixed event after the testator's death at which the estate devised or bequeathed in a will is to be enjoyed. For example, if a testator makes a gift to his wife for life, and after her death share and share alike to his *surviving* children, the question arises whether the children surviving him, or those surviving at the future period of distribution, that is the death of his wife, are to take. For a long time the courts of England invariably held that in cases of this kind the estate vested at the testator's death, and the children then living took vested interests, but this mode of construction was overruled, and for a century or more the settled doctrine in England has been that the children or others interested under the will take vested interests only at the future period, and survivorship takes place among them up to that period, unless there appear some special intent to the contrary. It is proposed now to trace out this change of construction, citing only cases sufficient to illustrate the points, reference being made to Jarman for a collocation of the cases. The Virginia authorities, however, will be reviewed at length. In the first place, it is evident that, as long as the principle prevailed that no survivorship could be attached to a tenancy in common, none could exist between the death of a testator

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and the future period of distribution, because the estate vested at the testator's death in the devisees or legatees as tenants in common, and there could be no survivorship among such tenants. And even after this principle had been disapproved by the English courts, cases may still be found in which the vesting of the estate was referred to the testator's death. We will now show how this construction, that words of survivorship are to be referred to the testator's death where the gift is not immediate, but there is a future period to which they could be referred, although established by repeated adjudication (see 2 Jarm. on Wills, p. *633 and *640), was at first departed from on particular grounds, and finally overruled in England.

One of the first cases to which this construction was not applied was *Brograve* v. *Winder*, 2 Vesey, Jr., 634, where a testator devised real estate to A for life, with remainder to A's sons, and in default of sons of A, to be sold, and the proceeds equally distributed among W's sons and daughters, or the survivors or survivor of them. The question was whether the testator meant W's sons and daughters surviving at his death, or those surviving at the death of the life tenant A. Lord Loughborough admitted that in general the words of survivorship would not prevent the vesting at the death of the testator, but he said that the circumstances of this will gave them a different effect. "In this will," he said, "the penning of which is very particular, when you once fix the intention that they shall take it as money, which is clearly the sense of this will, there is no gift till the distribution." Somewhat similar to this case are the cases of *Newton* v. *Ayscough*, 19 Vesey, 534; and *Hoghton* v. *Whitgreave*, 1 Jac. & Walk., 146. See 2 Jarm. on Wills, p. *647. Of this class of cases Mr. Jarman says: "The general rule referring survivorship to the death of the testator was, it will be observed, departed from in the preceding cases only upon particular grounds, and these cases, by resting the construction on the special circumstances, might seem, indirectly, to afford a confirmation of that rule. Their effect, however, in consequence of the indefinite and questionable nature of the exceptions, which they went to establish, evidently was to strike at the root of the rule itself, and to prepare the way for its abandonment in cases where such circumstances did not exist."

In *Cripps* v. *Wolcott*, 4 Madd., 11, Sir J. Leach says: "I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no

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special intent to be found in the will, the survivorship is to be referred to the period of division. * * * Here there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous estate for life." In *Gibbs* v. *Tait*, 8 Sim., 32, a testator gave the residue of his personal estate to his wife for life, and after her decease or marriage, he gave what should be remaining of such residuary moneys, in manner thereafter mentioned; that is, as follows: one moiety to J, the son of T, the other moiety in equal shares to all the daughters of T and their issue, *with benefit of survivorship and accruer*—the same words used in *Brown* v. *Burton*. The court held that the daughters who were living at the death of the widow were entitled to the exclusion of the representatives of one who survived the testator, and died before the widow, and the possibility of *indefinite survivorship* by the use of the term "with benefit of survivorship" was not considered. See 2 Jarm. on Wills, p. *650. After a review of this class of cases, Mr. Jarman says: "In this state of the recent authorities, one need scarcely hesitate to affirm that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which survivorship can be referred; and where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only;" and the rule embodied in the latter half of this sentence is now the established doctrine of England.

Turning now to the Virginia cases, we find two in which this exact point was presented for adjudication, and was decided by our Court of Appeals. *Hansford* v. *Elliott*, 9 Leigh, 79, and *Martin's adm'r* v. *Kirby*, 11 Gratt., 67. In the former case, a testator, after bequeathing the residuum of his estate to his wife during life or widowhood, directed that the whole of his personal estate, at the death of his wife, should be equally divided among his *surviving* children who are individually named. Here, then, the question was whether the words *surviving children* should be taken to refer to the period of the testator's death, or to that of the death of his widow the tenant for life.

Parker J. held that the word *surviving* referred to those children who survived the testator, and that all living at his death took vested interests. The learned judge rested his decision upon the cases of *Roebuck* v. *Deane*, *Perry* v. *Woods*, and other cases (2 Jarm. on Wills, *236), the principle of

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which decisions was developed in the first part of this article. Referring to the cases of *Brograve* v. *Winder*, *Hoghton* v. *Whitgreave*, and *Newton* v. *Ayscough*, already mentioned *supra*, he says, "In the first three cases the intention was very clear to refer the survivorship to the death of the tenant for life. The estate, *at that time*, was to be sold by trustees and distributed." This observation agrees with the quotation from Jarman, *supra*. Having thus removed the obstacle interposed by these cases, the only one of the later cases cited is that of *Cripps* v. *Wolcott*, and of this case the court says: "The only authority directly opposed to this construction is the case of *Cripps* v. *Wolcott*, decided by Sir John Leach, in 1819—where the Vice-Chancellor laid down as a general rule that words of survivorship are to be referred to the period of division and enjoyment, if there be no special intent to the contrary; and that if a previous life estate is given, the period of division being the death of the tenant for life, the survivors at such death will take the whole." But the court held that this decision of Sir J. Leach was not sustained by the authorities, and that at all events the preponderance of authority was the other way (there being no later case than *Cripps* v. *Wolcott* referred to), and rendered the above decision. This case establishes the rule in Virginia that words of survivorship in cases involving the question under consideration, are always to be referred to the period of the testator's death, unless a special intent appears to the contrary. The case of *Martin* v. *Kirby* was almost identical in its facts with *Hansford* v. *Elliott*, and approved and affirmed Judge Parker's decision in the latter case. While thus affirming the decision of the prior case, Judge Lee differed with the views of the court in *Hansford* v. *Elliott* in reference to the state of the law in England, and for obvious reasons. He had before him *Gibbs* v. *Tait* (*vide supra*) and other later cases, whereas, as we have seen, Judge Parker refers to none of these later cases except *Cripps* v. *Wolcott*.

Martin v. *Kirby*, which was decided in 1854 (*Hansford* v. *Elliott* having been decided in 1837) contains a full citation of the authorities, and refers also to Mr. Jarman's work. We can better observe Judge Lee's views by letting him speak for himself. He says: "It is true, Judge Parker, in delivering his opinion in *Hansford* v. *Elliott*, seems to think that most of the cases may be explained upon the particular circumstances attending them, and that they are not irreconcilable with those, which refer the period of survivorship to the death of the testator, and that at all events, the weight of the author-

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ity is in favor of that doctrine. I confess my examination of the English cases had brought my mind to a different conclusion. It seemed to me that many of the two classes of cases were directly conflicting and irreconcilable; and that whatever might be the safest and soundest construction, and that best adapted to promote the intention of the testator, the preponderance of the English authorities was in favor of the rule making the words of survivorship relate to the expiration of the previous particular estate, being the period of the distribution of the subject of the gift, rather than to the death of the testator." Again he says: "I think, too, the rule prescribed in that case—*Hansford* v. *Elliott*—(so far as any rule can be applied to a subject of this character) is, perhaps, the soundest and safest rule, and best adapted, in a large majority of cases, to promote the intention of testators. But whatever might be my opinion as to this, I think it should be adhered to as the settled doctrine of this court, notwithstanding that different result of the English cases."

These two cases were both approved and followed in *Stone* v. *Nicholson*, 27 Gratt., 1. We have thus shown that the rules on this subject are different in England and in Virginia, and have traced out the causes of this diversity. But though there may be in each jurisprudence a general rule in the absence of any intent, it must be remembered that in both countries, as was remarked in *Newton* v. *Ayscough*, and approved in *Martin* v. *Kirby*, "the period to which the survivorship relates depends not upon any technical words, but upon the apparent intention ot the testator, collected from the particular disposition or the general context of the will."

Outside of Virginia, cases are also to be found agreeing in principle with the doctrine of our State, and the rule recognized by our court seems to be that generally accepted in the United States, and this rule is said to be "most in harmony with that admirable principle in the law which leads the courts always to favor such a construction of wills as best provides for descendants or posterity." *Moore* v. *Lyons*, 25 Wendell, 142. See further *Lawrence* v. *McArter*, 10 Ohio, 37; *Hurlburt* v. *Emerson*, 16 Mass , 241; *Drayton* v. *Drayton*, 1 Desaus, 324; *Weed* v. *Aldrich*, 2 Hun. 531.

III. Having thus examined these two outlying points, we will now address ourselves more particularly to the consideration of the case of *Brown* v. *Burton*. In the first place, let it be borne in mind that Mr. Royall's position is this: that the phrase with "benefit of survivorship" has been fixed and established by adjudication to import, and on principle should

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import absolute, indefinite survivorship among the tenants seized of the estate to which the survivorship is attached, that, therefore, it is not open to construction, and when it is employed as in this case, its mere use excludes all contention as to any period during which the survivorship shall take place, and the estate goes inevitably to the longest liver, just as in joint tenancy. We will first see whether this proposition is tenable upon principle, and then whether it can be sustained in the light of authority. "Survivorship" does not mean, in our law, that the whole estate goes to the longest liver of the class, because he is the *survivor* of all his co-tenants, but it relates to the *surviving* of the interest of one who dies, to those remaining. That is, when one dies, his interest does not go to his heirs, but to those surviving him, and whether this survivorship which takes place upon the death of each one, is to cease at the death of one or of two or more, or is to continue until all have died but one, depends entirely upon the character of the limitation. Hence, when survivorship exists among several up to a certain event, it is immaterial whether one or more die before that event happens—when one dies, his interest in the estate survives to those who outlive him. When an estate is limited to the *survivors* or *survivor* at a particular period, as soon as that period is determined, there is no difficulty as to these words; they must mean those living at that period, whether one or more. What is insisted upon is that the legal phrase "right of survivorship" has no connection with the *longest liver* as being the mere *survivor* of the rest, but that it refers to the right of those surviving one who dies, to hold the estate as an entirety—the same thing occurring when another dies—and so on, until the time arrives when the estate is to vest; if the survivorship is indefinite, that is to the longest liver, then the vesting does not take place until all have died but one, if not, then the estate vests in the number still surviving at the period fixed for the vesting.

That this is the proper meaning of the "right of survivorship" is more clearly seen when we recall the Latin expression, *jus accrescendi*, of which the "right of survivorship" is the correct translation; the *survivorship* is that by virtue of which an *increase* is made to the shares of those surviving any one of the co-tenants who may die. Sometimes the Latin is rendered more exactly by the phrase *right of accrual*, evidently referring to the accrual of the share of one who dies to those surviving him, without reference to the number that may die before the estate shall vest. That the nature

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of an estate held in *joint tenancy* requires that the survivorship, which is an incident of that estate, should be exercised *usque ad ultimum superstitem*, cannot control or vary the general doctrine. This, then, being the meaning of survivorship, I cannot see how any of Mr. Royall's citations from Coke to *Doe* v. *Abey* countenance his contention that the phrase "benefit of survivorship" means survivorship to the longest liver *necessarily* and *technically*. These words express aptly and briefly that the tenants enjoy the benefit of the survivorship attached to the estate they hold; if that estate is a joint tenancy, then the survivorship is an *incident* of the estate, and, of course, indefinite; if it is a tenancy in common, reference must be had to the general intention of the instrument for their precise meaning. Let us now look at the cases in which these words have been used. In *Gibbs* v. *Tait*, 8 Sim., 132, a testator bequeathed the residue of his personal estate to his widow, in trust to apply the interest and proceeds for her own use, and after her death he gave what should be remaining of such residuary moneys, unto and equally among all the daughters of T. and their issue, "*with benefit of survivorship and accruer.*" T. had three daughters living at testator's death. One of them died without issue in the lifetime of the testator's widow. Held: that the two surviving daughters were entitled to the residue absolutely. Here no peculiar efficacy or significance was given to the words in italics, and the fact that the word "issue" is used with them (remembering the point under discussion) strengthens the argument that the use of them is perfectly compatible with a limitation to *issue* of tenants in common. In *Maberley* v. *Strode*, 3 Vesey, 450, where the same words "benefit of survivorship" are used, the court recognizes no peculiar power in the phrase, but treats it and speaks of it as any other "words of survivorship." And in a case which will be examined, *infra* (*Hawes* v. *Hawes*), we shall see that these words used just as in *Brown* v. *Burton*, were not only not construed to possess any fixed meaning, but were interpreted by reference to another portion of the will. Jarman arranges the cases, where the words in question are used in a class with other cases, where phrases such as "to the survivor" or "to the survivors or survivor" were employed, and never intimates that there is any distinctive force in the words "benefit of survivorship," but calls them all "words of survivorship." It is true that where the word "surviving" is used, it must be inferred that there is some point of time to which it refers, at which the estate vests, and there can be

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no question of indefinite survivorship. This word, although occurring in the instruments construed in the Virginia cases, rarely occurs in the English cases.

It can be safely concluded that the words in controversy are open to construction, and the question finally arises do they convey in this case an intention to create indefinite survivorship? Let us look, first, at the cases in which the question of indefinite survivorship has arisen. In the case of *Rose* v. *Hill*, already referred to in another connection, this very question arose and was decided adversely to Mr. Royall's views. A testator after giving certain property to his wife for her life adds "and from and after her decease, I give and devise the same premises, every or any part thereof, to and to the use of Anne, Thomas, Mary, William, and Nathaniel, my sons and daughters, and the *survivors and survivor of them*, and the executors and administrators of such survivor, *share and share alike*, as tenants in common, and not as joint tenants," and it was upon the interpretation of this clause that the controversy arose. All the children above named died except Nathaniel, and it was argued by his counsel, just as was argued by the appellant in the case at bar, that the true construction of the will was "that it was a tenancy in common amongst the five children for life, with survivorship to the longest liver of them," and, therefore, the defendant (Nathaniel) was entitled to the whole as last survivor. The court decided that the estate vested in all the children living at the testator's death, and added "but as against the defendant, it is enough to say that it cannot come to him by survivorship." And, in this case, the words of survivorship employed are just as appropriate to express indefinite survivorship as the words used in the principal case; and, if they had been employed, the result would not have been different. In the case of *Maberley* v. *Strode*, cited in the opinion of the court, and commented on at length by Mr. Royall, the words "benefit of survivorship" were used, and although the *issue* were to stand in their parents' place upon some event not mentioned, still nothing was said in argument or in the decision to lead to the inference that these words were regarded as differing from other words of survivorship, or as possessing any peculiar charm in themselves, but the will was construed as a whole, and it was decided that upon *those blind words* the safest and soundest construction, best warranted by the *authorities*, most beneficial to the parties, most likely to be that intended, was that they meant such as survived the testator. I do not understand that the court in *Brown* v. *Burton* cited this case a

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being exactly parallel with the one at bar, and it certainly proves that the words in question possessed no such special efficacy as Mr. Royall ascribes to them, but left the court free to construe the will upon all the circumstances of the case. In the case of *Jenour* v. *Jenour*, 10 Vesey, *463, the following clause in a will was in controversy: "and the other 200*l* per annum shall be my brother's during his life, if he shall survive my sister; and, after his decease, shall be equally divided between my two nephews, Joshua and Matthew Jenour, and go to the survivor of them in case his brother shall leave no lawful issue; and if he shall, such issue shall be in the place of their father, with regard to the said annuities." The testator's brother outlived the sister, and the question arose whether the survivorship was indefinite, that is, whether the surviving nephew was to take, if his brother died without issue at *any time*, or whether he were only to take, in case one of them died without issue, during the life of the life tenant, the testator's brother. The court below (afterwards affirmed by Lord Eldon), declared for the latter construction, that is, that both nephews took absolutely, at the death of the life tenant, the survivorship being limited only to take place up to that period, so that if after the death of the life tenant, one of the nephews should die without issue, his share would go to his representatives, and not to his surviving brother; the Master of the Rolls, Sir W. Grant, saying: "I am always indisposed to the construction of indefinite survivorship."

The case of *Hawes* v. *Hawes*, cited by Mr. Royall, discountenances absolutely the doctrine that the phrase "benefit of survivorship" has any such unalterable signification attached to it as always to import survivorship indefinitely to the longest liver. There the testator after giving personal estate to his four sons as tenants in common, with benefit of survivorship, if any died under twenty-one, devised real estate to the same sons as tenants in common, with benefit of survivorship, but not adding to the devise *if any die under twenty-one*, as in the case of the personal estate. Could a more apt case for the application of Mr. Royall's doctrine be imagined, than this devise? The devise is made simply to the sons, "with benefit of survivorship," these words closing the sentence, and not in the middle of it, as in *Brown* v. *Burton*. Lord Hardwicke thus states the question to be decided: "There are two questions in this cause, the first (the second does not concern us) arises upon the words of the will, which are, 'I give and devise all my estate in D unto my four children, A, B, C and D, their heirs and assigns forever, equally to be di-

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vided between them, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship.' The question is, whether the four children take, as tenants in common generally, or as tenants in common with some sort of benefit of survivorship?" If Lord Hardwicke had held the opinion contended for by the appellant, he would never have hesitated an instant about the interpretation of this clause; nay, he might have said that because the testator added the words *if any died under twenty-one*, in the case of the personal property, and omitted them in the devise, therefore he intended to attach indefinite survivorship to the devise. On the contrary, he seems to think that there *must* be some period to which the words of survivorship attach. He says, 1 Wils. Rep. 165: "The words *equally to be divided* in a will make a tenancy in common; here also is added as *tenants in common and not as joint tenants*, which are very strong words; but then it is also said 'with benefit of survivorship,' which last words create the difficulty in the case, that is to say, to know at what time the testator intended this benefit of *survivorship* should take place; and this may be explained by another part of the will, where he plainly points out a survivorship among the children themselves, as to his personal estate, where the words are 'if any of my younger children die under age and unmarried,' then I direct that the share of him so dying shall go to the survivors;' then he comes to this devise of his real estate to his said four younger children, but it is true he does not say with *like* benefit of survivorship." In this case, then, the court has evidently never heard of any technical meaning of the particular phrase "benefit of survivorship," and it states that the only difficulty is to know at *what time* this benefit of survivorship should take place, and to ascertain this it looks to the general interpretation of the instrument. Mr. Royall says of this case: "The important thing decided in *Hawes* v. *Hawes* was that the words 'with benefit of survivorship' means, in their natural and primary sense, that survivorship which takes place when one dies, and his interest, instead of going to his heirs, goes to his co-tenants." Certainly they do, but they do *not* mean that the longest liver shall take the whole. In *Hawes* v. *Hawes*, the court looked to the will of the testator for the interpretation of these words, and concluded they meant a survivorship, the benefit of which the children were to enjoy up to the time they were twenty-one; in *Brown* v. *Burton*, the court looked to the marriage contract for their interpretation, and concluded they gave a survivorship up to the death of Mrs. Brown—what is the difference?

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In the principal case the court says: "To maintain his position, the learned counsel for the appellant relies upon certain English cases, and affirms that at the date of the deed of settlement (1807) the words used by the grantor, 'tenants in common, with benefit of survivorship,' had a fixed legal signification, established by the decisions of the English courts, and are capable of but one construction, and that is, that when such words are used, the period of distribution—that is, the period at which the fund absolutely vests—is the death of all the donees except the last survivor, and cannot be referred to the death of the testator or grantor, or any other particular event."

Whatever may have been the course of investigation pursued by the court, I think it is fully borne out by our examination of the authorities, when it says further: "It is impossible, in the course of our opinion, to pass in review all the English cases on this subject, and it is sufficient to say, after careful examination, that they do not establish any such fixed and uniform rule as that contended for."

When the Court, in *Brown* v. *Burton*, came to consider the claim of the appellant, that the whole estate should go to the longest liver, it surely did not ask too much when it required him to establish that extraordinary claim with a reasonable degree of certainty. This claim was an unnatural one, it was unusual and without a parallel in the records of the English and Virginia cases, except in one or two cases cited above, where even the English Courts invariably rejected it, and there the massing of all the property of a decedent in the hands of one child is nothing uncommon, nor at variance with their social system, as it is with us. It is a principle of jurisprudence, regarded with especial favor in America, that courts will attempt to put such a construction upon instruments as will best provide for descendants or posterity, and as will determine the title to property as speedily as possible. This policy of the law in Virginia is plainly indicated by our decisions—in restricting the period within which survivorship shall take place, and during which the title remains undetermined to the shortest possible time consistent with the terms of the instrument—and by our statute in abolishing survivorship as between joint tenants.

It is no matter of surprise, then, that when the appellant imputed such an intention to James Brown as that for which he contends, the court should hold "this construction so at variance with the declared purpose of the grantor to provide for his issue, and which would at some indefinite period give the whole fund to the last survivor of unborn children, with-

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out any provision for the families of those who have died, can only be given in a case so plain, as to compel the court to adopt it by some rigid and arbitrary rule of law, from which there is no escape or evasion."

The law is a practical science, and the whole tendency of modern jurisprudence is to divest it of all useless and unjust technicalities, and to rely more and more upon reason guided by experience and common sense in its application to present needs. Now is it to be supposed, that the parties in the contract in this case, when they consulted together over its provisions (which were to provide for the wife, if she became a widow, she relinquishing her dower interest and distributive share, and for the children or issue of their union) could possibly have looked forward in the uncertain future, and have contemplated a case of their having children, who should, in their turn, marry, and die, before their parents, leaving also children behind them?

Mr. Royall finds fault with the provision that the fund should lapse if all the children died under twenty-one, and supposes a case, in which each child should marry, have a family, and die under twenty-one. That supposition was, to say the least, extremely improbable, and such a contingency might be safely risked, though it is believed that it never occurred to the parties as being possible. I do not contend that this contract is a marvel of perspicuity in its provisions, but if the object had been to create the limitation contended for by the appellant, the unusual character of that provision would have caused the draughtsman of the instrument to make it precise, plain and specific. As to the word "issue," whether under that term the grand children were contemplated or not, is not very important in determining the intention of the parties to an instrument, providing for the issue or children of a marriage not yet consummated. Their prospective children under the circumstances must have been uppermost in the minds of the parties, and in providing for them, they were left to provide, in turn, in the far future for their own children. But without indulging in any speculation as to what might or might not have been intended by a prospective husband and wife in an instrument executed nearly seventy-five years ago, it is submitted that the decision of the court is based not only upon sound legal principle, but is a just and righteous conclusion upon the facts of the case.

But there is an American case, not cited by the court, and to which its attention had not been called by counsel which is almost identical with *Brown* v. *Burton*, and conclusively

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in favor of the doctrine there announced—the only difference between the two cases being that, in *Brown* v. *Burton*, the court discovered circumstances in the instrument indicating an intention to put the period of survivorship at the death of Mrs. Brown, instead of that of Mr. Brown. This case is *Fulton* v. *Fulton*, 2 Grant's Case (Pa.) 28. The following is the provision of the will, out of which the contest arose: "The remainder of my landed property I bequeath to my two daughters, Martha and Mary, and my two sons, Cochran and Benjamin, to be equally divided between them, who are charged with the comfortable maintenance of their mother, my loving wife Sarah, and in addition to the above remainder of my landed property, I bequeath to my said four children, Martha, Mary, Cochran and Benjamin, and my loving wife, the whole of my stock of every description, grain in the ground, and in the barn, hay and farming utensils of every description, and also the balance of the time of an indentured apprentice, provided they fulfill the indenture on their part. *If any of the above named four children should die, it is my will that the share of such one should be equally divided among the survivors;* and it is my will that all of the above named heirs contribute equally towards paying my just debts and funeral expenses."

The words of survivorship here are simply that the share of each one dying shall go equally to and among his cotenants, with no reference to any particular period at all, and are just as indefinite if not more so, than the words "with benefit of survivorship," in the principal case. The Court of Common Pleas held as follows: "The court is of opinion that the words in the will of James Fulton, deceased, 'if any of the above named four children should die, it is my will that the share of such one should be equally divided among the survivors,' are referable to the death of the testator; being unable from the will to find any other period. As all these children survived the testator, their estates are absolute." The decision of the Supreme Court, which is short and concise, and singularly applicable to the case of *Brown* v. *Burton*, I transcribe in full. "Much of the argument of the plaintiff in error is founded on facts apparently important, but not appearing in the case stated; much of it on difficulties seeming, by possibility, to arise out of the construction given to this will in the Court of Common Pleas; difficulties against which we cannot presume the testator intended to provide, unless we had some evidence that he thought of them. Perhaps he never thought of the mother

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outliving any of the children, much of it is a difficulty purely imaginary; for it is not true that a legatee or devisee and his estate are discharged by death from the duties imposed upon him by the testator in consideration of the devise or bequest. We think the court put the right construction upon this will, as well as upon the effect of the former action. It has the weight of authority in its favor. It avoids the fault of converting an express fee simple estate into a life estate, or an estate tail by implication. It avoids the fault of seeming to give a fee tail or a life estate in personal property—both the realty and personalty being granted by the same words. It follows the rule that that construction ought to be favored, that makes an estate vest absolutely at the earliest possible period, and it is much more equal in its apparent results than the one contended for on the other side."

This case speaks sufficiently for itself. Mr. Royall mentions several quite modern English decisions as supporting his theory to wit; *Haddesly* v. *Adams*, 2 Jurist (N. S.) 724, and *Taffee* v. *Conmee*, 8 Jur. (N. S.) 919. These cases affirm the doctrine of *Doe* v. *Abey*, cited above, that a survivorship may be annexed to a tenancy in common, and that the estate does not thereby become a joint tenancy, giving the same reasons therefor (see *supra*). As to the length of the period during which the survivorship was to take place, these cases come within a rule that takes them out of the general discussion. It is to be observed, as also in *Doe* v. *Abey*, that the survivorship is annexed to an *estate for life* to several, after which an estate is limited over, which very materially affects the aspect of the case, for even the longest liver is only to have a *life estate*, and therefore it was that Lord Westbury said that the natural and obvious meaning of survivor, when applied to a class of people of this character, was the longest liver. See 2 Jarman on Wills *655, "where a gift is made to several persons, as tenants in common, for life, and then to the survivor, *with a limitation over after the death of the survivor*, indicating therefore, unquivocally, that the survivor is to take at all events, the testator is considered to refer to survivorship indefinitely, and not to survivorship at his own death." In one of these cases (*Doe* v. *Abey*) where there was an estate for life, the question arose, as each one of the tenants died, if survivorship did not take place among them, what would become of the deceased tenant's share? The only answer the counsel could give, was, that the heir takes it as *special occupant*, until the death of the survivor, and this view the court very properly rejected. The fee in these cases

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rested in the remainderman only after the death of *all* the life tenants, hence, the question of survivorship was confined to the latter.

These decisions, therefore, do not conflict with the views maintained in the foregoing, nor do they tend to support the theory, that the phrase "with benefit of survivorship" attached to a tenancy in common, imports technically and necessarily that the whole estate always vests in the longest liver.

B. T. C.

Richmond, Va.

ARE PERSONS CONVICTED OF PETIT LARCENY PRIOR TO DECEMBER 1ST, 1876, DISFRANCHISED BY THE LATE AMENDMENT OF THE SECOND CLAUSE OF THE FIRST SECTION OF ARTICLE THREE OF THE VIRGINIA CONSTIUTION?

The question is a practical and important one, as it is probable that the right to vote of a thousand or more persons in Virginia depends upon its proper determination.

The third article of the Constitution provides as follows:

"Sec. 1. Every male citizen of the United States, twenty-one years old, who shall have been a resident of the State twelve months, and of the county, city or town in which he shall offer to vote three months next preceding any election, and shall have paid to the State, before the day of election, the capitation tax required by law for the preceding year, shall be entitled to vote for members of the General Assembly, and all officers elected by the people: provided, that no officer, soldier, seaman or marine of the United States army or navy shall be considered a resident of this State by reason of being stationed therein; and provided, also, that the following persons shall be excluded from voting:

First, Idiots and lunatics.

Second, Persons convicted of bribery in any election, embezzlement of public funds, treason, felony or petit larceny.

Third, No person who, while a citizen of this State, has, since the adoption of this Constitution, fought a duel with a deadly weapon, either within or beyond the boundaries of this State, or knowingly conveyed a challenge, or aided or assisted in any manner in fighting a duel, shall be allowed to vote or hold any office of honor, profit or trust under this Constitution."

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Previous to the late amendment, which became operative on the 1st day of December, 1876, persons convicted of petit larceny were not disfranchised; consequently, but inconsiderately as the writer believes, the answer generally given to the question has been that the amendment operates to disfranchise only those convicted *since* its adoption; because, to give it the effect of disqualifying those previously convicted, would make the amendment objectionable to the tenth section of the first article of the Constitution of the United States, which declares that no State shall pass any *ex post facto* law. The advocates of this construction must overlook the fact that the theory of our political system excludes certain classes from participation in the elective franchise on grounds of *public policy*, viz., because they lack either the intelligence, the virtue or the liberty of action essential to the proper exercise of that privilege, at the same time forgetting the marked distinction between retrospective laws and *ex post facto* laws. Cooley on Constitutional Limitations (4th ed.), 37; Id., 324-5; *Calder* v. *Bull*, 3 Dall., 390.

In the case of *Ridley* v. *Sherbrook*, 3 Cold., 569, it was held that the elective franchise is not an *inalienable* right or privilege but a *political* right conferred, limited or withheld at the pleasure of the people acting in their sovereign capacity. See also Cooley on Const. Lim., 753. After the late war, the Constitution of Missouri was so amended as to require a "test oath" as a prerequisite of voting; against the validity of the amendment, it was urged that it was in conflict with the Constitution of the United States, because *ex post facto;* but it was unanimously decided by the Supreme Court of that State in *Blair* v. *Ridgely*, 41 Missouri, 63, that the amendment was not unconstitutional. In an opinion that seems to be sustained by reason and authority, the court says, "the principle of the provision in the Constitution is involved in and flows from the duty of the State to protect itself, that is the welfare of the people, it proceeds upon the distinction between laws passed to punish offences in order to prevent their repetition, and laws passed to protect the public franchises and privileges from abuse by falling into unworthy and improper hands. The State may not pass laws in the form, or with the effect of bills of attainder, *ex post facto*, or laws impairing the obligation of contracts; it may and has full power to pass laws restrictive and exclusive, for the preservation or promotion of the common interest as political and social emergencies may, from time to time, require, though in certain cases disabilities may direct-

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ly flow as a consequence." The court drew a proper distinction in this case between the right to exercise a calling, trade or profession which is unquestionably an *inalienable* right and the right of the elective franchise, which is merely a *political* or *conventional* one, that "may be enlarged or restricted, granted or withheld at pleasure with or without fault." The same distinction was recognized and clearly illustrated by the Supreme Court of the United States in *Cummings* v. *Missouri*, 4 Wall., 277. See also *ex parte Garland Id.*, 333; *Anderson* v. *Baker*, 23 Maryland, 531. In the last mentioned case, the same doctrines were held, and it was determined that the right of suffrage is altogether a conventional one, and that it may be granted, abridged or taken away by the State Government in its discretion.

As to the scope of *ex post facto* laws, see Cooley on Constitutional Limitations, 323-4: "*Ex post facto* laws are technical expressions which include every law which renders an act punishable in a manner in which it was not punishable when committed; they relate to penal and criminal proceedings which impose punishments and forfeitures, and not to civil proceedings which effect private rights retrospectively; retrospective laws divesting vested rights, unless *ex post facto*, do not fall within the prohibition contained in the Constitution of the United States, however repugnant they may be to principles of sound legislation." 1 Kent Com., 409, 410, and authorities there cited.

Now, it seems to the writer quite clear, in the light of these decisions and of Chancellor Kent's definition of *ex post facto* laws, that the late amendment to the State Constitution disfranchises those convicted of petit larceny before as well as after the amendment became operative. But there are two other reasons for this view, which, it is believed, are conclusive, that will be suggested rather than elaborated.

First, that the article of the Constitution contains in itself evidence that such was the intention of the law-makers, because in the next clause of the same section persons fighting duels, &c., "*since the adoption of the Constitution*," are excluded from the right of suffrage.

Second, because to hold differently would be to limit the power of the State to regulate the elective franchise. "The most absolute and unqualified right of the State is that of regulating the elective franchise; it is the foundation of all State authority." *Anderson* v. *Baker*, *supra*. 1 Story Const., ch. 9, §581. The whole subject of the regulation of elections, including the prescribing of qualification of suffrage, is left

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by the National Constitution to the several States." Cooley on Const. Lim., 752. The fourteenth and fifteenth amendments to the Constitution of the United States do not interfere with the right of the State to prescribe who shall exercise the right of suffrage unless the privilege be denied on account of race, color, or previous condition of servitude. *United States* v. *Reese*, 92 U. S. Rep., 214; *United States* v. *Cruikshanks*, 92 U. S. Rep., 542; *Kennard* v. *Louisiana*, Id., 480; *Live Stock, &c., Association* v. *Crescent City, &c.*, 16 Wall., 36.

H. R. POLLARD.

Stevensville, King and Queen County, Va.

ENGLISH HIGH COURT, QUEEN'S BENCH DIVISION

June, 1879.

PHILLIPS *v.* LONDON AND SOUTHWESTERN R. CO.

1. In actions for personal injury, a jury should take into consideration all the heads of damage, in respect of which the sufferer is entitled to compensation. These are the bodily injuries sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business.
2. In an action for personal injuries, a new trial will be granted at the instance of the plaintiff, where the damages awarded by the jury are unreasonably small. A verdict for £7,000 damages set aside in this case because too small.

Motion for a new trial on the ground that the damages given by the jury were inadequate, and also on the ground of misdirection.

The trial of the action took place on the 4th of April, 1879, before Field J., and a special jury, in London, when the jury found a verdict for the plaintiff for £7,000. The facts of the case appear from the judgment.

A rule *nisi* having been obtained;

Ballantine, Serjt., and *Dugdale*, for the defendants, showed cause; *Sir J. Holker*, *A. G.*, *Pope*, *Q. C.*, and *A. L. Smith*, for the plaintiff, in support.

The following cases were cited in addition to those mentioned in the judgment: *Falvey* v. *Sanford*, 23 W. R., 162, L. R. 10 Q. B., 54; *Huckle* v. *Money*, 2 Wils., 205; *Beardmore*

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v. *Carrington*, 2 Wils., 244; *Manton* v. *Bales*, 1 C. B., 444; *Armytage* v. *Haley*, 4 Q. B., 917; *Kelly* v. *Sherlock*, L. R. 1 Q. B., 686, 15 W. R. C. L. Dig., 64; *Armsworth* v. *South-eastern Railway Company*, 11 Jur., 759; *Blake* v. *Midland Railway Company*, 18 Q. B., 111; *Pym* v. *Great Northern Railway Company*, 10 W. R., 737, 2 B. & S., 759, 768.

The judgment of the court (Cockburn C. J. and Lopes J.) was delivered by COCKBURN C. J.

This was an action brought by the plaintiff to recover damages for injuries suffered when travelling on the defendant's railway, through the negligence of their servants. A verdict having passed for the plaintiff with £7,000 damages, an application is made to this court for a new trial, on behalf of the plaintiff, on the ground of the insufficiency of the damages, as well as on that of misdirection, as having led to an insufficient assessment of damages; and we are of opinion that the rule for a new trial must be made absolute—not, indeed, on the ground of misdirection, for we are unable to find any misdirection, the learned judge having in effect left the question of damages to the jury, with a due caution as to the limit of compensation, though we think it might have been more explicit as to the elements of damage. It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants, who cannot always, even by the utmost care, protect themselves against the carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Mr. Justice Brett, in *Rowley* v. *London* and *North-western Railway Company*, 21 W. R., 869, L. R. 8 Ex., 231, an action brought on 9 and 10 Vict., c. 93, that a jury in these cases "must not attempt to give damages to a full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation." And this is in effect what was said by Mr. Justice Field to the jury in the present case. But we think that a

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jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effects on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lesson the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business, which, again, may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life.

If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a court ought not, unless under very exceptional circumstances, to disturb their verdict. But, looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim. The plaintiff was a man of middle age and of robust health. His health has been irreparably injured to such a degree as to render life a burden and source of the utmost misery. He has undergone a great amount of pain and suffering; the probability is that he will never recover. His condition is at once helpless and hopeless. The expenses incurred by reason of the accident have already amounted to £1,000. Medical attendance still is, and is likely to be for a long time, necessary. He was making an income of £5,000 a year, the amount of which has been positively lost for sixteen months—*i. e.*, between the accident and the trial—through his total incapacity to attend to his professional business. The positive pecuniary loss thus sustained all but swallows up the greater portion of the damages awarded by the jury. It leaves little or nothing for health permanently destroyed and income permanently lost. We are therefore led to the conclusion, not only that the damages are inadequate, but that the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account.

It was contended on behalf of the defendants that, even assuming the damages to be inadequate, the court ought not, on that account, to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort, unless there has

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been misdirection or misconduct in the jury, or miscalculation, in support of which position the cases of *Rendall* v. *Hayward*, 5 Bing. N. C., 424; and *Forsdike* v. *Stone*, L. R. 3 C. P., 607, were relied on. But in both these cases the action was for slander, in which, as was observed by the judges in the latter case, the jury may consider, not only what the plaintiff ought to receive, but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us, if we think the damages unreasonably small, to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply when they are insufficient to meet the justice of the case. The rule must therefore be made absolute for a new trial.

RULE ABSOLUTE FOR A NEW TRIAL.

SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

FECHHEIMER *v.* NATIONAL EXCHANGE BANK OF NORFOLK.

March 27.

D. & L. carried on two stores in Norfolk, in premises of which they held leases. On the 8th of May, 1866, they conveyed to F. all their goods in these stores, all debts due them, and the leasehold premises, in trust to pay certain specified debts, with authority to take possession, sell the goods, and collect the debts. On the 15th of May, W. sued D. & L. in assumpsit for $913 30, and on the same day sued out an attachment against their effects, and this attachment was levied on all the goods and debts at the two stores, which were taken possession of by the sergeant of the city. On the same 15th of May, but two or three hours after the attachment of W. was levied, the National Exchange Bank of Norfolk sued out an attachment against the property of L. & G. claiming a debt of $11,665, and this attachment was levied by the same officer upon the goods and in his hands under the other attachment, and also upon the leaseholds of the two houses. In this case F. interpleaded, and there was a verdict and judgment in his favor; and afterwards the suit of W. was dismissed. F. then sued the Bank in an action of trespass on the case for the damages he had sustained by the levy of their attachment. HELD:

1. Though at common law the action on the case was the proper remedy so far as the goods, &c., embraced in the first attachment was involved, and trespass *vi et armis* was the remedy as to the leaseholds which were not levied on by the first; yet, as under the Virginia statute

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case may be brought wherever the action of trespass *vi et armis* could be brought. The action on the case was properly brought to recover the damages sustained as to all the property attached.

2. F. has a right to recover from the Bank all the damages he has sustained by the levy of the attachment of the Bank upon the two storehouses held under lease, and the withholding the possession from him.
3. If the attaching creditors had been joint trespassers in seizing and detaining the attached effects, then they would have been jointly and severally liable for the whole amount of the damage resulting from such joint trespass. But their acts in so seizing and detaining said effects having been several, they are only liable severally for the damages resulting from their several acts.
4. The attachments and returns of the officer thereon, showing that the property was held under both attachments, *parol* evidence is not admissible to prove that it was held exclusively under the first attachment.
5. If the plaintiff seeks to introduce a copy of the record in the attachment suit, for the purpose of showing the existence of said record, and how the case therein mentioned had been disposed of, it can only be done by its being introduced for all the purposes for which it may properly be available to either party.

This was an action of trespass on the case in the Circuit Court of the city of Norfolk, brought in September, 1867, by Martin S. Fechheimer against the National Exchange Bank of Norfolk, to recover the damages alleged by the plaintiff to have been sustained by the levy of an attachment at the suit of the said National Exchange Bank of Norfolk, upon certain goods, wares and merchandise, debts, books, &c., and two leasehold interests in two storehouses, all in the city of Norfolk, the same having been attached as the property of Lublin & Steiner, but which the plaintiff claimed to be his, and to have been in his possession at the time of the levy. On the trial of the cause there was a verdict and judgment for the defendant; and a writ of error to this court.

In the progress of the trial the plaintiff took several exceptions to rulings of the court, marked respectively A, B, C, D, E and F, the last being to the refusal of the court to set aside the verdict on the grounds that the verdict was contrary to the law and the evidence, and that the court had given an erroneous instruction to the jury at the instance of the defendant, and had refused to give an instruction asked for by the plaintiff. In this exception all the facts proved are set out.

It appeared that Lublin & Steiner were merchants carrying on two stores in the city of Norfolk, in houses which they held under leases. One of these was No. 9 East Market Square, and the other No. 11 East Main Street. On the 8th of May, 1866, they conveyed to the plaintiff, Fechheimer, all

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their goods in these stores, all debts due them, and the leaseholds interest to pay certain debts named in a schedule attached to the deeds, with authority to take possession and sell the goods, and collect the debts, and for this purpose to employ the necessary agents and clerks to attend to the business.

On the 15th of May, 1866, Wm. T. Dixon & Brother sued Lublin & Steiner in *assumpsit* in the Corporation Court of the city of Norfolk, to recover a debt of $913.30, which they claimed to be due to them; and on the same day sued out an attachment against their effects. And this attachment was levied on all the goods and debts at the two stores, which were taken possession of by the sergeant of the city. These plaintiffs did not file a declaration in their action; and at the September term, 1866, of the court, the suit was dismissed by order of the court. The record in this case is referred to as No. 2.

On the same 15th of May, 1866, but two or three hours after the attachment of Dixon & Bro. was levied, the National Exchange Bank of Norfolk sued out an attachment against the property of Lublin & Steiner, claiming a debt of $11,665.47 and this attachment was levied by the same officer upon the goods, &c., in his hands under the other attachment, and also upon the leaseholds of the two storehouses.

In this case Fechheimer interpleaded, claiming that all the property levied on was his, and that he was in possession of it at the time of the levy of the attachment. This attachment case came on to be tried at the July term of the court, and after a trial, which lasted from the 5th to the 25th of the month, the jury found a verdict that "Fechheimer had title to the property levied upon by the attachment sued out by the National Exchange Bank of Norfolk." And the court rendered a judgment that the said property be discharged from the said levy, and that the sergeant of the city do forthwith deliver the said property to the said Fechheimer, his agents or attorneys; but this order is not to effect the authority of the said sergeant to hold the same for any other cause than the levy aforesaid. This case is referred to in this case as record No. 1. The other facts in the case, and the questions involved in the exceptions, are sufficiently stated by Judge MONCURE in his opinion.

Scarburgh & Duffield for the plaintiff in error.

W. H. C. Ellis for the defendant in error.

MONCURE P. delivered the opinion of the court.

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The court is of opinion that the Circuit Court erred in overruling the motion of the plaintiff in error to set aside the verdict and grant him a new trial, "because the said verdict is contrary to law and to the evidence produced before the jury at the trial of this cause;" as stated in the last bill of exceptions, marked "F," in which are certified the facts proved at the trial of the cause.

It was proved as a fact in the cause, that at the time of the levy of the attachment referred to in said certificate, sued out by the defendant, the Exchange National Bank of Norfolk, against the estate of Lublin & Steiner for the amount of a debt of which the principal was $11,665.47, claimed by the former to be due to it by the latter, the property so levied on, to wit: "all the goods, wares and merchandise, consisting of boots, shoes, &c., at the stores Nos. 9 Market Square and 11 Main Street, Norfolk, Va., and also on the unexpired terms of the leases of said stores," was the property of the said plaintiff in error, Martin S. Fechheimer, as claimed by him, and not the property of the said Lublin & Steiner, as contended by the defendant in error, the Exchange National Bank of Norfolk aforesaid. It also appears from the facts set forth in said certificate, that the said attachment was levied on the said property at the instance and request of the said defendant in error. And although it appears that at the time of such levy, the said property, except "the unexpired terms of the leases of said stores," was subject to a levy which had previously, on the same day, been made thereon by the same officer, under another attachment sued out in the same court by Wm. T. Dixon & Bro., against the estate of the said Lublin & Steiner, for a debt claimed by the former to be due to them by the latter, the principal of which is $913.30, with interest and cost; and that the said property on which the attachment in favor of Wm. T. Dixon & Bro. was levied as aforesaid, remained subject to both of the said attachments until the 25th day of July, 1866; when a verdict and judgment were rendered in favor of the plaintiff in error, the said Martin S. Fechheimer, on his petition of interpleader in the said attachment case of the National Exchange Bank of Norfolk against the said Lublin & Steiner, and continued subject to the said attachment in favor of the said Wm. T. Dixon & Bro., until two or three days after the day and year last aforesaid, when possession of the said property was delivered by the sergeant to the plaintiff, Martin S. Fechheimer, by the direction of the counsel of the said Dixon & Bro., upon the advice of the counsel of the Exchange National Bank of Nor-

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folk aforesaid, to the counsel of the said Dixon & Bro., for the reason that the said Martin S. Fechheimer had established his title to the said property.

Without deciding, therefore, what amount of damage the plaintiff is entitled to recover for the seizure and detention of his said property against the defendant under the said attachment of the latter—that being a question of fact for the jury to decide, with the aid of the court in the solution of any question of law which may arise in the course of inquiry as to the said fact--it seems to be very clear that there ought to have been a verdict and judgment in the cause in favor of the said plaintiff instead of the said defendant, and that the Circuit Court therefore erred in overruling the motion of the plaintiff to set aside the verdict and grant him a new trial as aforesaid.

In regard to the unexpired term of the leases of said stores which was conveyed with the other property aforesaid by said Lublin & Steiner to said Fechheimer, the same was not included in the levy of the said attachment in favor of the said Dixon & Bro., but was included in the levy of the said attachment in favor of the National Exchange Bank of Norfolk aforesaid. For damages arising from the unlawful seizure and detention of the said leasehold estates under the said attachment in favor of the National Exchange Bank of Norfolk against the said Lublin & Steiner, an action of trespass *vi et armis* at common law was the proper remedy. And the Code, chap. 145, § 6. p. 995, provides that "in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." The latter is the form of action in this case. It is perfectly clear, therefore, that in regard to the said leasehold estates, the right of action exists, and that is enough to show that the Circuit Court erred in overruling the motion to set aside the verdict and grant a new trial as aforesaid.

But in regard to the other property on which the said attachment in favor of the National Exchange Bank of Norfolk was levied, being the same property on which the said attachment in favor of said Dixon & Bro. was levied as aforesaid, both of the said attachments were actually levied on the said property, and were certainly intended so to be, by the plaintiffs therein respectively. Certainly the detention of the said property thereafter by the officer who made the said levies, was with the consent and approbation, and upon the responsibility of the plaintiff respectively, at whose instance the said property was so detained. It is unnecessary, and

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would be premature, now to decide, in what proportion the said plaintiff would be so liable. That several attachments may successively be levied upon the same property, is perfectly clear and a fact of frequent occurrence. It would be strange if by levying an attachment for a small debt upon property worth ten times the amount of the debt, the property should be exempt from the levy of any other attachment until it should be discharged from the first attachment. The Code, chap. 148, § 26, p. 1015, expressly provides that "the attachment first served on the same property, or on the person having the property in possession, shall have priority of lien." Certainly the levy of the second attachment in this case on the property in question, was at the instance and with, the consent of the attaching creditor and his counsel, and the said creditor is therefore liable for any damages which may be sustained by any person by reason of a wrongful seizure or detention of such property. In this case the debt claimed by the first attaching creditor was small compared with that claimed by the second attaching creditor. It is not improbable that if the first had been the only attachment in the case, there might have been a replevin of the property, which would have prevented any damage to the claimant by reason of the seizure and detention of the property. Whereas, the large amount of the aggregate of the claims of the two attaching creditors, might have deterred or prevented the claimant from replevying it. But we repeat that we do not mean to intimate in this opinion, in the slightest degree, what ought to be the measure and proportion of the damages to which the different attaching creditors would or ought to be held liable in such a case. At common law, the form of action against the second attaching creditor for the seizure and detention of the same property levied upon by the first attaching creditor would have been trespass on the case, the form pursued in this instance. But as by the statute now in force, that form may be pursued when the cause of action is trespass *vi et armis*, therefore one action of trespass on the case will cover a cause of action, though at common law, as to part of it, trespass on the case, and as to the other part trespass *vi et armis*, would have been the proper remedy.

The court having thus disposed of the principal question in the case, to wit: Whether the Circuit Court erred in overruling the defendant's motion for a new trial, because the verdict was contrary to law and the evidence, which arises on the last bill of exceptions in the case, marked F, will

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now take notice of the other bills of exceptions, or such of them as may seem to require notice. And first as to Bill of exceptions marked "A."

We do not think that the Circuit Court erred in refusing to give the instruction asked for by the plaintiff as mentioned in that bill of exceptions. That instruction assumes that the defendant is liable for the whole amount of damage sustained by the plaintiff from the seizure and detention of his property therein mentioned, without regard to any liability therefor of the first attaching creditor. If the attaching creditors had been joint trespassers in seizing and detaining the attached effects, then such trespassers would have been jointly and severally liable for the whole amount of the damage resulting from such joint trespass. But their acts in so seizing and detaining said effects were several; and they are only liable severally for the damage resulting from their several acts. The instruction, in the form in which it was asked for, was calculated to mislead the jury, and ought to have been so modified as to inform the jury of the extent of the appellee's legal liability as aforesaid. Second, as to Bill of exceptions marked "B."

We think that the Circuit Court erred in refusing to give the instruction asked for by the plaintiff, and set out in this bill of exceptions; which is, that if the jury believe from the evidence that it proves what it tends to prove as stated in said bill, then the levies mentioned in the said first bill of exceptions marked "A," and which were made upon the goods, wares and merchandise, and leaseholds mentioned in the said first bill were wrongful, and that as to the said leaseholds, the defendant in this action is liable to the plaintiff in this action for damages therefor, and also for the detention of the said leaseholds from the possession of the said plaintiff, and that the defendant's said liability is for such damages as will compensate the plaintiff for the injury sustained by him as to the said leaseholds by reason of the said levies and the detention aforesaid of the said leaseholds from the possession of the said plaintiff. The attachment in favor of the National Exchange Bank of Norfolk, but not the attachment in favor of Wm. T. Dixon & Bro., having been levied upon the said leaseholds, the former plaintiff is exclusively liable for the said damages. Third, as to Bill of exceptions marked "C."

We think the Circuit Court erred in overruling the objection of the plaintiff to the introduction of "W. H. C. Ellis, a witness to testify that the sergeant of the city of Norfolk held the goods, wares and merchandise and leaseholds men-

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tioned in the said first bill of exceptions marked 'A,' as aforesaid, under, or under color of, the attachment mentioned in the record, set out in the plaintiff's said first bill of exceptions, of which the No. 2 therein mentioned is a copy, and not under, or under color of, the attachment mentioned in the record, set out in the plaintiff's said first bill of exceptions, of which the No. 1 therein mentioned is a copy." We think that the said attachments and returns thereon show that the said goods, &c., and leasehold, were not held by the said sergeant as the testimony of the said witness tends to show they were held, and cannot be contradicted by parol testimony. Fourth, as to Bill of exceptions marked "D."

It is stated in that bill, that at the trial of the cause, the plaintiff, to maintain the issue joined on his part, offered to introduce in evidence before the jury an authenticated copy of a record, which is the same mentioned in the plaintiff's first bill of exceptions marked 'A,' and is therein referred to as marked 'No. 2,' for the purpose of showing the existence of said record, and how the case therein mentioned had been disposed; but the defendant, by its counsel, objected to the introduction of the said copy of the said record in evidence before the jury, unless the same should be introduced for all the purposes for which it might be properly available to either party, and the court sustained the said objection of the defendant, and refused to allow the said copy of the said record to be introduced in evidence, unless the same should be introduced by both parties for all the purposes for which it might properly be available to either party; to which ruling of the court the plaintiff excepted," &c., "and then the plaintiff introduced in evidence the said copy of the said record, reserving the benefit of, and not waiving, his said exception." We think there is no error in the said ruling of the court. Fifth and lastly, as to Bill of exceptions marked "E."

It is stated in that bill, that after the jury were sworn to try the issue joined in the case, and after all the evidence on both sides had been produced, which evidence tends to prove the facts certified in the plaintiff's sixth bill of exceptions, marked "F," the defendant moved the court to instruct the jury as follows:

"If the jury believe from the evidence that before the attachment of the Exchange National Bank against Lublin & Steiner was levied by the sergeant, he had taken the property in his return mentioned out of the possession of Lublin & Steiner, or Fechheimer, by virtue or under color of a prior attachment issued in the suit of Dixon & Bro., then pending,

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and that he kept the actual possession of said property and held the same by virtue or under color of the said attachment of Dixon & Bro. until after the verdict of the jury and the judgment of the court in the case mentioned in the record of which the No. 1 mentioned in the plaintiff's first bill of exceptions ('A') is a copy, and then delivered the said property to the said Fechheimer, in consequence of the instructions of said Dixon & Bro., or their counsel so to do, they ought to find for the defendant."

The court gave the said instruction, to which the plaintiff excepted.

We think that the record shows that after the attachment of the Exchange National Bank against Lublin & Steiner was levied by the sergeant, which was on the same day, though after the attachment of said Dixon & Bro. was levied, he kept the actual possession of said property, and held the same by virtue or under color of both of the said attachments until and after the verdict of the jury and the judgment of the court on the said verdict in favor of the said Fechheimer or his interpleader in the attachment of the Exchange National Bank of Norfolk aforesaid, and then delivered the said property to the said Fechheimer, in consequence both of the said verdict and judgment in favor of the said Fechheimer, and of the instructions of said Dixon & Bro., or their counsel so to do. The said instruction was therefore not warranted by the facts of the case as certified by the court, which erred in giving the said instruction to the jury.

The court is therefore of opinion that the judgment of the said Circuit Court, to which a writ of error and supersedeas were awarded by this court in this case is erroneous, for the reasons and on the grounds aforesaid, and ought to be reversed and annulled, the said verdict set aside, and the cause remanded to the said Circuit Court for a new trial to be had thereon, in conformity with the foregoing opinion.

JUDGMENT REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

Richmond.

OLD DOMINION STEAMSHIP CO. *v.* BURCKHARDT.

MARCH TERM, 1879.

1. Where a vendee obtains possession of a chattel with the intention, by the vendor, to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract and obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction. And the legal consequence is that, if before the disaffirmance, the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transfer is good against the vendor.
2. Upon the sale of a chattel to be paid for on delivery, if possession is delivered without the payment, and before the vendor claims the chattel it is sold by the vendee to an innocent purchaser and paid for, the vendor cannot recover the chattel from the innocent purchaser.
3. But if there has not been a contract of sale, but only a transfer of possession, to become a contract of sale when payment is made, the person in possession has no title to the chattel, and can, therefore, convey none to an innocent purchaser, and the owner may recover the chattel
4. In this case, HELD: There was a contract of sale as well as delivery, and though the vendee failed to pay, the vendor could not recover the chattel from an innocent purchaser for value.

This was an action of detinue in the Circuit Court of the City of Richmond, brought by Frederick Burckhardt against the Old Dominion Steamship Company, to recover ninety tierces of stearine of the value of $3,600. The defendant pleaded *non detinet*, and it was agreed that any defense might be made under that plea that might be made under any proper special plea.

When the case was called for trial, the parties agreed to dispense with a jury, and submit the whole matter of law and fact to the court, and the court having heard the evidence and argument of counsel, rendered a judgment in favor of the plaintiff for the ninety tierces of stearine, or the alternative value of $3,332.67, with interest and costs.

The defendant excepted to the judgment of the court, and the exception contained all the evidence. And they then moved the court for a new trial, which motion the court overruled, and they again excepted; and the court certified the facts and the evidence to be as set forth in the first bill of exceptions. And thereupon the Old Dominion Steamship Company ob-

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tained a writ of error and *supersedeas* to this court. The view of the evidence taken by this court is shewn in the opinion of CHRISTIAN J.

Crump, and *Sands, Leake & Carter* for the plaintiff in error.

Stallo & Kittridge and *Berkeley & Berkeley* for the defendant in error.

CHRISTIAN J.—This case is before us on a writ of error to a judgment of the Circuit Court of the City of Richmond. The action was detinue for ninety tierces of stearine in the possession of the Old Dominion Steamship Company, and claimed as the property of Burckhardt, a merchant resident in the city of Cincinnati. In the Circuit Court a jury was waived by the parties, and both matters of law and fact submitted to the court for its decision. The Circuit Court found in favor of the defendant in error (Burckhardt), and pronounced its judgment in his favor, against the plaintiffs in error, for ninety tierces of stearine, of the value of three thousand three hundred and thirty-two dollars and sixty-seven cents, if to be had, or the value thereof if not to be had, with interest on said values to be computed after the rate of 6 *per centum per annum*, from the 2d day of May, 1876, until paid, and costs.

There was a demurrer to the declaration, which was afterwards withdrawn. The only plea tendered was *non detinet*, and on that issue alone the case was heard and determined in the Circuit Court. A motion was made by the plaintiff in error to set aside the judgment and grant a new trial, which motion was overruled. A bill of exceptions, setting out the evidence, was tendered, and signed and sealed by the court. And thereupon the plaintiff in error applied to this court for a writ of error, which was accordingly awarded.

The question we have to determine is, was the judgment of the Circuit Court upon the evidence appearing in the record before us erroneous? And, first, it is to be premised that the question, as to how the appellate court will regard, and give effect to, a bill of exceptions in which the *evidence* and not the facts proved are certified, in a case tried by a court without a jury, and where the evidence is conflicting, is a question not definitely settled by the decisions of this court. There is certainly some conflict of authority on this point.

Some of the cases hold that the same rule is to be applied to a case where a jury is waived and the case is tried by the

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court upon the law and facts, as to a case where there is a verdict of a jury; and that in both cases where the *evidence* (and not the facts proved) is certified, and the evidence is conflicting, the bill of exceptions must be taken as a demurrer to evidence; and so regarding it, the appellate court will only reverse, when it appears that by rejecting all the oral evidence of the plaintiff in error and giving full credit to that of the defendant in error, together with all fair and legal influences to be deduced from said evidence, the judgment is erroneous. See *Pryor* v. *Kuhn*, 12 Gratt., and *Bachman* v. *Selden*, 27 Gratt.; *Hodges' ex'or* v. *First National Bank of Richmond*, 22 Gratt.

In *Baratta* v. *Mitchell*, 27 Gratt., two judges out of three (the court then composed of three judges), held that a different rule prevailed where the judgment is by the court, upon the law and facts, and it was so held also in *Wickham & Goshorn* v. *Martin, Lewis & Co.*, 13 Gratt., by two judges out of four.

According to these last mentioned authorities, the rule in such case is different from that which prevails when there is a verdict of a jury; the bill of exceptions is not, in such case, to be regarded as a demurrer to evidence, but in case of a conflict of evidence in *such* a case the preponderance will be given to that side which prevailed in the court below.

In the case before us, I do not think it necessary to reconcile these conflicting decisions, and declare which is the true rule, settled by the weight of authority.

The question is not altogether free from doubt, it was not argued in this case, and its decision is not necessary to a determination of the controversy upon its merits. For, in my view, if we adopt either rule, the result in this case will be the same. Adopting that rule which is most favorable to the defendant in error, and regarding the bill of exceptions as a demurrer to evidence, I think it clear the plaintiff, in the court below, was not entitled to recover, and that the judgment of the court below is erroneous.

In forming my judgment in this case, I will look alone to the evidence offered on behalf of the plaintiff in the court below, and so much of the evidence offered by the defendant, as is not in conflict with the plaintiff's evidence. This evidence consists of the depositions of Frederick Burckhardt (the plaintiff in the court below) and of several of his employees, and also of certain teamsters and employees of the Cincinnati Transfer Company, who were engaged in transferring the stearine in controversy, from Burckhardt's fac-

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tory to the wharf boat of the Chesapeake and Ohio Railroad Company.

Burckhardt's deposition was twice taken, the first on the 24th June, 1876, and the second on the 19th October, 1876. He also testified in person before the Court at the December term, 1876.

The question to be determined, upon the plaintiff's evidence, and so much of the defendant's as is not in conflict therewith, is, whether there was, on the 26th of April, 1876, (the date of the transaction out of which this suit originated), a sale by Burckhardt to the Goettle Bros. of the ninety tierces of stearine in controversy, which, upon delivering, transferred *the title* to Goettle Bros., or whether there was simply a transfer of *possession* of the goods; in other words, whether the owner (Burckhardt) intended, by that transaction, to transfer both the property in and the possession of the goods to Goettle Bros., or to deliver nothing more than the bare possession. If the transaction was a sale which transferred both title and possession, although such title and possession was obtained by false and fraudulent representations by Goettle Bros, the goods cannot be recovered from Hall, the *bona fide* purchaser, who paid value for them without notice of such fraud, nor from the Old Dominion Steamship Co., which had the goods to be delivered to Hall. If, on the other hand, there was no sale, which, upon delivery, passed no title, but it was intended to pass the bare possession only, then the sale by Goettle Bros. could pass no title to their vendee, and Burckhardt not having parted with the title, could claim the goods in the hands of whomsoever they might be found.

To determine this question, let us look first to the deposition of Burckhardt, taken the 26th June, 1876.

After stating that he was a merchant, who had been doing business in Cincinnati for thirty years, in the firm name of Burckhardt & Co., he is asked to state if he had any transactions with Goettle Bros. in respect to ninety tierces of stearine in the latter part of April, 1876; if so, to state in detail what that transaction was. He answered this question as follows:

"Mr. Goettle, the one who is lame, Emil, I think his name is, asked me on 'Change, about the 23d or 24th of April, if we had any stearine; I told him we had some of off-grade on hand. He asked me then if I would let him telegraph on it, and I said yea, he could telegraph. He asked then if he could send for samples, which were called for by some one from his office. On the morning of the 26th of April, Mr.

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Emil Goettel called at my works and said that he had an order for the ninety tierces (there were two lots of which samples were given him) which he could use at eleven cents; eleven and one-quarter was the figure given by us when *he got the sample.* He requested to have fresh samples drawn from them, and he stood and examined the samples when they were drawn, and I said that eleven cents was the best that could be done, and I would let it go at that. He said that we might have it weighed off as soon as convenient, which was done. In the afternoon of April 26th, the same day, during my absence from the store, he sent this paper which is hereto attached and marked exhibit No. 1, a copy of which is as follows:

Messrs. Burckhardt & Co.:
Please deliver to dray 90 trs. stearine and oblige

GOETTLE BROS.

Mark H——.
April 26th, 1876.

He got the stearine on this order, which was delivered to him by the employees at my store, late in the afternoon, it must have been after two o'clock, for I was at the store then, and the order had not then come. After I went away I returned late in the afternoon, and then found it had gone."

In answer to the question, state if the expression "to telegraph on it" is a term used in the trade in Cincinnati, and if so, what it signifies? he answered:

"Brokers and provision brokers confer with their principals in respect to goods that they order; it is a usual term with brokers on 'Change."

In answer to the question "how and where was this stearine to be paid for, and what did the price come to?" he says: "It was to be paid for immediately on delivery; as soon as the goods are delivered it is expected that the money shall be paid by the brokers, or that they give their principals; the price came to $3,409.67 for the ninety tierces."

In answer to the question what was done about the payment of this stearine, he says:

"My collector went to Goettle, I think, in the evening of the 26th, or the following morning, to get the money; he came back and said that Mr. Goettle would see me on 'Change; I went there on 'Change and could not find Mr. Goettle there; in the afternoon I sent again to his office and

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did not find him in and came back without finding him. The following morning, the 28th, I sent again, and he waited there, at Goettle's office, until near 'Change, and told me that he could not get any money, and that Mr. Goettle would see me on 'Change again; I met Mr. Goettle in front of the Exchange about 12 o'clock or little after; I demanded of him to pay for the stearine or the bill of lading; he said he was sorry he could not pay it; I told him that he must either pay for the goods or return them or the bill of lading for them; that the goods were ours and I wanted the money for them. He said that he had shipped them and drawn against them; I asked him who they were shipped to; he gave me the name of Charles Hall, of New York; I demanded of him the bill of lading and he said that he could not return it, as he had used it and drawn against it; I told him to give me the draft or else have the draft stopped from being paid; he assented to stop the payment of the draft and sent a dispatch, a copy of which is hereto annexed and marked exhibit "2," a copy of which I took at the time; his brother, while we were in conversation, came up to us, and said that the draft was used in Kuhn's bank, on third street; I requested Mr. Goettle to go with me to Mr. Kittridge, my attorney, to determine what steps were necessary to protect us in our rights; the brother came with me; he agreed at Mr. Kittridge's office to telegraph Mr. Hall to have the payment of the draft stopped; I also telegraphed, and a copy of the first dispatch is hereto attached, marked exhibit "3," and after I saw Mr. Kittridge I again dispatched, a copy of which is hereto attached, marked exhibit "4"; I went to Mr. Kuhn's office also, to give him notice, and I told him that the stearine was our property, and that we should follow it at once and replevy or attach it wherever we could find it. This all happened on April 28th, and I afterwards succeeded in stopping the stearine at Richmond."

The telegrams referred to in the foregoing deposition are as follows, and were offered in evidence by the plaintiff:

Exhibit "2," referred to in the foregoing depositions.

28th Apl., 1876.

Chas. G. Hall, New York:

Burckhardt & Co. claim and are entitled to proceeds ninety tierces stearine marked *V*. They telegraph you.

[Signed.] GOETTLE BROS.

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Exhibit 3, referred to in the foregoing depositions.

Apl. 28th, 1876.

Chas. G. Hall, New York:

We claim proceeds ninety trs. stearine shipped by Goettle Bros. Don't pay dft.

BURCKHARDT & CO.

Exhibit 4, referred to in the foregoing deposition.

Chas. G. Hall:

The 90 tierces stearine shipped by Goettle Bros. April 26th, is ours. We have ordered the railroad company not to deliver it except on our order.

BURCKHARDT & CO.

Exhibit 5, referred to in the foregoing depositions.

The Western Union Telegraph Company, 174 N. Y.; No. of message, 456, dated New York, April 28th, 1876. Received at n. w. cor. Fourth and Vine str., Cincinnati, 4 P.—.

To Burckhardt & Co.:

Goettle Bros. draft on ninety tierces stearine paid and charged their account.

CHAS. G. HALL.

On cross examination, in answer to the question whether, at the time of the transaction, the credit and standing of Goettle Bros. were good, he answered: "I knew nothing to the contrary." He admitted, also, that he told his men to have the stearine weighed off for the Goettle Bros., and that the letter "H" directed to be marked on the packages in their order for delivery, indicated that they were to be shipped. It was further proved by Frederick S. Crally, the collecting clerk of Burckhardt & Co., that he presented an invoice for ninety tierces of stearine on 26th April, 1876, between three and four o'clock in the afternoon, that he saw Mr. Emil Goettle, who stated that it was not all hauled at that time, and that he would hand Mr. Burckhardt a check on 'Change in the morning; that he called again on the morning of the 27th, when he saw Al. Goettle, and he promised that he would bring a check for the proceeds on 'Change, on the

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next morning; saw both the Goettles on the 28th, and both promised that the matter should be fixed up promptly. Witness was not present when sale was made; heard Emil Goettle enquire for Mr. Burckhardt, and saw him and B. go together to the factory, where he presumes the sale was made. After Goettle left, it was repeated that the stearine was sold to Goettle Bros.

It was further proved by the foreman of Burckhardt & Co. that he delivered the 90 tierces of stearine upon the order above referred to, signed by Goettle Bros., to the wagoners of Transfer Company, and placed the shipping mark upon the packages; that the last load was delivered when it was nearly four o'clock. This was the evening of the 26th April, 1876. It was further proved by the teamsters who hauled the stearine to the wharf boat of the C. & O. R. R. Co., that it was delivered on the afternoon of the 26th April. It was also proved by the clerk of the Transfer Company, that 90 packages of stearine were hauled by their wagoners from Burckhardt's factory to the wharf boat of the Chesapeake and Ohio Railroad Co., and the drayage charged to Goettle Bros.

The plaintiff also testified before the court, that, on the evening of the 26th April, on his return to the factory, about 4 o'clock P. M., he found that the stearine had either been all just delivered or nearly all delivered, and that he gave himself no further concern about the matter, as he knew he could not get the money that evening, it being after banking hours; he also testified that he knew the goods were delivered from his factory for immediate shipment, and that the letter "H" on the order of Goettle Bros. was a shipping mark; that the stearine was charged on his books to the Goettle Bros., and the bill sent by his clerk for collection was made out against them.

It was further proved by defendants' evidence (and we may look to this, because it is not in conflict with, but is corroborated in part by plaintiff's evidence), that Goettle Bros. took a bill of lading for the goods, and drew a draft on Chas. G. Hall, of New York, to whom the stearine was shipped. "The draft was for about 90 tierces of stearine, and called for between thirty-four and thirty-five hundred dollars" (the words of the witness are here quoted), and the draft was negotiated by Kuhn & Sons, brokers, in Cincinnati, who forwarded the draft with the bill of lading attached thereto, to said Hall at New York. It was paid by Hall before he had any notice of any claim on the part of Burckhardt to the goods. It is also proved that Goettle Bros. failed a few days after the transaction with Burckhardt.

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Upon this evidence, I think it is clear that *on the 26th of April—the day of the delivery of the goods*—there was a sale from Burckhardt to Goettle Bros., which transferred to them *the title* as well as the possession of the goods, and that it was not the delivery of the *bare possession* which entitled Burckhardt to claim the goods in the hands of a *bona fide* purchaser without notice of Burckhardt's claim.

On *that day* (the day of delivery) there was no inquiry of Goettle Bros., as to who was their principal, or whether they had a principal at all. Burckhardt inferred that they were acting as brokers for an *unnamed* principal, because one of the Goettles inquired of him "if he could telegraph" on the price fixed (11 cents), but this was a mere matter of inference. If it was true, as Burckhardt says in his second deposition, that he would not have trusted Goettle Bros., it is passing strange, that before the delivery he did not make the same demand, which he says he made on the 28th, that he should disclose the name of his principal on the twenty-sixth. On that day, *whom* was he trusting if not Goettle Bros.? Certainly not an undisclosed principal, whose credit and whose name were both equally unknown to him.

He says the sale was for cash on delivery. To whom was he looking for that cash? To Goettle Bros. or to some unknown and unnamed principal? What did it matter to him whether Goettle Bros. had a principal, or who was their principal, or whether that principal was known or unknown, if his contract with them was "cash on delivery?" In such a contract the delivery and the payment of the cash must be cotemporaneous acts, or the goods must be paid for before delivery. Why was not the cash demanded on delivery? Burckhardt could have protected himself either by demanding cash before the goods were delivered, or seizing the goods before they left the Chesapeake and Ohio R. R. wharf, or by demanding that the bill of lading should be delivered to him instead of Goettle Bros. If he had intended to deliver the bare possession of the goods without transferring the title by making a *sale* out and out to Goettle Bros., why did he charge the goods to Goettle Bros., and send his check to them for payment? He well knew that the packages, which were delivered from his factory on the order of Goettle Bros., were marked for *immediate shipment;* and yet knowing this, he permitted them to go out of his possession without being paid for. He was in his factory when the last package was shipped, for he said when he returned about 4 o'clock on the afternoon of the 28th April, he found that the stearine

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had nearly been delivered, yet he took no steps to prevent its delivery, but charged the proceeds on his book to Goettle Bros., and sent his clerk next morning to them to demand of them *not the stearine*, which he now insists he had not sold to them, but *the cash* for the amount of the proceeds of sale. He did not see the Goettle Bros. until the 28th. It was *then*, he says, he pressed them either to have the goods, or an order for the goods, or the money. It was then he demanded of them the name of the party to whom the goods had been shipped; and being informed it was Chas. G. Hall, of New York, telegraphed to him, "We claim *proceeds* of 90 tierces of stearine shipped by Goettle Bros. Don't pay draft." He was then informed that Goettle Bros. had sent the draft and bill of lading to Hall, and that the draft had been negotiated by Kuhn & Sons. He still claims the *proceeds* in his first telegram. It was after he saw his counsel that he sent the second telegram claiming the goods. Now, I think it is clear, that the pretension of Burckhardt that he made no *sale* of the stearine to Goettle Bros., but only delivered the bare possession of the goods to them as the brokers of an *unknown and unnamed* principal, and that therefore no title passed by delivery, is purely *an after thought produced by the events* which happened between the 26th of April (the day of the delivery) and the 28th (the day of the interview between Burckhardt and Goettle Bros.) In this interval, the latter had failed; in this interval, a bill of lading and draft had been negotiated and forwarded to Hall, paid by him, and charged to account of Goettle Bros. In this interval, counsel had been consulted, and then, for the first time, the goods claimed as the property of Burckhardt. When these important facts came to light on the 28th, it is made apparent that Burckhardt must suffer loss unless it can be shewn that the delivery of the property was not a sale to Goettle Bros., but only the delivery to them of the bare possession as the brokers representing an unknown principal, and that no title passed by the delivery. But in determining whether it was a sale and delivery which passed the title, it is plain we cannot be governed by these subsequent events, but by the facts as they occurred on the delivery of the goods. On that day, so far as the record shews, there was not a whisper of the insolvency or failing condition of Goettle Bros. Indeed, the record shews that their failure was sudden, and owing to unexpected failures of some of their customers in the South. And Mr. Burckhardt himself, in an answer to the question, "At that time (April 26th), as far as you know, was not their credit and standing good?" says, "I knew nothing to the contrary."

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The transaction on that day (not affected by subsequent events) had all the constituent elements requisite to a sale and transfer of title The *price* of the goods was agreed upon between Burckhardt and Goettle Bros. No inquiry was made if he was buying for a principal, and no principal either known or unknown was spoken of. The goods were delivered by Burckhardt on the order of Goettle Bros., marked for immediate shipment. The goods were charged by Burckhardt on his books to Goettle Bros., and Burckhardt's collector applied repeatedly to Goettle Bros. for payment of the cash promised on delivery of the goods, and there is no hint that Burckhardt claimed title to the goods, or that there had been no sale to Goettle Bros. until after their insolvency had become known; and after the goods had come into the hands of a *bona fide* purchaser, who had paid for them without notice of Burckhardt's claim asserted by a telegram sent from his attorney's office, in which he claims, two days after the sale, that that the goods are still his. I am, therefore, clearly of opinion that, looking only to the plaintiff's evidence, the transaction between Burckhardt and Goettle Bros. on the 26th April, 1878, was a sale, which, on delivering, passed the title to the 90 tierces of stearine; and from that moment, Goettle Bros. had a property in the goods, while Burckhardt had a property in the price. This being the case, and the goods having come into the hands of a *bona fide* purchaser from Goettle Bros., it matters not whether they were obtained from Burckhardt by false pretences and fraud or not. It may be admitted that they were (and it certainly is not proved in the record that they were), and yet *the title of Hall*, to whom the goods were consigned by Goettle Bros., who received the bill of lading and draft from them, and paid the draft without notice of Burckhardt's claim, is not affected by the fraud of Goettle Bros. even if it was distinctly proved.

Whatever conflict of authority there may have been formerly, upon the question, Whether the property in goods passes by a sale which the vendor has been fraudulently induced to make? that question is definitely and finally settled by the recent cases both in England and in this country.

Mr. Benjamin, in his admirable and accurate work on Sales, says (sec. 433, p. 394, ed. 1877):

"It is not until quite recently that it was finally settled whether the property in goods passes by a sale which the vendor had been fraudulently induced to make. The recent cases of *Stevenson* v. *Newnham* in Exchequer Chamber, and *Pease* v. *Gloahec*, in the Privy Council, confirming the princi-

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ples asserted by the Exchequer in *Kingsford* v. *Merry*, taken in connection with the decisions in the House of Lords in *Oakes* v. *Turquard*, leave no room for further question. By the rules established in these cases, whenever goods are obtained from the owner by fraud, we must distinguish whether the facts shew a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession* induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in and the possession of the goods to the persons guilty of the fraud, or to deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case. This contract is *voidable* at the election of the vendor not void *ab initio*. It follows, therefore, that the vendor may affirm and enforce it, or rescind it. He may sue in assumpsit for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it. But in the meantime, and until he elects, *if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person.* If, on the contrary, the intention of the vendor was not to pass the property, but *merely to part with the possession* of the goods, there is no *sale*, and he who obtains such *possession* by fraud, can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner."

This doctrine has been well established by the American courts. It has been affirmed and definitely settled by the decisions of the highest courts, certainly (if not in others) in New York, Massachusetts, Pennsylvania, Maine, Maryland, Ohio, Illinois, Iowa, Wisconsin and Virginia. See note to Benjamin on Sales, § 433 second American edition, and the numerous cases there cited. The same doctrine has been repeatedly affirmed by our courts.

In *Williams* v. *Givins*, 6 Gratt., 268, it was held that where the owner of personal goods sells and delivers the same to a purchaser a title to the property passes, though voidable and defeasible as between vendor and vendee, if obtained by false and fraudulent representations of the latter to the injury of the former in regard to the consideration. In which case, the vendor may reclaim his property from the vendee, but not from a *bona fide* purchaser, from or under the vendee,

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for value, paid without notice of the fraud. And this rule is not varied by the circumstance that the fraudulent purpose has been accomplished by the vendees knowingly paying the consideration, in counterfeit money received by the vendor under the belief that it is genuine.

In *Wickham & Goshorn* v. *Martin, Lewis & Co.*, 13 Gratt., 427, where an insolvent merchant purchased goods, not intending to pay for them, and after fraudulently getting possession, conveys these goods with all of his other estate in trust for the payment of his debts, the trustee having no notice of the fraud, it was held that the trustee was a purchaser for value without notice.

In that case, Judge Samuels said: "If Graff had bought the goods knowing his own insolvency, or had industriously used devices to deceive the sellers, still Wickham & Goshorn, subsequent purchasers, without notice, have a title better than that of Martin, Lewis & Co., the original sellers."

In a recent English case, on appeal from the Admiralty court, twice argued by very able counsel, the Privy Council, composed of Lord Chelmsford, Knight, Bruce and Luiner-Lows JJ., and Sir E. V. Williams, by a unanimous decision, affirmed the following to be the true rule of law, viz.: "Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and the possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract, or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to a innocent transferee, the title of such transferee is good against the vendor."

In *Rowley* v. *Biglow*, 12 Pick. R., Shaw C. J. said: "We take the rule to be well settled that where there is a contract of sale and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor, therefore, can reclaim his property as against the vendee * * * but not against a *bona fide* purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud, and without notice of the fraud of the first purchaser, he

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takes a title freed from the taint of fraud." In the case of *Hall* v. *Hicks*, 21 Maryland R., 406, a case singularly like this in all its features, Bartol J., delivering the unanimous opinion of the court, speaking of the rule above referred to, says: "The rule rests upon the well-established principle of equity, that when one of two innocent persons must suffer by the fraud of a third, the loss shall fall upon him who has enabled such third person to do the wrong." This case is so like the case under consideration, and the views of the learned judge are so apposite to this, that I extract still further from his able opinion: "There can be no doubt upon all the authorities that consignees who *bona fide* advance money on consignments made to them upon bills of lading, acquire an interest in the property, and are purchasers for value. Persons so situated come within the definition of *bona fide* purchasers recognized in numerous cases."

In that case, as in this, it was earnestly urged that the sale was a conditional one, which condition was "cash on de-delivery," and therefore no *title* passed, because the *condition* to pay cash on delivery was not complied with.

In meeting this view, the learned judge says: "An examination of the authorities, and a careful consideration of the subject, have led us to the conclusion that the same rule applies; and that a *bona fide* purchaser, without notice of the condition upon which his vendor has acquired the possession, will be protected against the claim of the original vendor, in the same manner when the sale and delivery are conditional, as when the possession has been obtained by fraud. It seems to us that the same equitable principle lies at the foundation of the rule, and is equally applicable to both classes of cases. If a party purchases goods for cash, and they are delivered to him upon the condition that he shall pay for them on delivery, he perpetrates a fraud by selling them to another before complying with the condition; but if the person to whom he sells deals with him in good faith, ignorant of the secret defect in his title, and pays value, it is difficult to see why, upon the principle before stated, the innocent purchaser ought not to be protected against the claim of the original vendor, who by his own act has enabled his vendee to perpetrate the fraud. This view is consistent with the general current of authorities, and supported both by the adjudicated cases and the elementary writers." And he cites a number of cases, with Kent's Com. and Story on Sales in support of this view. See also on this point, that the sale was on condition: *Wait* v. *Green*, 36 N. Y., 556; *Huffmann* v. *Noble*,

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6 Metcalf; *Western Transportation Company* v. *Marshall*, 37 Barb., 510. Without being committed to all the doctrines of that case, it is sufficient to say that both in that case and in this, the sale was "for cash on delivery," and when the goods were delivered marked for immediate shipment, being paid contemporaneously or before the delivery, it must be taken that the vendor has waived the condition.

It would protract this opinion (already too long) beyond reasonable limits to review the cases relied on by the learned counsel for the defendant in error in the able and ingenious arguments submitted by them in support of the judgment in the court below. A careful examination of these cases will shew that they do not militate against the principles established by the decisions of English and American courts above referred to; and that while in some of them there may be apparent conflict, I think even the few (modern) cases relied on can be easily reconciled upon the special facts and circumstances of those cases. There is certainly nothing in them to overthrow the principles established by the great current of English and American authorities.

I am opinion, therefore, for the reasons herein stated, that Hall, the consignee of Goettle Bros., being a *bona fide* purchaser without notice, has acquired in the 90 tierces of stearine in controversy a title superior to that of Burckhardt, and that the judgment of the court below ought to have so declared. I am, therefore, for reversing the judgment, and entering a judgment for the plaintiff in error.

JUDGMENT REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

FROMMER *v.* CITY OF RICHMOND.

MARCH TERM, 1879.

F., who lives outside the city limits, in Henrico county, rents a stall in the market house of the city of Richmond, where he carries on his business as a butcher. He prepares his meat for market at his house, and owns two carts and horses, which he uses to bring his meats from his house to his stall, to carry it to such purchasers who buy it and wish it carried to their houses, and to take out to his house such of it as is not sold; and he pays a tax on these carts and horses as property in the county. HELD: Under the charter of the city, the City Council may require F. to take out a license for so using his carts and horses, and to pay a tax on said license.

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This was an appeal from the judgment of the Hustings Court of the city of Richmond, affirming a judgment of the Police Justice, imposing a fine of ten dollars upon F. Frommer, for his failure to take out a license upon a wagon used by him in the city. The case is fully stated by Judge CHRISTIAN in his opinion.

Young for the appellant.

Keiley for the appellee.

CHRISTIAN J.—The court is of opinion that there is no error in the judgment of the Hustings Court affirming the judgment of the Police Justice.

A fine was imposed on the plaintiff in error by the Police Justice of the city of Richmond, for a violation of one of the city ordinances. On appeal to the Hustings Court, that judgment imposing a fine was affirmed, and from this judgment of the Hustings Court the plaintiff in error applied to one of the judges of this court for a writ of error and *supersedeas*, which was accordingly awarded.

The bill of exceptions taken to this judgment of the Hustings Court sets out the following facts:

That the appellant, F. Frommer, is a butcher in the second or new market of this city, and is duly licensed as such by the council thereof, and occupies a stall therein, for which he pays the rent to the city, according to the ordinances on the subject; that said F. Frommer resides in the county of Henrico, about half a mile outside of the corporate limits of this city, and that his slaughter-pens and slaughter-house are at the place of his residence, and that he slaughters there all cattle, sheep, &c., the meat of which is offered by him for sale at his said stall at said market; that he is the owner of two wagons, running on elliptic springs, which are kept by him at his said residence in the county, and one or the other of which is used by him, daily, in transporting his slaughtered meat from said slaughter-house every day, to the said second market-house in said city, where the same is to be sold, and in carrying back such of said meat as may not be sold, after the market hours were over; and that he also carries and delivers, during and after market hours, to the houses of such of his customers residing in said city as may desire the same to be done, any meat so purchased by any of them from him, but that this is done without reward or hire. It further appeared that said wagons are given in by said F. Frommer in his list to the commissioner of the revenue for said county

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for taxation, according to law, as a part of his personal property in said county; that said F. Frommer also sells and delivers as aforesaid cured meats, chiefly, but not exclusively, of his own curing—he occasionally buying from commission merchants in said city, such cured meats as he may need for his customers over and above what he cures himself, which meats are sent to him by the said commission merchants. His meats, which are cured by himself, are slaughtered and cured at his said slaughter-houses in said county, where such animals as he purchases for his business are, when their condition requires it, fatted before slaughter.

The fine imposed upon the plaintiff in error in this case, was because of his refusal to pay a license tax upon his wagons employed in transporting his meats from his slaughter-pens, situated a short distance outside the corporate limits, to his stall in the new market, and also in delivering meats to his customers in different parts of the city. The city, under its general powers of taxation conferred by its charter, under the decision of this court in the case of *Ould & Carrington* v. *The City of Richmond*, 23 Gratt., 464, might have imposed this tax. But special authority is conferred upon the city authorities by the 71st section of its charter, in terms which cover this case, and leave no room for doubt or construction. That section provides as follows:

§ 71. The council may grant or refuse licenses to owners or keepers of wagons, drays, carts, hacks and other wheeled carriages kept or employed in the city *for hire*, and may require the owners or keepers of wagons, drays and carts USING THEM IN THE CITY, to take out a license therefor, and may require taxes to be paid thereon, and subject the same to such regulations as they may deem proper, and prescribe their fees and compensation.

The plaintiff is an owner of wagons which he uses in the city in pursuit of his regular business, which is conducted in the city. It is difficult to conceive any just or reasonable ground why he should be exempted from the license tax required by the city authorities under the foregoing provision of the city charter. His counsel in this court suggested two grounds for such exemption: First, that it was the policy of the law to relieve butchers from taxation in order to cheapen the articles of prime necessity which he furnishes to the people of the city. And second, because he lives outside of the corporate limits; that the wagons are not kept in the city for hire; and these same wagons are taxed as personal property in the county of Henrico.

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As to the first suggestion, it is sufficient to remark that the same argument was zealously pressed in the case of *Sledd* v. *Commonwealth*, 19 Gratt. But this court held upon the construction of a statute, certainly not more comprehensive in its terms than the provision of the charter above referred to, that butchers were liable to the tax.

It is to be observed that the tax imposed is for a license to use his wagons on the streets of the city in the pursuit of his business in the city. It is difficult to imagine why the owner of drays, wagons and carts, used in the transportation of flour in the city should be required to pay a license tax, while the same vehicles used in transporting meats are to be free from such license tax. Meat is certainly no more an article of prime necessity than bread.

It is further insisted that the City Council imposes this tax because these wagons are kept in the county of Henrico, and are taxed in that county. But the question is, not where the wagons are *kept*, but are they used in the city in the business of the butcher, whose place of business is in the city. If so, they clearly come within the provisions of the charter as liable to the license tax.

The construction of the city ordinance, contended for by the counsel for plaintiff in error, cannot be maintained. It is manifest that the ordinance embraces wagons *employed* in the city as well as those *kept* in the city. It can make no difference that the wagons are *kept* on premises just outside of the corporate limits, if they are used or employed on the streets of the city in his business conducted in the city.

Nor does the fact that the county of Henrico taxes these same wagons as personal property make any difference. They are a part of the personal property of the plaintiff in error, subject to taxation. It is in no sense a double tax; the city does not tax them *as property*, but simply requires a license for the privilege of using its streets in the conduct of his business in the city. The city is subjected to constant and enormous expense in repairing and keeping its streets in order. This license tax is intended to meet in part this heavy burden; and it is not only a legitimate but a most appropriate means of reimbursing the city, because it is the use of vehicles on its streets that causes, in the main, their wear and tear.

We are therefore of opinion, that there is no error in the judgment of the Hustings Court, and that the same be affirmed.

It is proper to remark that there may be a question,

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whether this court has jurisdiction in this case, it having originated before the Police Justice, and the fine being only ten dollars, but we do not deem it necessary to press upon that question, inasmuch as we affirm the judgment of the court below, and as it is desirable that the question should be settled upon its merits.

CHRISTIAN J. delivered the opinion of the court, in which the other judges concurred.

JUDGMENT AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

LEWIS AND ALS. *v.* OVERBY'S ADM'R AND ALS.

MARCH TERM, 1879.

John Lewis, a year before his death in 1866, put each of his four children into possession of a parcel of land with the personal property upon it, but did not convey it. About the same time, he made his will, and by it gave to each of the children the land and property in his or her possession. By a codicil, he states that he was the guardian of his children, and requires that each one of them shall execute a receipt for all claim against him as guardian, before they shall be entitled to receive their portion under his will, and he directs that if any one of them shall refuse so to do, his or her portion shall be sold, and the proceeds held to meet the liability, and the balance paid over to those executing the receipt. These children held the land so in their possession, each of them selling a part of that given to him or her prior to 1873. In 1873, a judgment was recovered by Robert Y. Overby's administrator against the executors of Lewis, upon a bond on which he was surety, and in 1877, a bill was filed by said administrator against the executors and devisees and legatees of Lewis to enforce its payment against the estate left by him. The executors had been informed by Lewis, that he owed no debts and was under no liability, and neither they nor the other children had ever heard of this debt until the suit was brought in April, 1873. HELD:

1. That neither the act of Lewis putting them in possession of the land, nor under the devise to them, are the devisees entitled to the protection of the statute C. V., 1873, ch. 146, § 16, which provides that no gift, &c., which is not on consideration deemed valuable in law, shall be avoided either in whole or in part, for that cause only, unless, within five years after it is made, suit be brought for that purpose, &c.
2. The devisees having continued to hold the land from the time they were put in possession, and having sold parts of it, they are estopped from setting up a claim to a settlement of L.'s guardian accounts, and holding his estate liable as their guardian, though they did not execute a release of their claim.
3. The executors having been assured by L. that he owed no debts, and

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they knowing of none, they will not be liable for the value of the personal property that L. had in his lifetime put into the possession of his children.

4. The executors having distributed the personal property of L. in his possession at his death without taking a refunding bond, they are responsible to the creditors for its value, though they knew of no debt due from L.
5. All the parties being before the court, the executors are entitled to have the devisees and legatees to whom they paid over the proceeds of the personal property, subjected in the first place to pay the amount to the creditor.
6. The court should subject each devisee for his proportion of the debt, according to the value of the land devised to him or her, and direct a sale of his or her land, not sold in the first instance, for the payment of his or her proportion of the debt. If the land still held by one of them, does not discharge his or her portion of the debt, the balance remaining unpaid should be apportioned in like manner among the others, and the land of each sold to pay his or her portion until the whole debt is paid or the whole land sold.

The facts are sufficiently stated in the head-notes for a proper understanding of the points decided, as also stated therein.

From the Circuit Court of Mecklenburg County.

Jones & Bouldin for the appellants.

Jno. A. Coke for the appellee.

MONCURE P. delivered the opinion of the court, in which the other judges concurred.

DECREE REVERSED IN PART.

SUPREME COURT OF APPEALS OF VIRGINIA.

ALEX. & FREDERICKSBURG R. R. CO. *v.* FAUNCE

MARCH TERM, 1879.

1. The owner of a fishery on a navigable river in Virginia is entitled to compensation for any damages resulting thereto by the construction of a railroad chartered by the State along the banks of such river.
2. Where the evidence in the court below is not certified, and that court has approved of the finding of a jury, the appellate court will not disturb the verdict, even though such finding may appear excessive.

This was an action of trespass on the case in the Circuit Court of the city of Alexandria, brought in September, 1871,

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by Jacob D. Faunce against the Alexandria & Fredericksburg Railway Company, to recover damages incurred by him as lessee of land, and a fishery attached, on the Potomac river, in the county of Prince William, by the erection and construction of certain embankments and obstructions, whereby the said landing was entirely destroyed for the purposes of fishing the same; by the pulling down and destruction of buildings he had erected, and placing obstructions in the berth attached to said fishing landing, &c.

The defendants pleaded not guilty, and also filed a special plea, that under the authority of the acts of the General Assembly, they proceeded regularly to have the land for the bed of their road condemned. That notice was given to Sarah Otterback, the lessor of the plaintiff, and tenant of the freehold; that the commissioners appointed by the County Court had ascertained and reported that $3,353 was a just compensation to the tenant of the freehold of the lands in the declaration mentioned, for the portion of lands proposed to be taken by the defendants for their purposes, and for damage to the residue of the said lands, &c. That the defendants had paid this sum, $3,353, into the said County Court, and that afterwards they proceeded to construct the embankment, and did the other acts complained of.

The cause came on to be tried in November, 1873, when there was a verdict and judgment in favor of the plaintiff for $3,400; and a motion to stay judgment, on the grounds that the fishing shore, being an appurtenant to the tract of land condemned for the purposes of the road, and that money paid, no separate action could be maintained on behalf of Faunce for damages to said fishing shore resulting from the construction of the defendant's railway through the land of Sarah Otterback; and that for any portion of the said sum of $3,353 to which Faunce may show himself entitled, his remedy, if any, is under § 16 of ch. 56 of the Code of Virginia; and the damage to the fishing shore, if any, having been embraced in said sum of $3,353 allowed by the commissioners and paid into court, Faunce cannot maintain a separate action for any alleged damage to the fishing shore.

But the court overruled the motion, and ordered judgment to be entered on the verdict; and the defendants excepted.

The defendants then moved the court to set aside the verdict, on the ground that the damages were excessive; but the court overruled the motion, and they again excepted. The parol evidence is sufficiently stated by Judge STAPLES in his opinion.

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It appeared that by deed dated the 25th of September, 1869, Sarah Otterback leased to the plaintiff, Faunce, all that fishing land called the Opossum Nose Fishing Landing, on the Virginia side of the Potomac river, in Prince William county, together with all the rights and privileges belonging to said fishing landing, from the 1st day of January, 1860, for five years, at the annual rent of $500; and in lieu of the rent for the first year of said term, Faunce was to clean out the fishing berth of said landing.

The defendants applied to this court for a writ of error and *supersedeas*, which was awarded.

F. L. Smith and *S. F. Beach* for the plaintiff in error.

Claughton and *Stuart* for the defendant in error.

STAPLES J. delivered the opinion of the court.

HELD as stated in the head-notes.

JUDGMENT AFFIRMED.

COURT OF APPEALS OF MARYLAND.

CATE *v.* SCHAUM.

In making distraint upon the goods of a tenant, the landlord cannot lawfully break open gates or inclosures, or force open the outer door of any dwelling house or other building, or enter by a window which is found shut though not fastened: but entrance may be made by opening the outer door by the usual means adopted by persons having access to the building, by turning the key, lifting the latch, or drawing back the bolt.

An unlawful entry by the landlord, to make a distress, will render the seizure of the goods void, and the party making it a trespasser *ab initio*.

Where the party is treated as a trespasser *ab initio*, so as to make his possession of the goods wrongful, the entire value of the goods is recoverable.

ALVEY J., in delivering the opinion of the court, said: The fact is not controverted that the agent of the defendant making the affidavit of the amount of rent due, and issuing the warrant of distress to the bailiff, was duly authorized so to act for the defendant. The bailiff receiving the warrant, therefore, was amply clothed with authority from the defendant to make the distress. But it is contended on behalf of

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the defendant, that, in the absence of special instructions or authority as to the manner of his proceedings, the bailiff was only authorized to act in a regular and legal manner in executing the warrant, and for any force or illegality committed by the bailiff the defendant is not responsible. It is not denied that the bailiff acted illegally in making the distress. It appears, according to his own testimony, that finding he could not get admission to the house by the front door, he went around and entered the rear yard of the house, through a gate that was fastened on the inside with a hook and staple, opening the gate by raising the hook with a piece of iron which he inserted through a crack in the gate. By other testimony it was proved, that after getting into the back yard he forced an entrance into the house through a window which he found closed. And the defendant, assuming this to be the true state of the case, prayed the court to instruct the jury that he was not liable for the entry so made by the bailiff; but the court refused to grant the instruction, and we think properly. From an early time it has been settled that neither the landlord nor his bailiff, in order to make distress of the tenant's goods, can lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling house or other building, or enter by a window which is found shut though not fastened; but it seems the landlord or his bailiff may open the outer door by the usual means adopted by persons having access to the building, and therefore he may open it by turning the key, by lifting the latch, or by drawing back the bolt. Co. Litt., 161 *a*; *Poole* v. *Longueville*, 2 Wms. Saund., 28*c*, note 2; *Dent* v. *Hancock*, 5 Gill., 120; *Ryan* v. *Shilcock*, 7 Exch., 72; *Brown* v. *Glenn*, 16 Q. B., 254; *Attack* v. *Bramwell*, 3 B. & S., 520; *Nash* v. *Lucas*, L. R. 2 Q. B., 590. And it is clearly established, and it will abundantly appear from the authorities just cited, that the unlawful entry upon the premises by the landlord or his bailiff to make the distress, will render the seizure of the goods altogether void, and the party making it a trespasser *ab initio*.

The rule seems well established that where the defendant can be treated as a trespasser *ab initio*, so as to make his possession of the goods wholly wrongful, their entire value will be recoverable. *Keen* v. *Biest*, 4 H. & G., 236; *Attack* v. *Bramwell*, *supra*; Mayne on Dam., marg. page 230, 234.

AFFIRMED.

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SPECIAL COURT OF APPEALS OF VIRGINIA.

HUDSON AND ALS. *v.* BURWELL'S ADM'R, &C.

1. P., the principal deputy of B., as sheriff of M. county, received from R., former administrator of H., a sum of money to hold as indemnity for the sureties of said R. Subsequently, R. was removed, and the estate of H. was committed to the hands of said B. as sheriff—P. still being his principal deputy. This sum was treated in a settlement of the estate as assets of the estate in the hands of P., deputy for B., adm'r. HELD: B. and his sureties are responsible for such sum and interest to the distributees of H.
2. A sheriff is responsible for assets of an estate committed to his hands, which come to the hands of his deputy after the expiration of the sheriff's term of office, unless he took steps to remove the deputy.

From the Circuit Court of Mecklenburg county.

(The facts are only partially stated in the opinion and headnotes, but it is hoped sufficiently for a proper understanding of the points determined. Inability to find a copy of the record prevents a fuller statement.)—ED.

Bouldin & Marshall for the appellants.

Joynes for the appellees.

MCLAUGHLIN J.—Two questions are presented in this record. First, did assets come to the hands of Peyton R. Burwell, the sheriff and administrator, and, secondly, is the sheriff accountable therefor upon his official bond, they having been received, if at all, after the expiration of his term of office as sheriff.

It appears that R. A. Puryear, the deputy of P. R. Burwell, the High Sheriff of Mecklenburg county, received of Abram. Ramey, the former administrator of Mary W. Hudson, the sum of $315, which he was to hold as an indemnity for Ramey's sureties. Subsequently, Ramey was removed, and the estate committed to P. R. Burwell, the sheriff of Mecklenburg county, Puryear being his principal deputy. In the original suit of the appellants against Burwell and Puryear, an account was taken by Commissioner Atkins of the assets of Burwell as administrator, and Puryear, his deputy, who ascertained the amount, charging the $315 on the 1st day of August, 1866, with interest, to be $541.62. No exceptions were taken to this report, and it was approved and a decree

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rendered on the 10th day of April, 1867, and P. R. Burwell, sheriff and administrator, was required to pay to the several parties entitled thereto their proportionate shares of the said aggregate balance. I am inclined to think that Burwell and his privies in contract were concluded by this decree, but even if the sureties on his official bond were not so concluded, nothing appears that this balance is not due from the administrator. Puryear, the deputy of Burwell, may have received it originally as an indemnity, but it appears from his answer, filed as early as September, 1852, that he treated, and so regarded it, as assets of Mary W. Hudson, and this view is confirmed by his allowing it to be reported against him by Commissioner Atkins in a suit to which he was a party. I think this sum must be considered as having come into the hands of the deputy, and with which the sheriff, as principal, must be chargeable.

Is the sheriff responsible for assets which came into his hands after the expiration of his term as sheriff? The petition alleges the Circuit Court thought not, and upon this ground dismissed the bill. The estate was committed to him as sheriff for administration *ex vertute officii*. It was his duty to complete the administration. No provision was made by the statute for administration *de bonis* devolving on his successor. And where the assets were received by the sheriff's deputy after the expiration of the sheriff's term of office, the sheriff is responsible therefor, unless he took steps to remove the deputy, which does not appear to have been done in this case. *Dabney and others* v. *Smith's legatees*, 5 Leigh, 13; *Douglass' ex'or* v. *Stump*, 5 Leigh, 392; *Tyler and others* v. *Nelson's adm'r*, 14 Gratt., 214.

I am of opinion that the Circuit Court erred in dismissing the bill of the plaintiffs. The demurrer should have been overruled and a decree rendered against Burwell and his sureties for the several amounts decreed the plaintiffs on the 10th day of April, 1867.

WINGFIELD P. and BARTON J. concurred.

DECREE REVERSED.

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MISCELLANY.

AN ACT FOR THE SUPPRESSION OF ORDINARIES.—Whereas it is most apparently found. that the many ordinaries in several parts of the country are very prejudicial, and this Assembly finde the same to be a general grievance presented from most of the counties. *Be it therefore enacted by the Governor, Councill and Burgesses of this grand Assembly, and by the authoritie of the same,* That no ordinaries, ale houses, or other tipling houses whatsoever, by any inhabitants of this country, be kept in any part of the country, except it be in James Citty, and at each side of Yorke River, at the two great ferries of that river: *Provided,* and it is hereby intended, that those at the ferries of Yorke river as aforesaid be admitted in their said ordinaries to sell and utter man's meate, horse meate, beer and syder, but no other stronge drink whatsoever; and that all other ordinaries, ale houses and tipling houses whatsoever, in the country (except as before excepted), be utterly suppressed, and whoever shall presume to sell any sorte of drinke as liquor, whatsoever by retail, under any colour, pretence, delusion or subtile evasion whatsoever, to be drunke or spent in his or their house or houses, or upon his or their plantation or plantations, from and after the tenth day of September next, and be thereof lawfully convicted, shall pay to the informer for each time he shall so offend, and be thereof lawfully convicted as aforesaid, one thousand pounds of tobacco, wherein no wager of lawe, shall be admitted or allowed, any act, law, usage or custome to the contrary notwithstanding.—*Hening's Statutes at Large, Vol. 2, p. 361, June, 1676, Bacon's Laws.*

AN ACT IMPOSING AND ASCERTAINING ATTORNEY'S FEES.—Whereas all courts in this country, are many tymes hindered and troubled in their judiciall proceedings by the impertinent discourses of many busy and ignorant men. who will pretend to assist their friend in his business, and to cleare the matter more plainly to the court, although never desired or requested thereunto by the person whome they pretended to assist, and many tymes to the destruction of his cause, and the greate trouble and hindrance of the court, for the prevention whereof to the future. *Bee it enacted by the King's most excellent Majestie, by and with the consent of the Generall Assembly, and it is hereby enacted by the authority aforesaid,* That noe person or persons whatsoever shall practice as an attorney or appear to plead in the General Court or any County Court, in this country, but such as shall be first lycensed by his Excellency or successors thereunto, and that any one that shall presume to plead in the general court or any county, or other court, without such lycense first obtained and had, shall forfiete for every such offence committed in the general court two thousand pounds of tobacco, and for every such offence committed in the county court, six hundred pounds of tobacco, the one half to our Sovereign Lord the King, his heirs and successors, and the other half to the informer, to be recovered by action of debt, bill plaint on information in the said court or courts where such offence shall be committed. *And bee it further enacted by the authority aforesaid,* That noe attorney or attorneys soe lycensed as aforesaid take, demand or receive from any person or persons more for any cause in the generall

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court, and bringing the same to judgment, than five hundred pounds of tobacco and caske, and for any cause in the county courts, and bringing the same to judgment, more than one hundred and fifty pounds of tobacco and caske. *And it is hereby declared and enacted*, That every attorney or attorneys shall have for every cause he undertakes in the generall court five hundred pounds of tobacco and caske, and for every cause he undertakes in the county court one hundred and fifty pounds of tobacco and caske, which he may lawfully clayme without any pre agreement made with the partyies for the same. *And bee it further enacted by the authority aforesaid, and it is hereby enacted*, That all such attorney and attorneys that shall refuse to plead any cause in the general court for the aforesaid ascertained fee of five hundred pounds of tobacco and caske, shall forfeit and pay to the person grieved five hundred pounds of tobacco and caske, after legall conviction on due proof thereof made, to be recovered by due processe of law; and upon refusal of any cause in the county court, shall pay to the party grieved one hundred and fifty pounds of tobacco and caske, after legal conviction as aforesaid to be recoved by due processe of law. *Provided allways*, That this act nor any clause therein, shall not extend to debarr any man, that is capable of pleading and managing his owne cause in any the said general or county courts, but that he may be permitted and allowed, to plead and manage his own businesse, anything in this act to the contrary notwithstanding. *Hening's Stat. at Large, Vol. 2. p. 478, June, 1680, 32d Charles II.*

Lawyers in the Legislature.—We read in a writ of summons, in the fifth year of Henry IV., "the King willed that neither you nor any other sheriff (vice comes) of the Kingdom, or any apprentice, nor other man following the law should be chosen." "This prohibition," says Coke, "was inserted in virtue of an ordinance of the Lords, made in the forty-sixth year of Edward III; and by reason of its insertion, this parliament was fruitless, and never a good law made thereat, and therefore called Indoctum parliamentum, or lack-learning parliament. Since this time," he adds, "lawyers (for the great and good service of the commonwealth,) have been eligible." And yet, to this day there survives an old fashioned and most unreasonable prejudice against the election of lawyers as parliamentary representatives, which, apart from either politics or polemics, would justify us in bespeaking fair play for any candidate who happened to be connected with the legal profession. With politics and polemics we have nothing to do; but it is only right that, when a member of the legal profession seeks the suffrages of a constituency, we should deprecate a prejudice detrimental to the interest of the profession generally, while calculated to impede "the great and good service of the commonwealth" which it is now more than ever in the power and directly within the province of legal members of the legislature to effect. It is a time of changes many and momentous in matters needing the most watchful supervision of lawyers—not that the legal profession alone is vitally affected, but that every subject in the land is vitally affected in his person or property by measures which have been already projected for good or for evil, and which for good or for evil will largely depend on the legal skill that is brought to bear on their provisions. It is a time when, whether the Government be Conservative or Liberal, change is the order of the day,

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and when the lawyer, whether he be Conservative or Liberal, is best able to render "great and good service to the commonwealth." And instead of rejecting the lawyer merely because he is a lawyer, it should be considered that for this very reason he can do service great and good. Again, none so much as he comes into such public and hostile contact with all classes and ranks of society; it is his pursuit to expose dishonesty and crime; the witness dreads him—the suitor recoils from him. But, neither should the prejudice hence arising affect the choice of a parliamentary representative; rather, it should be deemed that, by reason of his very familiarity with the legal aspects of vice and folly, his is the voice to guide and his the pen to prescribe the legislation that vice and folly has rendered necessary. Tested he should be in many ways; but when he is to be judged of as a lawyer merely, apart from politics or polemics, the truest test is the estimate of his fitness formed by his own profession.—*Irish Law Times.*

DEATHS.—We are deeply pained to have to record in this number the sad and untimely deaths of Isaac Grant Thompson, Esq., Editor of the *Albany Law Journal*, *American Reports*, &c.; and John L. Proffatt, Esq., Editor of the *American Decisions*, &c., both of which have occurred since our last number. Both of these authors died very young; the first was only thirty-nine, and the latter only thirty-five. Both had attained high reputations at legal writers, and will be sadly missed by the profession in this country. Mr. Thompson's work has been undertaken by Irving Browne, Esq., and Mr. Proffatt's by A. C. Freeman, Esq. Both are known to the profession as authors.

SHERIDAN'S power of repartee was never keener than upon an occasion when he had been snubbed by the chief justice. He sat in dogged silence listening to the judge's charge to the jury. All at once an ass began to bray. Sheridan rose in his stateliest manner, and, addressing the court, said: "I beg your lordship, but did you not hear a remarkable echo in the court room?"

JUDGE: "Have you anything to offer to the court before sentence be passed on you?" Prisoner: "No, Judge; I had ten dollars, but my lawyers took that."

A legal gentleman, who paid his addresses to the daughter of a tradesman, was forbidden the house, on which he sent in a bill of £93 13*s.* 4*d.* for 275 attendances, advising on family affairs.—*Irish Law Times.*

A few days ago our Supreme Court decided that the judge of a court may imprison an attorney for contempt, for refusing to defend a prisoner without compensation, after being commanded by the court. This practically settles a question about which there has been considerable doubt, ever since the decision in *Ex parte Yale*, 24 Cal., 241, holding that an attorney is not an officer of the court.—*Pacific Coast Law Journal.*

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SUPREME COURT OF APPEALS OF VIRGINIA.—This court is now in session at Staunton, all of the judges being present and in good health. Judge Moncure having been much improved by his rest during the summer. The court at Staunton will remain in session until about the 15th of October, and meet in Richmond on the 5th of November. Among the first cases to be heard in Richmond are those of Poindexter and Baccigaluppo, on writs of error, from judgments of the Hustings Court of the city of Richmond.

WILLIAM GREEN, ESQ.—We are highly gratified that this learned jurist has entirely recovered from his recent illness.

THE VIRGINIA LAW JOURNAL.—We are highly gratified at the manner in which this journal is steadily growing in favor with the profession in and out of the State.

A MAN being on trial in Mississippi on an indictment for working on Sunday, his counsel pleaded, in mitigation, that his client had been living in the thinly-settled part of Arkansas, where the distinction between the different days of the week was never very closely observed. In charging the jury, the judge, who was a severely moral man, began: "The prisoner may not have known that he was breaking the human law, but he certainly knew he was breaking the divine law. He must have known he was breaking the law of God. He knew that he was breaking the Ten Commandments." Whereupon the prisoner, seeing the penitentiary opening before him, jumped up, and, with upraised hands, exclaimed: "'Fore God, judge, I didn't know it. *They was passed while I lived in Arkansas.*"

A JUDGE in Indiana threatened to fine a lawyer for contempt of court. "I have expressed no contempt for the court," said the lawyer; "on the contrary, I have carefully concealed my feelings."

WANTED TO GET OFF THE JURY.—Some years ago an amusing and laughable scene occurred before Judge Oakey, of New York.

Counsel was about to proceed to open a case to a jury, when one of the jurymen got up and said;

"If your honor please, I'd like to get off the jury."

"You can't get off without a good excuse."

"I have a good reason."

"You must tell it or serve," said the judge.

"But your honor, I don't believe the other jurors would care to have me serve."

"Why not? out with it!"

"Well"—(hesitating).

"Go on!"

"I've got the itch."

"Mr. Clerk," was the reply, "scratch that man out." It is needless to say that this was one of the most mirth-provoking scenes that ever occurred in the court room.

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BOOK NOTICES.

WEBSTER'S GREAT SPEECHES.—The Great Speeches and Orations of Daniel Webster, with an Essay on Daniel Webster as a Master of English Style. By EDWIN P. WHIPPLE. Boston: Little, Brown & Company, 1879.

We are glad to welcome this very interesting volume. It supplies a long felt want. The speeches of this great statesman and lawyer should be in every lawyer's library, and this work presents them in a very attractive form. The price of the book is only three dollars, and we predict for it a ready sale.

A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By LEONARD A. JONES, author also of "A Treatise on Railroad Securities." In two volumes. Second edition. Boston: Houghton, Osgood & Company. The Riverside Press, Cambridge, 1879. For sale by West, Johnston & Co., Publishers and Booksellers, Richmond, Va.

We have received from the enterprising house of West, Johnston & Co., of Richmond, Va., this valuable law book. We believe that the first edition of this work made its appearance about a year and a half ago, and the rapidity with which it has been exhausted, and the fact that the author has felt warranted in issuing the second edition, speaks more for the work than anything we can say. The present edition has been revised throughout, contains one hundred and fifty pages more, and is said to refer to one thousand more cases than the first. The laws of mortgages of this country must, of course, depend very much on the statute laws of the several States; and the difficulty of presenting the whole subject in the compass occupied by this author, so as to be useful in every section, must be manifest to any reader. We think Mr. Jones has succeeded in doing this as well as possible, and we commend his work most highly as the best one that we have seen on the subjects treated of.

Volume I treats of the nature of a mortgage, its form and requisites, parties, who may take a mortgage, what may be the subject of a mortgage, equitable mortgages, liens for purchase money, vendor's lien, absolute deed with agreement to reconvey, the debt secured, insurance, fixtures, registration as affecting priority, notice as affecting priority, void and usurious mortgages, usury, mortgagor's rights and liabilities, purchaser's rights and liabilities, lessee's rights and liabilities, assignment of mortgages, merger and subrogation.

Volume II, of payment and discharge, redemption of mortgage, mortgagor's account, when right to redeem is barred, when right to foreclose accrues, when right to foreclose is barred, remedies for enforcing, foreclosure by entry and possession, foreclosure by writ of entry, statutory provisions for foreclosure, parties to equitable foreclosure, foreclosure in equity, receiver, strict foreclosure, decree of sale, foreclosure sales under decree, application of proceeds, judgment for deficiency, power of sale mortgages and trust deeds.

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The synopsis of the mechanic's lien laws of the several States will be found to be a valuable feature of the work. We bespeak for it that sale which its merits should cause it to have. The work of the publishers is first-class.

THIRD BRADWELL'S REPORTS.—Reports of the Decisions of the Appellate Court of the State of Illinois. By JAMES B. BRADWELL. Volume III. Containing a portion of the Opinions of the First District of the March Term, 1879; all the remaining Opinions of the Second District, up to the June Term, 1879; all the remaining Opinions of the Third District, up to the May Term, 1879; and all the Opinions of the Fourth District from the organization of the Court up to the July Term, 1879. Chicago: Chicago Legal News Company, 1879. Through J. W. Randolph & English, Richmond.

We are under obligations to the publishers, for this volume, which is the first that we have seen of the series. We like it so well that we hope to be able to get the whole set. It contains about one hundred and fifty cases, many of which are of novelty and importance, and what is very remarkable, and speaks very badly for the lower courts of Illinois, *they are all reversals*. We have seen volumes of reports frequently in which the *reversals* were in the majority, and we have known *appellate* courts to reverse *themselves*, but we never saw a volume before in which the *reversals* were *unanimous*. The cases seem to be very well reported, and the work of the publishers is well done.

AMERICAN REPORTS, VOL. XXVII. By ISAAC GRANT THOMPSON, ESQ., 1879. Albany: John D. Parsons, Jr., Publisher.

The foregoing volume contains all cases of general authority in the following reports: 3 Baxter, 4 Baxter, 59 Ga., 60 Ga., 10 Heiskell, 11 Heiskell, 12 Heiskell, 19 Kansas, 20 Kansas, 1 Lea, 64 Mo., 65 Mo., 66 Mo., 71 N. Y., 30 Ohio St., 31 Ohio St., 85 Pa. St., 86 Pa. St., 9 W. Va., 10 W. Va., 11 W. Va. We have before spoken of these reports with praise, and the foregoing volume is not inferior to any of the former of the series as far as we can detect. In consequence of the death of Mr. Thompson, the editorial work of these reports will now be devolved on Mr. Irving Browne, of Troy, N. Y., a lawyer of twenty years standing, who was closely associated with Mr. Thompson, and who will now edit the *Albany Law Journal*. He has had considerable experience as a legal writer and editor, and we are satisfied that the work will not deteriorate in his hands.

AMERICAN INTER-STATE LAW. By DAVID RORER, of the Iowa Bar, author of "Rorer on Judicial and Execution Sales." Callaghan & Co., Chicago, 1879.

We have received from the enterprising and excellent publishers this valuable work. The author is well known to the profession by reason of his former work, and is an able and concise writer. He has, very sensibly, we

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think, in his present work, simply discussed the subject of the relations of the several States of the Union to each other under the duplex system of our National and State Governments, and not complicated it with discussions of questions of international law. The arrangement of the work is good, and the work of the publishers is excellent.

OHIO STATE REPORTS.—We have received from the publishers, Robert Clarke & Co., Cincinnati, Ohio, advance sheets of these excellent reports.

SOUTHERN LAW REVIEW.—This excellent law periodical is on our table, and is an unusually interesting number.

LONDON LAW MAGAZINE AND REVIEW.—We have the August number of this very fine work, with its usual variety of excellent legal reading. Among others is an article entitled "Mixed Marriages in Virginia—Kinney's Case"—in which the able opinion of Judge Hughes is reported in full as the argument of the article.

BARTON'S LAW PRACTICE.—The author of this valuable work has made some corrections and additions on pages 63, 64, 73, 74, 117, 118, 217, 218, 255, 256, 523 and 526, and the publishers will supply these pages, free of charge, to any one who may apply therefor. These corrections and additions make the work even more valuable than it has already proven itself to be, and Mr. Barton has placed the profession under obligations to him for his labors in their behalf.

DAMNUM ABSQUE INJURIA CONSIDERED IN ITS RELATION TO THE LAW OF TORTS. By EDWARD P. WEEKS, ESQ., Counsellor at Law; Author of a Treatise on "Attorneys and Counsellors at Law;" and of Works on "The Mining Legislation of Congress," "Mines, Minerals, &c." 1879. Sumner, Whitney & Co., San Francisco, Cal.

We have received from the publishers this work, and from the examination which we have been able to give it, have been most favorably impressed with its worth. It will be found to be a general survey of the doctrine known to the law as *damnum absque injuria*, treated only in its relation to the law of torts, and not an attempt at a treatise or commentary on the law of torts, about which so much has been written by Judge Cooley and others. The author is well known as a concise and accurate writer, and from our observation of this book it is written in his best style. Surely law books will soon be written on every subject after awhile. The work of the publishers is admirably done.

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THE

VIRGINIA LAW JOURNAL.

OCTOBER, 1879.

DO FEDERAL JUDGMENTS REQUIRE TO BE DOCKETED IN VIRGINIA.

The question of the docketing of federal judgments is one of much importance, and stands upon a peculiar footing in Virginia.

It is familiar that at common law, for reasons having their foundation in the feudal system, lands could not be seized for the tenant's debts; therefore, there was at common law no such thing as a judgment lien.*

From the Statute, Westm. 2, giving the elegit, first sprung the lien of the judgment, a lien co-extensive with the precept of the writ.

In Virginia, the judgment lien, until the revisal of 1849, depended alone upon the right to sue out the elegit, and existed only so long as the capacity to sue out that writ continued. *Leake* v. *Ferguson*, 2 Gratt., 420; *Borst* v. *Nalle*, 28 Gratt., 423; *United States* v. *Morrison*, 4 Peters, 136.

At the Revisal of 1849, the statute was enacted which gave to judgments a lien in express terms.

This statute and the right to sue out the elegit constituted the double source whence the lien of judgments could be derived, until the 26th day of March, 1872, when the act was passed abolishing the elegit in Virginia. Acts 1871-'72, p. 462. Since that date, the express statute on the subject has formed the only source of the judgment lien in this State.

Now, let us inquire from what source a judgment of an United States Court can derive a lien.

*Of course, we are speaking here of judgments in behalf of private persons. The lands of the vassal could always be seized for debts owing to the Crown.

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It is apparent that such lien must depend either upon some act of Congress giving the lien expressly, or upon the right to sue out the elegit, or upon the adoption by Congress of the State law giving the lien.

Let us examine these several sources.

No act has ever been passed by Congress conferring upon federal judgments a lien in express terms.*

The lien has been derived by the courts of the highest authority, and in the best considered cases, from what are known as the Process Acts of Congress. *Ward* v. *Chamberlain*, 2 Black, 439; *Brown* v. *Pierce*, 7 Wall., 217; *Baker* v. *Morton*, 12 Wall., 158; *Massingill* v. *Downs*, 7 How., 760.

These Process Acts are acts prescribing the mesne and final process that shall issue from the federal courts.

When the Union was formed, provision had to be made for executions. There was no right at common law to seize or sell the land of the judgment debtor for the satisfaction of the judgment. The State laws on the subject could not operate *proprio vigore* within the sphere of the federal sovereignty. It became necessary for Congress to adopt some system which should apply to the whole Union.

By the 14th section of the Judiciary Act of 1789 (embodied in section 716 of the Revised Statutes of the United States), power was given to the federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This section was construed in *Wayman* v. *Southard*, 10 Wheat., 1, to confer upon the courts power to issue executions or final process. This section did not restrict the federal courts to the kinds of process used in the State Courts. Congress deeming it inexpedient that this latitude should be left with the courts, and considering that the laws of each State were best adapted to the needs of its citizens, and that their adoption would prevent confusion in the administration of their respective jurisdictions by the federal and State tribunals, passed on the 29th September, 1789, the first Process Act, which substantially declared that the executions in the federal courts should be the same in each State as at the date of the passage of the act were used in the courts of that State. This act, temporary in its nature, was continued by acts passed 26th May, 1790, and 18th February, 1791, and its provisions were made

*It has been doubted, though I think without good reason, whether Congress has power to make federal judgments a lien on lands situate within the several States.

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permanent by an act passed 8th May, 1792. The act of 1792 was substituted and repealed by implication by one passed 19th May, 1828, which adopted for the federal courts the executions *then* in use in the State Courts, thus bringing the conformity down to that later date. The act of 19th May, 1828, was in turn substituted by one passed June 1, 1872, which likewise adopted the executions *then* allowed in the State Courts. 17 U. S. Stat. at Large, p. 197.

The act of 1872 is embodied in section 916 of the Revised Statutes of the United States as follows: "The party recovering a judgment in any common law cause* in any Circuit or District Court 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 in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such Circuit or District Court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments as aforesaid by execution or otherwise."

The act of 19th May, 1828, was repealed by implication by that of June 1, 1872 (the latter act covering the same subject matter, and being intended as a substitute for the former; (see *Fox's adm'r* v. *Commonwealth*, 16 Gratt., 1); and it was expressly repealed by operation of section 5596 of the Revised Statutes of the United States.

The Process Act of June 1, 1872, adopted the executions in use in the several States at the time of its passage. Since its enactment (former acts on the subject having been repealed) executions could issue from the federal courts only under and pursuant to its provisions. Inasmuch as the elegit had been abolished in Virginia at the date of its passage, no elegit could, since June 1, 1872, or can now, issue from the federal courts in this State, any more than such writ can issue from the State Courts.

No lien can therefore attach to a federal judgment in Virginia, arising from the capacity to sue out the elegit.

This renders all the cases I have seen, which hold docketing to be unnecessary, to preserve the lien of a federal judgment inapplicable to the present state of the law in Virginia.

*The 8th equity rule provides: "Final process to execute any decree, may, if the decree be solely for the payment of money, be by a writ of execution in the form used in the Circuit Court in suits at common law in actions of assumpsit."

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Those cases arose where the elegit (or some other form of execution for seizing or selling real estate) was in use. The ground of their decision was, that the United States having by adoption provided the elegit for the federal courts, there resulted a consequent lien to the federal judgment from the right to sue out that writ; that no State law, except so far as adopted by Congress, could control the practice of the federal courts or the effect of their process; and that therefore this lien, an incident of the judgment, and an effect of the elegit, could not be impaired or affected by a statute of the State requiring judgments to be docketed, not adopted by Congress. This lien of the judgment was merely an incident of the final process of the court conferring no property in or to the land, and therefore not within the influence of the 34th section of the Judiciary Act. See *Massingill* v. *Downs*, 7 How., 760.

From what has been already said, it appears that the only remaining source from which the lien of a federal judgment in this State can be derived, is the State Statute giving the lien in express terms.

Any lien so derived must be claimed either directly under the State Statute as such, or under such statute as adopted by Congress.

Let us see first how the case stands when the lien is claimed directly under the State Statute as such. It is doubtless true, as a general rule, that no State Statute can operate directly, or except so far as adopted by Congress, on a federal judgment, so as to add anything to, or detract anything from, its effect; but I see no reason to doubt that the State can declare by law that any judgment, or even any contract, shall constitute a lien on lands lying within its borders. If, therefore, the State Statute giving the judgment lien embraces federal judgments (as I shall hereinafter attempt to show it does), I think the judgment creditor in the federal court may claim the benefit of that lien; but he can only claim the lien upon the conditions on which it is conferred. The statute gives a right, and whoever claims the right under the statute, must conform to all its provisions. He cannot accept the part that benefits him and reject the balance. It is one of the broadest principles of jurisprudence that no one can claim under and against the same instrument. The right being conferred by the statute, and springing from it, must be taken as it is given. No one would question this when the lien is claimed directly under the State Statute as such. The same, of course, would be true, if the State Statute has been

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adopted by Congress, *and* such adoption extends to all its provisions.

Two questions then arise. Has Congress adopted the statute in question (Code, 1873, chap. 182, sec. 6–8)? If so, to what extent?

I am aware of no decision to the effect that a State Statute giving an express lien to judgments is adopted by the acts of Congress in relation to federal judgments. The fact that the lien of the federal judgment has been always derived from the right to seize or sell the land of the debtor under the final process of the court has rendered any decision on this point unnecessary.

While I have seen no decision in many of the cases, there are *dicta* which seem to countenance the idea that such statutes constitute rules of property, and are adopted in the federal courts by the 34th section of the Judiciary Act. For example, in *Ward* v. *Chamberlain*, 2 Black, 438, Mr. Justice Clifford, delivering the court's opinion, and speaking with reference to an Ohio statute, like our own, says: "Repeated decisions of this court also have established the doctrine, that the lien of judgments and decrees in the federal courts arises out of the adoption of the State laws upon that subject, and that the lien may be considered as a rule of property under the 34th section of the Judiciary Act;" and he cites *Clements* v. *Berry*, 11 How., 411; *United States* v. *Morrison*, 4 Pet., 124; *Ralston* v. *Bell*, 2 Dall., 158, and *Lombard* v. *Bayard*, 1 Wall., Jr., 96.

The force of this *dictum* is, however, somewhat weakened on the next page, where he says: "Expressions are to be found in one or more of the cases referred to which countenance the idea that the State laws in respect to the lien of judgments and decrees were adopted by the courts of the United States, but upon a closer examination of the subject, it will appear, we think, that those laws are recognized and substantially adopted by the acts of Congress regulating process in the courts of the United States."

There may, then, be some doubt whether the 34th section of the Judiciary Act (sec. 721 United States Revised Statutes) operates to adopt the State Statute. But assuming what is the most unfavorable view to my position, that our statute is adopted, and that the benefit of the lien thereby given may be claimed for federal judgments, it seems to me that it is necessary to docket the federal judgment to preserve its lien against a purchaser of the land for value and without notice.

If our statute has been adopted, it has been adopted in its entirety. The statute is as follows:

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"§ 6. Every judgment for money rendered in this State * * * * shall be a lien on all the real estate * * * * except as follows:

"§ 8. No judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it be docketed, &c."

It will be seen that the section that gives the lien expressly provides the exception or limitation. The whole forms one statute which, if adopted at all, is adopted in all its parts.

The provisions that confer the lien and require the docketing are not severable, but are welded together by express words. The words of adoption are general words, which necessarily adopt the statute as a whole.

The only reasonable difficulty that I can conceive against the idea that the whole statute is adopted, the part that requires the docketing as well as the part that gives the lien, is, that Congress has no compulsory jurisdiction over the State officer, and could not have intended to make the lien of a federal judgment or decree dependent upon the action of such State officer, who is beyond its control. But when carefully examined, it seems to me this objection loses all its force. The extent to which the State statute is adopted must be determined upon the frame of the statute and the particular circumstances of each case. If the State law did not provide for the docketing of a federal judgment—if under the State law a suitor in the Federal Court could not compel the State officer to docket his judgment, then there might be force in the objection; for in that case the lien of the federal judgment would be made dependent upon a condition which the judgment creditor could not perform. But when the State law imposes upon the State officer the duty to docket the federal judgment, and the suitor in the federal court has the same right to enforce a compliance with that duty as a suitor in the State Court, the ground for the presumption that Congress did not intend to adopt that part of the statute which requires the docketing, is entirely removed.

Now, so far as the Virginia Statute is concerned, there seems to be no difficulty about the docketing of federal judgments and decrees in the clerks' offices of the State courts. The statute that imposes the duty and regulates the manner of docketing judgments and decrees, is sufficiently broad in its terms to embrace those of federal courts. The Legislature has manifested the most earnest purpose to provide for the registry of all titles, liens and charges affecting real estate. In view of this policy of the State, and the broad and general language employed in the statute, the courts would

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not hesitate so to construe the Virginia Act on the subject as to afford every facility for the docketing of federal judgments and decrees.

Section 6 provides that "*every judgment* for money *rendered in this State*" shall be a lien. Section 4 provides that the clerk of each court shall keep in his office a well bound book, in which he shall docket, without delay, "*any judgment in this State*," when he shall be required to do so by any person interested. It is manifest that these provisions embrace federal judgments, and that any person interested in such a judgment may require the clerk of a State court to docket the same. This being so, it seems to me, that the State Statute, if adopted at all, is adopted in all its parts; and that, whether the lien of the federal judgment is claimed directly under the State Statute as such, or under the State Statute as adopted by Congress, it is necessary to docket such judgment to preserve its lien.

There is another view in which this question may be considered.

Sec. 967 of the U. S. Rev. Stat. provides that the lien of federal judgments and decrees shall cease in the same manner and at like periods as the lien of State judgments and decrees.

Under the Virginia Statute, the docketing of a judgment is an act necessary to be done, not to create the lien of the judgment, but to preserve it as against a purchaser for value and without notice. An undocketed judgment confers a lien with the rendition of the judgment, which lien, however, *ceases* upon the alienation of the land to a purchaser for value and without notice.

The case of *Borst* v. *Nalle*, 28 Gratt., 423, is in point. In that case, it was contended by counsel that the docketing of a judgment was an act necessary to be done to create the lien, not to preserve the lien and prevent its loss, and that, therefore, such docketing was not within the terms of certain Acts of Assembly which extended the time for the exercise of certain civil rights and remedies. The construction of this statute in this respect was thus directly presented to the court; and its construction of a State statute is, of course, binding upon the federal courts. The court held that the docketing was not necessary to create the lien, but to preserve and continue the lien; that the lien attaches with the rendition of the judgment, and continues until alienation to a purchaser for value without notice, when it *ceases* if the judgment has not been docketed.

The failure to docket being a matter causing the *cessation* of the lien, it would seem to come within the federal statute

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just referred to; and that in case of such failure, the lien of a federal judgment would equally cease.*

Upon the whole, I conclude, that it is necessary to docket a federal judgment or decree in Virginia, in order to preserve its lien against a purchaser for value without notice.†

If I am right in this, however, it is an accidental result of the peculiar state of the law in Virginia. Certainly the law on the subject is in a very undesirable condition. Experience has proven the wisdom of registry laws. Regard for the security of titles requires that every judgment constituting a lien on lands should be docketed; and regard for the convenience of the citizen requires that such judgment should be docketed in the county where the land lies. The business of the federal courts is so large, and has been increasing so much in recent years, that the omission of their judgments and decrees from the general requirement to docket, mars the completeness, and defeats, to a large extent, the object of the registry system. It seems to me that it would be well that Congress should, by a general and uniform law, provide that, whenever the State laws admit the docketing of federal judgments and decrees, their lien should be dependent upon a compliance with those laws.

Congress could safely trust the States not to impose any improper or unreasonable conditions or restrictions upon the lien of judgments, as their laws would operate equally upon the judgments of their own courts, and upon their own citizens. Congress has already, by the statute we have noticed, reposed this confidence with respect to the cessation of the judgment lien. And if it should go further, and require federal judgments to be docketed as required by State laws, it would only carry out a general purpose, already partially manifested, to conform federal judgments as to their operation and effect to those of the State courts.‡

Richmond, Va., Sept. 25, 1879. FRANK W. CHRISTIAN.

*The case of *Cropsey* v. *Crandall*, 2 Blatchf., 342, has been supposed to be adverse to this view. But that case was very different. For the law of New York there (Laws N. Y., 1840, ch. 386. p. 334) which required the docketing. made such docketing necessary, not for the preservation and continuance of the lien, but for its creation and inception.

†This, however, may not be true with respect to decrees in admiralty. See *Ward* v. *Chamberlain*, 2 Black: 430; 21st Rule in Admiralty.

‡In the case of *U. S.* v. *Humphries. &c.*, published in the present issue of the *Journal*, Judge Hughes held that it was not necessary to docket a federal judgment. The writer was counsel in that case; and it is with diffidence that he has adhered to the opinion he there unsuccessfully sought to maintain, against the views so strongly presented in Judge Hughes' opinion. He has thought, however, that he would not perform an useless service in directing the consideration of the profession to the question, which is one of interest and novelty.

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U. S. CIRCUIT COURT EASTERN DISTRICT OF VA.

UNITED STATES *v.* JOSEPH M. HUMPHREYS ET AL.

In order to their being liens upon real estate in Virginia, judgments and decrees obtained in courts of the United States held in the State, need not be recorded.

In equity.

L. L. Lewis, U. S. Attorney, and *Henry T. Wickham, Esq.*, appeared for the United States.

Frank W. Christian for the defendants.

The facts of the case are sufficiently set out in the opinion of the court.

HUGHES J.—The very able and informing briefs of counsel leave me nothing to do but state the points of the case, and deduce a decision from the authorities which govern it.

The United States obtained a judgment in October, 1877, against Joseph M. Humphreys, late collector of customs at Richmond, and his sureties on his official bond. This judgment was never docketed as required by the laws of Virginia. In January, 1878, Humphreys executed a deed of trust to secure money borrowed, through Thomas N. Page, on lands of his lying in the county of Henrico, near the city of Richmond.

The United States brings its bill in equity in this court against J. M. Humphreys and other proper parties defendant, to subject this land to the lien of its judgment. And the single question in the case before the court is, whether the judgment is of higher dignity than the trust deed, and can be enforced as against the lien of the debt secured by that deed.

The contention of the trust creditor is, that the United States lost its lien and the benefit of its priority in time over the deed by failing to docket its judgment in pursuance of the requirement of the 8th section of chapter 182 of the Code of Virginia, which provides that "no judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it is docketed" in the county or corporation where the land lies, on the judgment

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docket required to be kept by the clerk of each county or corporation court of the State, either within sixty days next after the date of such judgment, or fifteen days before the conveyance of said estate to the purchaser.

I shall first consider the question as if the judgment creditor was a private creditor.

The 6th section of the same chapter of the Code of Virginia provides that "every judgment for money rendered in this State heretofore or hereafter against any person shall be a lien on all real estate of such person." This provision was first embodied in the Code of 1849. Previously to that time, and, indeed, subsequently until March 26, 1872, the writ of *elegit* was in use in Virginia; but on that date that writ was finally abolished by special act of the Legislature.

Such being the law of Virginia as to the lien of judgments in the State Courts, the next inquiry is, How does the law thus existing apply to judgments of courts of the United States rendered in the State of Virginia?

It is well-settled law that judgments rendered in the courts of the United States are liens upon the defendant's real estate in all cases where similar judgments of the State Courts are made liens by the law of the State. *Ward et al.* v. *Chamberlain et al.*, 2 Black, 430; more particularly page 438, *et seq.* Many other decisions of the Supreme Court of the United States might be cited to the same effect. These judgments are liens, not by virtue of the adoption of State laws by the United States Courts, by rules of court or otherwise, but by virtue of acts of Congress giving the same effect to final process of United States Courts as is given by State laws to process of the courts of the States in which they are held; giving the same remedies on judgments and decrees of federal courts as are given by State laws on judgments and decrees of State Courts; and giving authority to the United States Courts to make proper rules for securing these objects.

We are therefore to look to acts of Congress on this subject to ascertain how far judgments of United States Courts in Virginia are liens upon lands. If there had been no such act of Assembly as that of March 26, 1872, abolishing the writ of *elegit* in Virginia, it might probably be contended that in Virginia the process act of Congress of 1828 is not repealed by the act of Congress of June 1, 1872, now section 916 of the revised statutes of the United States, and that the writ of *elegit* lies from the United States Courts in this State. But the Virginia law of March, 1872, does abolish the *elegit*, and section 916 in the revised statutes, giving the same effect

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to, and remedies on, judgments of the United States Courts as were *then* ("now") given by State law to judgments of State Courts, repeals by substitution in Virginia the process act of 1828 as to the *elegit*, whatever it may do in other States, under the particular legislation of those States bearing upon this subject. Decisions of United States Courts in other States, seemingly in conflict with this view, were rendered upon the condition of State legislation in those States, and do not necessarily apply to the condition of legislation in Virginia.

The judgment in this case against Humphreys became a lien upon his lands just as it would have become if it had been a judgment of a State Court; and the remaining question is, whether by the execution of the deed of trust which Humphreys gave in January, 1878, the judgment "*ceased*" to be a lien under the operation of the 967th section of the revised statutes of the United States, which provides that judgments of United States Courts within a State "shall cease to be liens on real estate, &c., in the same manner and at such periods as judgments of the courts of the States cease by law to be liens thereon."

I do not doubt that so far as this law shall operate *proprio vigore* in any case—for instance, as a statute of limitations—the lien of a judgment of a United States Court would cease just as that of a State Court would do under a State statute of limitation; but I am precluded by a current of decisions rendered by courts of the United States from holding that the lien of a judgment of a United States Court ceases in the event it is not docketed in accordance with a State law as against a subsequent purchaser without notice. I am precluded from holding that the lien of the judgment in this case ceased in January, 1878, as against the trustee's title under the deed of trust executed in that month by Humphreys.

The decisions of the United States Courts have been in nothing more uniform, unvarying, and consistent, than in holding that where rights once attach under laws of Congress adopting laws of the respective States, these rights are not divested by a non-compliance with conditions, restrictions, or limitations contained in those very State laws, where a compliance with the latter would depend upon a resort in any way to State officials, or to the machinery of the State judiciary.

The provision of the Code of Virginia making a judgment for money a lien upon the real estate of the debtor makes, in

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the 8th section of chapter 182, an exception in favor of a subsequent purchaser without notice, where the judgment has not been docketed. The process of docketing depends upon the action of an officer of a State Court in keeping a docket, and upon that officer's actually docketing the judgment of the United States Court when presented.

There is no law of Virginia requiring this officer to docket the judgment of a United States Court. He acts strictly in a ministerial capacity, and is not required by any express law to enter such a judgment when presented for such a purpose. Congress, on its part, has not (as I think it should do) by law required clerks of United States Courts to keep such dockets in each district as the law of Virginia requires to be kept in each county. So as to other restrictions, exceptions, limitations and conditions which State laws conferring rights insert in the laws conferring them. I think it may be laid down as a rule having few exceptions that in any case of a law of a State conferring rights upon conditions, or with exceptions, and adopted by Congress as operative in that State, wherever the exceptions or conditions depend upon the action of State officers, so that the enjoyment of rights thus once conferred could be defeated or divested by the action, or refusal to act, of a State officer, such a condition, or exception, in the State law is uniformly held by the United States Courts not to limit the rights conferred by the act of Congress adopting the State law. This was decided in *Palmer* v. *Allen*, 7 Cranch, 550–64; *Wayman* v. *Southard*, 10 Wheaton, 1; *United States Bank* v. *Halstead*, 10 Wheat., 51; *Boyle* v. *Zacharie et al.*, 6 Peters, 648; and (more particularly in their bearing upon the question now under consideration) *Massingill* v. *Downs*, 7 Howard, 760; and *Carroll* v. *Watkins*, 2 Abbott's U. S. Reports, 474. In these last cases, the law of Mississippi, giving the lien in favor of judgments for money, was modified by provisions requiring judgments to be docketed, and making exceptions in favor of subsequent purchasers without notice as against judgments not docketed—provisions identical in purport with those of Virginia. But the Supreme Court of the United States held in the former case that in States where judgments create liens, a judgment of a United States Court has that operation throughout the judicial district in which it is rendered, and any provisions of State legislation modifying the lien of judgments, and restricting their operation, cannot affect the lien of a judgment of a United States Court.

I think the decision of the Supreme Court in *Massingill* v

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Downs is decisive of the question under consideration, and requires me to decide that the judgment of this court, rendered in October, 1877, is good against the trust-deed executed in January following, and that the lien created by section 916 of the revised statutes of the United States, adopting section 6 of chapter 182 of the Virginia Code, is not controlled or affected by section 8 of that chapter of the Virginia Code. This court has decided that a *lis pendens* in a United States Court binds property in litigation, though not recorded and docketed, as required by State law if in a State Court. *Rutherglen* v. *Wolf*, 1 Hughes, 78.

I do not think it necessary to go farther and inquire whether a judgment in favor of the United States has the same force as a judgment in favor of the State of Virginia in this State, and as a judgment in favor of the Crown in England. I am inclined to believe, on authority, and would so decide, if necessary in this case, that judgments in favor of the United States stand on the same principle as those in favor of the Commonwealth and of the Crown; that they are a lien independently of laws, making judgments generally a lien upon the estates of debtors, and do not depend upon those laws. Although the ancient writ in favor of the Crown of *extendi facias* is obsolete by mere disuse, having given place to more efficient remedies, yet I imagine that it still lies theoretically; and its theoretical existence is sufficient to establish the liens in this country of judgments in favor of the State and Federal Governments.

Their precedence over all liens in favor of private persons stands upon such broad maxims as *salus populi suprema lex; Thesaurus regis est pacis vinculum, et bellorum nervi*, and the like. Certain prerogatives of the Crown belong, in the United States, not only to the State governments, but to that of the United States. Those which belonged to the King in England as *parens patriæ*, as distinguished from those which belonged to his person, survive to the Government of the United States in this country. *Dollar Savings Bank* v. *The United States*, 19 Wall., 239.

This doctrine is well settled in respect to the State Governments; more particularly by *Commonwealth* v. *McGovern*, 4 Bibb, 62; *Leake* v. *Ferguson*, 2 Gratt., 436; and *Commonwealth* v. *Baldwin*, 1 Watts., 54. Authorities might be multiplied if it were necessary.

It might not be necessary, in respect to recent judgments in favor of the United States, to resort to a bill in chancery for the enforcement of them upon real estate. But where

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they have been standing for any length of time, and junior liens have supervened, I think the proper method of proceeding is the same as would be proper in respect to judgments in favor of citizens—that is to say, by bill—and that such a course has been properly taken in this case.

SUPREME COURT OF APPEALS OF VIRGINIA.

JULY TERM, 1879.

GRUBB *v.* WYSORS.

G. sold a tract of land to W., Jr., the purchase money to be paid in three equal annual instalments, and G. retaining the title until the whole was paid. For the first instalment W., Jr., executed a negotiable note with W., Sr., as surety, payable at one year, and he gave his own notes at two and three years, for the rest of the purchase money. G. assigned the note for the first payment to M., and M. assigned it to H., and it was paid after maturity and protest by W., Sr., the surety. On a bill filed by W., Sr., to be subrogated to the lien rights of G., and to be paid out of the proceeds of the sale of the land before the two bonds given for the second and third instalments, held by G. were paid. HELD:

1. While the assignment of the note for the first payment by G. carried with it to his assignee so much of the lien on the land as was necessary to secure the same, and, as between G. and the assignee, gave the latter a prior lien; these equities of the parties *inter sese*, are not available to the surety, W., Sr., by subrogation in a case like this, where the rights of G., the creditor, would be impaired thereby, and therefore the lien of W., Sr., the surety, must be postponed to that of G., the vendor.
2. While a surety who pays a debt of his principal will ordinarily be subrogated to all of the lien rights of the creditor, when the latter has no longer occasion to hold them for his own protection, equity will never displace the creditor to his prejudice merely to give the surety a better footing.

On the 5th of May, 1874, Frank S. Grubb sold to George W. Wysor, Jr., a tract of land for $3,199, payable in three equal annual instalments. For the first instalment Wysor, Jr., executed a negotiable note, with his father, George W. Wysor, Sr., as surety, payable twelve months after date, and for the other two instalments, executed his own bonds, payable at two and three years; the title to the whole land was retained by the vendor to secure the purchase money. The note for the first payment was assigned, by the payee, Grubb, before maturity, to E. McCormick, and by him endorsed to Hurst, Purnell & Co., and, after maturity, paid to the holder by Wysor, Sr., the surety. Wysor, Sr., then filed his bill in the Circuit Court of Carroll county against Wysor, Jr. and

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Grubb, claiming that having paid said note for the first instalment of the purchase money of said land as surety for his son, Wysor, Jr., who has no other property than his interest in said land, he is entitled to be subrogated to the lien rights of Grubb, the vendor, and to be paid out of the proceeds of the sale of said land before Grubb should be paid the balance of the purchase money, and asking that a sale of said land should be directed for this purpose. A decree to affect this having been rendered by the Circuit Court of Carroll county, Grubb appealed therefrom to the Court of Appeals.

Crockett & Blair for the appellant.

Walker for the appellee.

BURKS J.—That the negotiable note of June 1, 1874, was given for the first instalment of purchase money for the tract of land sold by the appellant, Grubb, to the appellee, George W. Wysor, Jr.,—that the appellee, George W. Wysor, Sr., was surety for the latter on said note—that the note was assigned by Grubb, the payee, to McCormick, and by the latter endorsed to Hurst, Purnell & Co., and after protest at maturity for non-payment, was paid to the holder by the surety—are facts not questioned in this case.

The averments in Grubb's answer to the bill, that the note was paid by the complainant, not as surety, but on his own account, or if paid by him as surety, that he had received satisfaction from his principal for the amount so paid, are affirmative statements and not supported by the proofs. So that the only question left for decision by this court is, whether the surety is entitled to the substitution and priority granted him by the decree of October 12, 1877.

The subrogation of the surety, for indemnity, on payment of the debt of his principal, to all the rights, remedies and securities of the creditor against the principal for the debt, is a familiar doctrine of courts of chancery everywhere. It is founded, it is said, not upon contract, but upon a principle of natural equity and justice. "It is a mode," observes Judge Strong, "which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay. To affect this, the latter is allowed to take the place of the creditor, and make use of all the creditor's securities as if they were his own." *McCormick* v. *Irwin*, 11 Casey, 111, 117.

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But this principle has no application where its enforcement would be unjust and inequitable. It may be invoked for indemnity, and sometimes, and on certain conditions, for exoneration, by a surety against his principal, but not in a case where it would operate to the prejudice of the creditor. For instance, it has been held by one, whose judgments always command, as they deserve, the highest respect, that the surety, upon paying the debt, is entitled to all the securities held by the creditor, "*provided* the creditor has no lien upon them or right to make them available against the principal debtor, to enforce the payment of a debt different from that which the surety has paid. But if the creditor has such a right, and one arising out of the transaction itself, of which the suretyship forms a part, then the right of the surety to the benefit of the securities is subordinate to the right of the creditor to make them available for the payment of his other claims, and can only be made available after the paramount right is satisfied." Sir John Romilly, M. R., in *Farebrother* v. *Wodenhouse*, 23 Beavan, 18, cited in Brandt on Suretyship, § 279.

The principle here enunciated would apply, as it seems to us, with equal if not greater force, to a case where the creditor has a security for an entire debt, payable in instalments, for one only of which the surety is personally bound. To allow the surety, on payment of this instalment, to have the benefit of the security, which was provided for the entire debt, and postpone the creditor until the surety is indemnified, would be, in effect, in a case where the security is insufficient to pay the whole debt, to require the *creditor* to indemnify, instead of the *principal debtor;* for, in the case supposed, the creditor has the prior, subsisting paramount right to resort to the security until his entire debt is satisfied.

Such is the case in judgment. Grubb, by written contract, stipulated to sell his tract of land to Wysor (the younger) at the price of $3,199, payable in three equal annual interest-bearing instalments, and expressly retained the title until all the purchase-money should be paid. One month thereafter, the negotiable note was taken for the instalment first to be paid. The land, no doubt, was deemed inadequate security for the payment of the price agreed upon, and the object of the note was to strengthen the security. The land stood as security for the entire purchase-money, and the note as additional security for one instalment. If the view of the Circuit Court prevails, what was intended as further security amounts practically to no security whatever; for, by substitution, as applied in the first decree, and the priority therein

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given to the surety, and by the sale under that decree, the whole tract of land has been taken to indemnify the surety for the payment of the note, and the creditor is left without any security for the two-thirds of the purchase-money due him and unpaid. This cannot be equity. The surety will be permitted to occupy the place of the creditor, when the latter has no longer occasion to hold it for his own protection, but equity will never displace him, to his prejudice, merely to give the surety a better footing.

The assignment by Grubb carried with it to his assignee so much of the lien on the land as was necessary to secure the payment of the note assigned, and, as between Grubb and his assignee, a prior right to satisfaction out of the proceeds of sale. Such is the effect of the decisions of this court in *McClintic* v. *Wise's adm'r and others*, 25 Gratt., 448, and *Gordon* v. *Fitzhugh and others*, 27 Gratt., 835. But these decisions only settle the rights and priorities, growing out of assignment, between the original assignor and assignee, and among successive assignees of debts having a common security. These equities of the parties *inter sese* are not available to the surety by subrogation in a case like the present, where the rights of the creditor will be impaired thereby. On the contrary, the case presented is one in which the doctrine of marshalling of securities for the benefit of the creditor has application. If the assignee, holding the note unpaid, had filed his bill to have satisfaction out of the land, as he held two securities and the vendor only one, equity would either have required him in the first instance to resort to the security of the note before coming upon the land, or if permitted to obtain satisfaction out of the land, and that proved insufficient to pay both debts, he would have been required to turn over the note to the vendor as a subsisting security for the re-payment, as far as necessary, of what had been taken by the assignee out of the land. It is apparent, therefore, that payment of the note by the surety could give him no equity to be let in upon the land, until the vendor's debt has been fully paid.

The land was sold under the decree of October 12, 1877, and purchased by the surety at a price not quite sufficient to indemnify him for the amount he paid for his principal. It appears by the report of the commissioner, that the sale was made on the 20th day of May, 1878. Grubb excepted to the report, on the ground that the land did not sell for its value, and he made an upset bid of $1,500, and asked a day to make good his bid. The decree of August 8, 1878, gives

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him sixty days to make good his bid in the mode described by the decree, and if the terms should be complied with, orders a re-sale of the land at the upset bid; if the terms should not be complied with, it orders the report to stand confirmed.

The decree of October 12, 1877, must be reversed so far as it gives priority to the appellee, Geo. W. Wysor, Sr. It is not otherwise erroneous, as the said Wysor is entitled, by substitution, to a lien on the land subordinate to the paramount lien of the appellant, and he had the right to bring his bill to enforce his lien subject to the superior rights of the appellant. The sale of the land was therefore properly ordered; and if it had been error to order the sale, and for such error the decree should be wholly reversed, if the conditional confirmation of the report by the decree of August 8, 1878, has become absolute, such reversal would not, under the statute, affect the rights of the purchaser, as the sale was made six months from the date of the decree ordering it. Code of 1873, ch. 174, § 11.

The cause will be remanded to the Circuit Court, with directions to order an account of the purchase-money, yet unpaid and owing to the appellant, and when the amount thereof has been ascertained, if the conditional confirmation of the sale by the decree of the 8th of August, 1878, has become absolute, to direct the payment of said amount out of the proceeds of said sale, when collected, and after said amount has been fully paid, to apply the residue, if any, of said proceeds towards the satisfaction of the sum recovered by the said George W. Wysor, Sr., against the said George W. Wysor, Jr., under the decree of October 12, 1877; and if the confirmation of the sale by the decree of August 8, 1878, has not become absolute, the said Circuit Court will be further directed to cause the land to be resold, and to apply the proceeds of the re-sale in the order and in the manner hereinbefore indicated.

DECREE REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

WYTHEVILLE.

HANKS, &C., *v.* PRICE, &C.

JULY TERM, 1879.

1. In an action of ejectment, brought against the person in possession, the landlord of such person may come in and be allowed to defend the action under § 5, ch. 131, Code of 1873, whether the actual relation of *lessor* and *lessee* exists between them or not; and this will be permitted even where the plaintiff and defendant in possession have submitted the matters between them to arbitration, an award made in favor of the plaintiff, and a rule awarded against the defendant in possession to show cause why the award should not be entered as the judgment of the court against him.
2. In general, the law will imply a tenancy, whenever there is an ownership of land on the one hand, and an occupation by possession on the other.

Joseph Price and Julia A., his wife, brought an action of ejectment in the Circuit Court of Carroll county against Sally Hanks, the person in possession, to recover a certain tract of land. She was the widow of William Hanks, Jr., and merely occupied and cultivated the land by permission of her children, it being no part of her dower. Pending the controversy, the whole matters were referred by the plaintiffs and defendant to arbitration, and the award made in favor of the plaintiffs. This was returned to the court, and a rule was issued against the defendant to shew cause, if any she could, why the award should not be entered up as the judgment of the court, when James S. Hanks, Gilbert Hanks, Geo. W. Jones, and Louisa J., his wife, Jonathan L. Hanks, Ewell Hanks, Mary E. Hanks and W. G. Hanks, the last four infants, by Jas. S. Hanks, their brother and next friend, who were the children of the defendant, and who claimed to be the owners, in fee, of the land, asked leave of the court to be made defendants with their mother, and to be allowed to defend the said action. This was denied by the Circuit Court, and a judgment rendered in favor of the plaintiffs for the land. Whereupon, the said James S. Hanks, and the other children above named of said Sally, applied to a judge of this court for a writ of error, which was awarded.

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The other facts are sufficiently stated in the opinion of the court.

Shelton for the plaintiff in error.

Walker for the defendant in error.

STAPLES. J. This is an action of ejectment in which the plaintiffs claimed title to the premises in fee. The declaration and notice were served upon the tenant in possession. During the pendency of the action, plaintiffs and defendant referred all matters of controversy to arbitration. The arbitrators rendered an award in favor of the plaintiffs, and upon its return a rule was issued against the defendant to show cause why the award should not be entered up as the judgment of the court. Upon the return of the rule, the plaintiffs in error appeared, and asked to be made defendants. The application was refused by the court and an exception taken.

The defendant—the tenant in possession—is the mother of the plaintiffs in error, and the widow of their father. She claims no interest in the land in controversy, but occupies and cultivates it with the consent of the plaintiffs in error, who claim to be the reversioners and owners in fee of the premises.

The decision of the Circuit Court, as is conceded, was based upon the provisions of the fifth section of chap. 131, Code of 1873, which declare "the person actually occupying the premises shall be named defendant in the declaration. If a lessee be made a defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in place of his lessee."

It is insisted that under this section the person claiming title can defend only where the occupying tenant is his *lessee*, and here there was no lease, or contract for a lease, express or implied, but a simple occupancy of the premises by the widow, under the license of the children.

Passing by, for the present, the question of the correctness of this construction of the tenancy, it is obvious that the decision of the Circuit judge is based upon a misconception of the meaning of the section already cited. This will be the more apparent from a brief examination of the doctrines of the common law. Long before any statute on the subject, it was the constant practice of the English courts to admit the landlord, or other person under whom the occupying tenant

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claimed, to come in and defend the action. This privilege was not confined to those who were technically lessors of the tenant in possession, but (to use the language of Mr. Justice Wilmot) was extended "to all those that stood behind him." It was, however, made a question, whether this right of the landlord to defend could be asserted without the consent of the occupying tenant. To remove all difficulty on this point, the English statute was passed empowering the landlord to appear and defend the action with or without the consent of the tenant in possession. The practice of the English courts has been generally followed in those States where the common law prevails. In *Herbert* v. *Alexander*, 2 Call., 502, decided long anterior to our statute, the right of the landlord to be made defendant was fully recognized by this court.

In a case before Lord Mansfield, he said: "By the words of the statute, the courts admit landlords only to defend, and difficulties had often arisen as to the meaning of the word landlord in the act. He was of opinion that where a person claimed in opposition to the title of the tenant in possession, he can, in no light, be considered as landlord; but where there is privity between them, the defence must be upon the same bottom, and letting in the person behind can only operate to prevent treachery and collusion." He further said, "It is no answer, that any person affected by the judgment may bring a new ejectment because there is a great difference between being plaintiff and defendant in ejectment." This construction of the statute has been almost universally followed by the American courts. So that the principle of the cases, both at common law and under the statute, is to extend the word "landlord" to all persons whatever whose right or title is connected to or consistent with the possession of the occupying tenant. See Adams on Ejectment, 231, and Tyler on Ejectment, 448, where the cases are cited. *Fairclaim* v. *Shawtide*, 3 Burr, 1290–4–5; Barton Prac., 355.

A moment's reflection will satisfy any one of the soundness of this construction. Very frequently it is a matter of great difficulty to determine whether the agreement under which the tenant holds is technically a lease or a mere license. The decisions on this subject are numerous and extremely difficult to reconcile. 2 Bing. on Real Prop., 78–9–80.

Still greater difficulties often occur in deciding whether the agreement constitutes the tenant a lessee of the land, or a mere joint tenant of the crops. *Line* v. *Miller*, 3 Gratt., 205, is one of that class of cases in which this court, after much deliberation, held that, under the contract, there were no

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lease but a mere joint tenancy in the crops raised on the land. 1 Washburn on Real Prop., 367.

It can scarcely be supposed it was ever intended the courts should pass upon difficult questions of this sort before determining whether the real party in interest has the right to be heard in defence of his title and his possession. If, in the case of a lessee, it is proper to receive his lessor as the real defendant, surely the same privilege should be extended to the landlord, whose tenant is a mere licensee or joint tenant of the crops. To suppose that the Legislature intended to apply a different rule in these cases is to attribute to them a palpable absurdity. It is very true, the statute uses the word "lessee," but it also uses the word "landlord" as its correlative. The word "lessee" was used, not so much to define a particular estate or interest, as to express a relation—that of landlord and tenant, a person holding under and in subordination to the title of another.

This construction of the statute is consistent with justice and sound policy, and is sustained by the authorities.

But if we are wrong in this view, and the interpretation of the statute claimed by the learned counsel for the defendants in error be the correct one, we should still hold the judgment of the Circuit Court erroneous. We are of opinion the tenant in possession is a lessee under an implied contract of writing. As already stated, she claimed no title to the land in controversy. It was no part of her dower interest. It had no connection with the mansion house and curtilege. The tenant, however, cultivated the land with the tacit permission of the heirs, five of whom were infants living with her in the mansion house. It is true she neither paid rent nor expressly contracted to do so; but we do not understand that is essential. In general the law will imply a tenancy wherever there is an ownership of land on the one hand, and an occupation by permission on the other, for in all such cases it will be presumed that the occupant intended to pay for the use of the premises.

Whether such an occupancy amounts to a tenancy from year to year, or a mere tenancy at will, determinable at the pleasure of the owner, must depend upon the circumstances of the case. Adams on Ejectment, 102, 103–4, 108. Taylor's Land and Tenant, sec. 19, 59. Tyler on Ejectment, 206, 212. In the present case the occupying tenant was either a tenant from year to year, or a tenant at will; and whether one or the other, she is to be regarded as a lessee of the premises, according to a literal interpretation of the statute.

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It only remains to inquire whether the award precludes the plaintiffs in error from being heard. If the rule of law be as already stated with respect to the right of the real party in interest to appear and defend the action, it is vain to say the tenant can do any act to defeat or impair that right. An arbitration is as ineffectual for that purpose as an attempted surrender or attournment to another. The award may bind the tenant, but it cannot bind the landlord, who is no party to the agreement to refer. As to him, it is a nullity, and all his rights remain precisely as if no award had been made.

The books abound with cases in which, even after judgment against the casual ejector, the real party in interest has been let in to defend the action. In some instances this has been done after judgment signed and a writ of possession executed. Tyler on Ejectment, and cases cited, 451, 2–3. Doe on De of *Mullary* v. *Roe*, 39 Eng. C. L., 194. Adams on Ejectment, 239, and notes. *Jackson* v. *Stiles*, 4 John. Re., 495. It is true the casual ejector was always a fictitious person having no title, the tenant in possession being the real party concerned. And it was for the reason that the latter was the real party in interest that the courts permitted him to make defence. As was said by Lord Mansfield, the plaintiff ought not to recover without a trial with the person interested in the question and affected by the judgment. The like considerations ought to control at the present day where the action is against the occupying tenant who asserts no title in himself, but claims in subordination to the title of another.

In the case before us, at the time the plaintiffs in error appeared, no judgment had been entered on the award since there was no difficulty in the way of a proper defence on the title. And even though the award had been entered up as the judgment of the court, they might have made defence at any time during the term.

It has been asked, however, upon what ground are the plaintiffs in error permitted to enter and oppose an award which does not affect their interests. So far as the award itself is concerned, the plaintiffs in error may not be interested in it, but they are concerned that it shall not be used for the purpose of giving the plaintiffs in the action an undue advantage over them. If they are not permitted to defend by reason of the award, a judgment will of course go against the tenant in possession—a writ of possession immediately issued by which the plaintiffs in error will be ousted from the possession and their adversaries let in. How will they regain

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that possession except by a new ejectment in which the relative position of the parties will be shifted and the plaintiffs required to show title. If this be the rule of law, every landlord is at the mercy of a fraudulent or ignorant tenant who may be persuaded or deceived into an arbitration.

For these reasons we are of opinion that the Circuit Court erred in refusing to permit the plaintiffs in error to be made defendants in place of the tenant in possession. The judgment must be reversed and the cause remanded to the Circuit Court with instructions to allow the plaintiffs in error to defend the action if they shall so desire.

JUDGMENT REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

SOUTHERN MUTUAL INSURANCE CO. *v.* KLOEBER FOR, &C.

APRIL TERM, 1879.

1. If the application for a policy is made a part of the policy, and is a warranty, and covers the applicant's interest in and title to the property, and his answer to the question, "What is your interest in the title to the property to be insured?" Is "fee simple." HELD: The fact that the wife of a former owner of the property, who is still alive, has a contingent right of dower in it, does not affect the applicant's interest in, or title to the property. Nor is it such an incumbrance as not being mentioned in his answer will be a breach of the warranty.
2. If in such case the application is not a warranty, the failure to mention the existence of such a contingent right of dower, is not such a misrepresentation as will avoid the policy.
3. Where the case is submitted to the court, and the evidence as to the value of the property insured is conflicting, the Appellate Court cannot interfere with the judgment of the court below on the ground the judgment is excessive.

This was an action of *assumpsit* in the Circuit Court of the city of Richmond, brought in June, 1873, by Charles E. Kloeber, for the benefit of B. Green, trustee, against the Southern Mutual Insurance Company, to recover the amount of the insurance by the defendant of the dwelling house of said Kloeber, situated in or near Chatham in the county of Pittsylvania. The defendant pleaded *non-assumpsit;* and it was agreed to dispense with a jury, and that the whole matter of law and fact should be submitted to the court. And the court having heard the evidence, rendered a judgment in favor of the plaintiff for $3000, the amount of the policy,

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with interest from the 1st of April, 1873; and the defendant excepted; all the evidence being set out in the exception; and obtained a writ of error and *supersedeas*.

It appears that in April, 1869, George W. Hall was the owner of the property insured, and by deed of that date he conveyed it with several other parcels of real estate, and also personal property, to Coleman D. Bennett, to secure the sum of $10,000 to Smithson H. Holland. Bennett having died at the June term of the County Court of Pittsylvania, Berryman Green was appointed trustee in the deed; and in September, 1871, Green sold this house and the grounds at public auction, when the plaintiff, Kloeber became the purchaser at the price of $4,060, and executed his bonds for the purchase money, payable at six, twelve, eighteen and twenty-four months, the trustee retaining the title. At the time of the issue of the policy, which is dated the 21st of September, 1872, Kloeber had paid but $534 of the purchase money.

The other facts on which the opinion of this court is founded are sufficiently stated by Judge CHRISTIAN in his opinion.

John A. Meredith and *Geo. B. Harrison* for the plaintiff in error.

Ould & Carrington for the defendant in error.

CHRISTIAN J.—This case is brought up by a writ of error to a judgment of the Circuit Court of the city of Richmond.

The defendant in error, in the year 1872, insured his dwelling house in the town of Chatham, in the county of Pittsylvania, in the company of the plaintiff in error (the Southern Mutual Insurance Company), to the amount of $3,000. The house was destroyed by fire on the 6th of November, 1872.

Suit was instituted against the company in the Circuit Court of the city of Richmond, and a jury being waived, and the matter of law and facts being submitted to the court, a judgment was rendered against the company for the sum of $3,000, with interest from the 1st day of April, 1873, till paid.

To this judgment a writ of error was awarded by this court.

The case was argued very elaborately here, both orally and in printed briefs. Numerous objections and points of difficulty were suggested in argument by the able counsel for the company. It is not necessary to notice them all in this opinion.

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If the judgment in this case can be successfully assailed, it can only be done upon one of the three grounds of error set forth in the petition filed by the company.

These three assignments of error are as follows, and will now be considered in the order of their assignment:

I. It is insisted that the policy of insurance in this case is a contract of *warranty;* and being a warranty, it is of no consequence whether the facts stated, or the act stipulated for, are material to the risk or not.

II. It is contended with great earnestness, that if the court should hold that the application with the questions and answers do not constitute a *warranty*, but are to be treated as representations only, then it is insisted "that they are false, are misrepresentations, and that the plaintiff practised a fraud" upon the company.

III. That the damages given by the judgment of the court are excessive.

First, then, we have to determine whether the policy in this case contains a contract of warranty, and the extent and effect of that warranty.

It is well settled, by numerous decisions, that where the application and conditions annexed are referred to in the policy, they form a part of it, and are to be considered as if incorporated in the policy itself. In the case before us, we must look first, therefore, to the policy, to see how far reference is had to the application, and determine the obligations of the insured as stipulated in the application with respect to matters referred to in the policy.

The policy in this case contains the following provision:

"By this policy of insurance, the Southern Mutual Insurance Company of Richmond, Va., in consideration of twenty-two dollars and fifty cents to them paid by the insured hereafter named, the receipt whereof is hereby acknowledged and a premium note of —— dollars and —— cents by the said company secured, do insure Chas. Edward Kloeber, of Pittsylvania county, and State of Virginia, against loss or damage by fire and lightning, to the amount of $3,000, on the following property, to wit: his two story brick and tinned dwelling house, 45x45, situated in said county, on the west side of the public road leading from Chatham to Lynchburg, Va. For a more particular description, and as forming part of this policy, by which the insured will be bound, reference being had to application and description No. 7721, on file in the office of this company."

The application, after setting forth the estimated value of

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the house insured, contains eighteen specific questions and answers, and following these questions and answers is the following stipulation: "And the said applicant covenants and agrees with said company, that the foregoing, together with the diagram hereupon, is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured."

In this application, the ninth and tenth questions are as follows: 9th Question. What is your title to, or interest in the property to be insured? Answer: Fee simple. 10th Question. Is your property encumbered, by what, to whom, and what amount? Answer: Vendor's lien of about $3,500.

It is insisted that these questions and answers constitute a warranty, and that the application being referred to in the policy forms a part of it, and contains an express warranty that these answers are in every respect true. It is to be noted that neither in the application nor in the policy is the word *warranty* or any other word of similar import to be found. The only part of the policy which refers to the application, and the only words in the policy upon which a warranty can be predicated, are as follows: "*For a more particular description*, and as forming a part of this policy by which the insured will be bound, reference being had to application and description No. 7721, on file in the office of this company;" and the stipulation in the application is limited to "the condition, situation, value and risk" of the property insured.

It is doubtful, to say the least, if this stipulation, together with the questions and answers, constitute a *warranty*, whether such warranty extends to and covers the interest in, and title to the property. Conceeding that it does, was there a breach of the warranty in the fact that Mrs. Hall, the wife of Kloeber's vendor, had a contingent right of dower in the house and lot purchased by Kloeber. There can be no breach of the warranty unless the statement averred in the warranty is shown to be false. The 9th question is, what is *your title to or interest in* the property to be insured? The answer is, "fee simple." Now, this answer is strictly true. Mrs. Hall's undefined and contingent right of dower, a right and interest dependent upon the contingency of her surviving her husband, certainly did not affect the character of the interest or title which Kloeber had in the property. Although she had this contingent right to assert her claim of dower against the property if she should survive her husband, still the estate in Kloeber was a fee simple estate in the sense in which he makes the answer. The questions to which he subscribed

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his answers were *printed* questions, and under the 9th question submitted to him, were also printed the words, "See 4th remark to agents on back of application." This "4th remark" is as follows: "In answer to question 9, agents must require applicant to state precisely *what his title is*, whether fee simple or otherwise, if realty be the subject of insurance, or whether absolute or otherwise if personalty be the subject." So that the question was limited as to the character of his title and nature of his interest. His answer, "fee simple," was in the sense in which the question was asked and answered, strictly true; and it was no breach of the warranty (if warranty it be) to show that Mrs. Hall, whose husband was still living and might survive her (when her right would vanish), had never united in the deed to Kloeber's vendor. That claim, if it ever arose and was ever asserted, could not change the nature and character of the estate in Kloeber. It would still be an equitable fee simple estate.

But it is insisted that there was a breach of the warranty contained in the answer to the 10th question, which read as follows: "10. Is your property encumbered, by what, to whom, and what amount?" Answer: "Vendor's lien of about $3,500." It is earnestly argued that Mrs. Hall's contingent right of dower was *an encumbrance* on this property; that the answer was false, and the warranty was broken, and the policy therefore void. I am of opinion that this contingent right of dower was not such an encumbrance as was contemplated either by the company or the insured. The very language in which this question is put, indicates that it had reference to specific liens or incumbrances capable of being described and estimated. Is your property encumbered, by what, to whom, and what amount? This the more certainly appears when reference is made to the instructions given by this company to its agents in reference to "encumbered" property. This instruction is as follows;

"§ 8. When property is encumbered, state the whole value of the premises, and also the amount of the incumbrance, and to whom; and never insure on buildings that are encumbered more than the applicant's interest in the property, unless he will agree in the application to assign the policy to the mortgagee as collateral security for the same, and pay one dollar as recording fee to the agent, and the secretary will then fill up the blank assignment on the policy, and record it at the time the policy is issued."

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Now these stipulations in a policy of insurance, even when they amount to warranties, must be reasonably construed, and like all other contracts with reference to the subject of the contract and intention of the parties.

Now, such an *inchoate*, contingent right of dower as was in Mrs. Hall is defined by Bishop as a mere possibility; not only is it no estate, but the right itself is a mere contingent possible thing; If the wife dies before her husband all is vanished.

Judge Baldwin defines such a right in the wife as an emanation from the ownership of her husband. See *Wilson* v. *Davidson*, 2 Rob. R., 405.

Before assignment, even after the death of the husband, the widow has no estate in the lands of her husband. It is a mere *chose* in action, and before assignment is strictly a claim. Greenl. Cruise Title Dower, ch. 3, sec. 1; 4 Munf., 382; 4 Seld., N. Y., 110. In a recent Missouri case, Bliss J. observed of this sort of *inchoate* dower that it "is not an estate, but a mere contingent claim, not capable of sale in execution, nor the subject of grant or assignment. The dowress has merely a contingent possibility of interest in the premises, but no property, no actual interest in it which is the subject of grant or assignment.—44 Missouri, 512, 515. See also 1 Bishop on Law of Married Women, § 348, and cases cited.

Formerly, it was questioned even whether the existence of this *inchoate* dower could be alleged as a breach of warranty *in a deed* against encumbrances. And while the modern authorities hold that a covenant in a deed against encumbrances would embrace the *inchoate* right of dower, none can be found which hold that in a policy of insurance the word encumbrance would embrace such a claim or interest as a contingent right of a woman whose husband is still living. It is plain, that in this case no such claim or interest was provided against. The very words used—if encumbered, *by what, to whom, and to what amount*—show, beyond all question, when taken in connection with the instructions to the agents of the company, that reference was had to specific liens or encumbrances which could be defined, identified and estimated, and not to a mere contingent possibility of interest which would require a skilled commissioner in chancery to ascertain its value, if any it had.

I am, therefore, of opinion, that the answer of plaintiff in error to this question—viz., vendor's lien of about $3,500—was strictly true, and that there was no breach of warranty in the fact that Mrs. Hall had an *inchoate* right of dower in

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the premises dependent upon her surviving her husband. The first assignment of error, of breach of warranty, is not well taken.

But it is insisted, as a second ground of error, that the policy is avoided because of the concealment or omission on the part of the insured to state this alleged encumbrance. Two sufficient answers may be made to this objection. First, By the terms of the policy the omission or concealment which will void the policy, must be of such facts as *are material to the risk or increases the hazard.* Evidence is abundant in the record, even the deposition of the president of the company, to shew that the concealment of this fact of Mrs. Hall's contingent claim was not material, and could not possibly increase the risk. Second, If, as already shewn, the stipulations in the policy amount to a warranty that there has been no breach which voids the policy, it follows, *a fortiori*, that the mere concealment or omission to state the fact constituting the alleged breach, cannot render the policy void.

The third and last assignment of error to be noticed is, that the *damages were excessive.* It is to be noted that the facts are not certified, but only the evidence. The evidence is conflicting on the question of the value of the building; and whether we regard the certificate of evidence as a demurrer to evidence, or adopt the rule in *Mitchel* v. *Baratta*, it is difficult to see how this court can interfere with the judgment of the court below upon the question of the *quantum* of damages. The Circuit Court estimated the value of the buildings at $9,000. The judgments in this case, and the *Virginia Fire Marine* v. *Same defendant in error*, were each $3,000—being two-thirds of the value. There is certainly evidence in the record tending to shew that, at the time of the fire, the building was worth $9,000. In the first place, it may be noted that the agent of the company personally inspected the building and wrote down its value as stated by the insured, at $10,000. It was proved by the former owner that the actual cost of the building was $7,500. It was further proved that the property had greatly enhanced in value between the date of its erection and the date of the fire. It was further proved, by an experienced architect, that to replace the building with similar material after the fire would require at least 20 per cent. on the original cost, which would be exactly the amount fixed upon by the court as its true value. Upon this evidence, this court could not, according to well-established principles, reverse the judgment, even though it might be of opinion that the damages were a larger amount than this court would have assessed them.

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In a recent case (*Southern Mut. Ins. Co.* v. *Frear*, 29 Gratt., 261), where a similar question of excessive damages was raised, it was said, "The question before the jury upon the evidence was only as to the question of damages, and though the court, if on the jury, might have been for a much less amount of damages than was fixed by the jury, yet it was a question of fact for the jury, and there was evidence before them tending to show that the amount of damages actually sustained was at least equal to the amount fixed by the jury. Although there was also evidence before the jury, strongly tending to shew that the building insured was actually of much less value than that at which it was fixed by the agent of the defendant at the time of the insurance, and even than that at which it was estimated by the jury assessing the damage in the case, yet the verdict of the jury was legally warranted by the evidence, and cannot, therefore, be set aside by the court upon the ground that it was contrary to the evidence."

Upon the whole case, I am opinion that there is no error in the judgment of the Circuit Court, and that the same should be affirmed.

ANDERSON, STAPLES and BURKS JJ. concurred in the opinion of CHRISTIAN J.

MONCURE P. dissented.

JUDGMENT AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

WYTHEVILLE.

CALHOUN *v.* WILLIAMS.

JULY TERM, 1879.

A batchelor who keeps house and has hirelings on his farm, is not a "householder" or "head of a family" within the meaning of those terms as used in the Constitution and laws of Virginia, and therefore is not entitled to the "Homestead" exemption as provided by the same.

John C. Calhoun, of *Virginia*, was never married. He was the son of Mark S. Calhoun and Elizabeth, his wife. On the 17th day of February, 1858, the father and mother conveyed to him a tract of land, in consideration of one dol-

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lar, and the further consideration that he would maintain them during their natural lives, &c. In the year 1859, Mark S. Calhoun and wife went to live with their son John C. In May, 1866, Mark S. Calhoun, the father, died, and the mother continued to live with John C. till the 2d day of March, 1876, when she died.

On the 10th of September, 1874, John C. Calhoun executed to R. M. Williams his bill single for $115.00. On the 3d day of October, 1875, Williams recovered judgment against the said Calhoun on the bill aforesaid. Execution issued on said judgment, and was returned no property found.

On the 6th of March, 1875, John C. Calhoun filed his homestead deed.

After the return of the Williams' execution *nulla bona*, he filed a bill to subject the real estate of Calhoun to the satisfaction of his judgment. Calhoun resisted the suit entirely upon the ground that he was entitled to his real estate as a homestead. On the 30th day of September, 1876, the Circuit Court of Smyth rendered a decree in the cause, directing the renting of his real estate for the payment of this debt, upon the ground that he was not entitled to it as a homestead. From this decree, Calhoun appealed to the Supreme Court of Appeals.

A. G. Pendleton for the appellant.

Gilmore & Penn, for the appellee.

ANDERSON J. The Homestead article of the Constitution of Virginia has been judicially construed, both by the Federal and State courts, to confer a personal privilege upon the "house holder or head of a family," and the question, and only question, in this case is, Is the appellant who claims the benefit of this provision of the Constitution a householder or head of a family? This provision was not made for all persons who are residents of the State, but for a particular class of persons; otherwise, it would not be limited to a "householder or head of a family." Who are embraced in that description? Worcester gives two significations to the term Householder. "1st. The occupier of a house." "2d. The master of a family." In which of these senses is it used in the Constitution? If in the second sense, it is nearly synonymous with the term "head of a family." And if used in that sense, the second phrase, "head of a family," was intended as explanatory of it. This mode of expression is not un-

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usual in writings. When the first phrase is considered not sufficiently explicit or definite, a second is used to give the meaning with greater definiteness and clearness. And this is peculiarly appropriate when the design is to describe one particular class of persons, and not two distinct classes. If the language of the first description is not sufficiently precise or explicit, but may have two significations given to it, one of which is not descriptive of the class of persons intended, whilst the other is, the writer, in order to make his meaning certain, will use another term which shows in which sense he has employed the first phrase or term. And I think such was evidently the intention of the draughtsman of this clause of the Constitution, and that the second description of the persons who were to be entitled to the privilege, was intended to be explanatory of the first, and not to constitute two classes of persons.

But if the term "householder" was intended to be descriptive of a different class from the "head of a family," it was intended to give the privilege to two distinct classes of persons; and if so, the copulative conjunction "and" would have been used, instead of the disjunctive "or," so as to read, "every householder and every head of a family shall be entitled," &c. But we need not confine ourselves to the definition given by the lexicographer. The term was evidently employed by the framers of the Constitution in the sense in which it is commonly used. The term household literally means the inmates of the house, the family, those whom the house holds. The term is frequently used in the sacred Scriptures, especially in the epistles of the New Testament, which, in the English version, is the best standard of the meaning of our language in common use. And the term household is so used in common parlance, and in friendly correspondence by letter. What is more usual than to send messages of regard or affection by the writer to the household? Such messages are universally meant for the family—the inmates of the house. And if they constitute the household, who can be meant by the "householder" but the "head of a family." But whilst we hold, that by the "householder" is meant the head of a family, we do not mean to say that every head of a family must be necessarily a householder.

But the whole scope of the article shows that the privilege was intended, not so much for the benefit of the person to whom it is given, as for the benefit of his family; to enable the person to whom it is given to use it to save his family from suffering and want. To this end, it was necessary that

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the head of the family should have the power to shield a portion of his property from levy and sale under execution or distress, or other process. In *Shipe, Cloud & Co.* v. *Repass and others*, 28 Gratt., p. 733, Judge Staples remarked, that "no one can look into the provisions of our Constitution, and the adjudicated cases of other States, and fail to see that the primary object is to provide for the family. As was said by the Supreme Court of Ohio in *Sears* v. *Hanks*, 14 Ohio R., 498, 501, the humane policy of the Homestead Act seeks not the protection of the debtor; but its object is to protect his family from the inhumanity which would deprive its dependent members of a home."

That such was the intention of the framers of our Constitution, to this end, to confer the privilege upon a person who had a family, and not upon the mere occupier of a house, I think is further shown by the 5th section of the article, which provides that the General Assembly "shall prescribe in what manner and on what conditions the said householder or head of a family shall thereafter set apart and hold for himself and family," &c.; "and may, in its discretion, determine in what manner and on what conditions he may thereafter hold for the benefit of himself and *family*." I think this language plainly shews that the householder intended was one who had a family.

Indeed, the whole theory and policy of the homestead is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children, and other persons dependent on him, towards whom he stands almost *in loco parentis*, which is, if not paramount, equal to his obligation to pay his debts. Whether it is sound in morals or not, is not the question. It is evidently the ground upon which the homestead was made a constitutional provision, as I think the debates in the Convention which framed it will shew.

The family may consist of a wife and children, or of other persons, who may stand in a state of dependence in the family relation. Or it may consist of persons standing in either of these relations to the head of the family, whether the father, or mother, or a brother, or a sister, or other relation, is the head, but they must be persons who are dependent, in some measure, on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution, or other process, and who would be benefited by its exemption.

The foregoing view, I think, is supported by a fair and lib-

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eral construction of the Homestead article of the Constitution, according to the intent of its framers, as gathered from its language and its general scope, and the object sought to be attained. And it is in harmony with the adjudications on the subject. In *Brown* v. *Witt*, 19 Wend., 475, the court said, "the statute declares that the following property, when owned by any person being a householder, shall be exempt from execution," &c.; and in determining what was meant by the word "householder" in that statute, said, it "means the head, master, or person who has charge of and provides for a family."

The term "householder" and master, and chief of a family, are used interchangeably, as meaning the same thing. In Thompson on Homestead, § 66, it is said, "If a person possesses the character of a householder—*that is*, if he is *master* or *chief of a family*, he does not lose it by temporarily ceasing to keep house."

The Constitution of Georgia, adopted in 1868, guarantees a homestead to each "head of a family," or guardian or trustee of a family of minor children. And the Supreme Court of the State held, that a single man, having no person dependent on him for a support, is not within the meaning of this provision, "the head of a family." (Thompson on Homestead and Exemptions, citing *Lynch* v. *Pace*, 40 Ga. 173.) What constitutes a family was considered with reference to the Texas Constitution of 1845 and 1866, providing for the exempting from forced sale of property of "all heads of families," &c. It was held that the term family was used in its generic sense, embracing a household composed of parents and children, or other relatives, or domestics and servants; in short, every collective body of persons, living together within the same curtilege, subsisting in common, directing their attention to a common object—promotion of their mutual interests and social happiness. Id. § 44, citing *Wilson* v. *Cochran*, 31 Texas, 680.

The duty to support is also made the test. He upon whom the law imposes such a duty, growing out of *status*, and not out of *contract*, and the person to whom he owes this duty, if dwelling together in a domestic establishment, constitute a family, of which he is the head. Ibid, § 45, citing *Whalen* v. *Cadman*, 11 Iowa, 226; *Marsh* v. *Lazenby*, 41 Ga., 153; *Sallee* v. *Waters*, 17 Ala.; *Sanderlin* v. *Sanderlin*, 1 Swan., 441. The writer says, the courts have adopted the more humane rule that a *moral* duty on the managing member of the domestic association, to support the others, or some of them,

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will be sufficient to constitute the association a family, and the manager of it, the head of a family.

There are cases which say that to constitute a family within the meaning of such statutes, there must be a condition of *dependence*, and not a mere aggregation of individuals. Ib. § 46.

The relation of master and servant, or more properly speaking, of employee and employer, as it ordinarily exists in this country, does not constitute a *family*. And therefore a single man, who has no other persons living with him than servants and employees, is not the head of a family, within the meaning of statutes creating homestead exemptions. Ib. § 47, citing *Garaty* v. *Dubose*, 5 S. C., 498; *Calhoun* v. *McLencton*, 42 Ga., 406.

The adjudications of seven of the States of the Union, to which I have referred, are mostly taken from the citations of Mr. Thompson's work on Homesteads and Exemptions, not having access here to the books in which the cases are reported. Although I do not mean to express a concurrence in all they say, I rely upon them so far as they are in harmony with the views I have presented in relation to the Virginia constitutional homestead provision.

It now only remains, briefly to apply these doctrines to the case in hand. Was the appellant a "householder," or "head of a family," in the sense in which those terms are used in the Constitution?

He had lived upon his own land for about eighteen years. He was never married. On the 17th of February, 1858, his father and mother conveyed to him a tract of one hundred acres of land, in consideration that he would support them during their natural lives; and they soon after left their own house and came to live with him. But both of them died, and he occupied the house alone, no one living with him except his employees. He claims the right to hold his property as a homestead, which he values at $1,680, probably all he owns, and which is a very low valuation, if his estimate of the value of the land is proportioned to its real value in the same ratio of his estimate of his personal property to its real value. He, an unmarried man, without a family to provide for, and no one dependent on him for support, seeks to hold all this property under the homestead, to avoid the payment of an honest debt, of the inconsiderable amount of $115—and interest on it from the 16th of November, 1874, and $7.20 costs. I agree with the Judge of the Circuit Court of Smythe county, that it cannot be done—that the homestead was not designed to

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enable a man, who had neither wife nor children, nor others dependent on him, to withhold his property, on the faith of which he had contracted a debt, from its payment, which he was in common honesty bound to pay; and then to take his neighbors' property or services, under a promise to pay for them, and then force him to lose them, although fully able to pay for them. For such an act he cannot offer the plea, upon which the right of the homestead is claimed, that he has a wife or children or a family of poor and needy persons, who are dependent on him, and have claims on him, and for whose support a moral obligation rests on him. He can make no such plea; and, therefore, the homestead provision was not designed for him. For the care of a widow who is childless, and lives alone, whose husband died without having a homestead assigned to him in his lifetime, we refer to chapter 183 of the Code of 1873, § 10; not intending now to indicate any opinion as to the proper construction of said section, as no question arises upon it in this case.

In reaching our conclusions we have not been unmindful of section 7 of the homestead article of the Constitution, which requires that the provisions of said article "shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out;" and have endeavored to give such a liberal construction to it, as will give effect to the intention of its framers.

For the foregoing reasons I am of opinion to affirm the decree of the Circuit Court with costs.

Opinion concurred in by Judges CHRISTIAN, STAPLES and BURKS. Absent, MONCURE P. (sick).

SUPREME COURT OF APPEALS OF VIRGINIA.

WYTHEVILLE.

HUFFMAN *v.* LEFFELL'S EX'OR, &C.

JULY TERM, 1879.

In July, 1870, D., deputy for H., sheriff of Craig county, had in his hands a writ of *fi. fa.* in favor of L. against M. He went to the house of M. to levy it, when M. claimed the benefit of the "Homestead" exemption, and claimed his personal property "to the extent it would go." The law to carry the "Homestead" exemption of the Constitution of Virginia into effect, had just been passed, and neither the deputy sheriff nor the debtor, M., knew the form in which the exemption could be

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claimed, although M. insisted on his right to claim it. D. then notified L. of M's claim of Homestead, and demanded of him an indemnifying bond before levying the *fi. fa.*, which L. declined to give. The debt was lost by the failure to levy. On a suit by L. against H., sheriff, and his sureties, to recover the debt in the execution, with interest and costs. HELD:

The deputy was excusable for not levying and selling under the circumstances, after L. had failed to give the indemnifying bond demanded of him; and, therefore, L. cannot recover against H. and his sureties, on his official bond, the debt thus lost by the failure to levy.

In July, 1870, Jacob Leffell, as executor of John Leffell, deceased, sued out a writ of *fieri facias* against Jonah McCartney, which was placed in the hands of Robert R. Doss, deputy for Oscar E. Huffman, sheriff of Craig county, Va., for collection. Doss went to McCartney's house to levy the writ, when McCartney, who was a "householder and head of a family," claimed the benefit of the homestead exemption under the Constitution of Virginia, and claimed his personal property to the extent it would go. He did not file this homestead deed at the time, because the law to carry the constitutional provision into effect had only been approved two or three weeks before, and it was not known then either by the deputy sheriff or the debtor in what form the deed must be prepared and executed. Doss then notified the plaintiff that McCartney claimed the homestead exemption, and that he required of him an indemnifying bond, which the plaintiff refused to give. McCartney filed his "homestead" deed in March, 1871, and shortly thereafter went into bankruptcy. The debt due on the execution was lost, and Leffell's sued Huffman and his sureties on his official bond; and under the instructions of the court below, the jury rendered a verdict against them for the amount of the debt in the execution, and the costs, for which a judgment was rendered, and to which Huffman obtained a writ of *supersedeas*.

The other facts are sufficiently stated in the opinion of the court.

Charles A. Ronald for the plaintiff in error.

D. B. Strouse, *J. M. Marshall* and *P. V. Jones* for the defendants in error.

BURKS J. Upon this record, there is no doubt, that at the time the execution of the relator was placed in the hands of the deputy-sheriff (Doss), the execution debtor (McCartney) was the

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absolute owner and in possession of personal property sufficient to satisfy the execution; nor can there be any doubt that the sheriff is liable to the relator for the full amount of the execution, unless he has been excused from making seizure and sale of the property by the failure or refusal of the plaintiff in the execution to give the indemnifying bond which was required of him.

Whenever an officer levies, or is required to levy, an execution on property, and a doubt still arise whether the property is liable to the levy, he may give notice to the plaintiff, his agent or attorney at law, that an indemnifying bond is required in the case; and if such bond, as is prescribed by the statute, be not given within a reasonable time after such notice, the officer may refuse to levy on such property, or may restore it to the person from whose possession it was taken, as the case may be. Code of 1873, §§ 4, 5.

Were the circumstances in this case sufficient to authorize the officer to demand of the plaintiff an indemnifying bond under the statute before he could be required to make the levy? Did a doubt arise, a reasonable doubt, whether the property of the debtor was subject to levy under the execution? We are of opinion that such a doubt did arise.

The execution bore date on the 11th day of June, 1870; was placed in the officer's hands on the 11th day of the next month (July), and was returnable on the fourth Monday in August following. When the officer went to McCartney's house to levy it, McCartney informed him that "he was entitled to the benefit of the homestead law as provided by the Constitution of Virginia; that he claimed it, and claimed his personal property to the extent it would go." It seems that he had not then set apart the property as exempt in the mode prescribed by the statute, because, as he stated, he had no form for the proceeding and knew of none, and he inquired of the officer if he knew of any, insisting at the same time upon his claim.

This claim the officer made known to the plaintiff, and demanded of him an indemnifying bond, which the plaintiff refused to give, in consequence of which refusal there were no seizure and sale of the property.

At the time the execution was issued, although it was for the collection of a debt contracted prior to the adoption of the Constitution, the debtor was entitled, under Article 11, § 1, of that instrument, if valid, to hold the property in question exempt from levy. The Constitution had been adopted the previous year (1869), and the General Assembly was

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holding its first session thereunder; and in pursuance of sec. 5, Art. 11, had passed an act to carry into effect the homestead and exemption provisions, which act was approved June 27, 1870, sixteen days after the execution was issued in this case, and fourteen days before it was placed in the officer's hands.

There was more or less diversity of opinion among the judges of the courts and the members of the bar as to the validity of the exemptions, affecting antecedent debts and contracts, provided by the Constitution, and the legislative enactment to give effect to such exemptions; and the invalidity of such exemptions was never finally and authoritatively determined until the decision of this court in the "Homestead Cases, rendered on the 13th day of June, 1872, and reported in 22 Gratt., 266, *et seq.*

Judge Christian, in delivering the opinion of the court in that case, adverting to the unsettled state of the law on the subject, and the inconveniences attending it, observed, that "it was much to be regretted, that a subject of such general interest and importance should not, at an earlier day, have received the final adjudication of the supreme tribunal constituted by law to pronounce the supreme law of the State, instead of being left to the decision of inferior courts, some of which have sustained the validity of the homestead exemption, while others have pronounced against it—thus leaving the law unsettled, and the people, both debtor and creditor, in doubts as to their rights and liabilities."

In other States, also, which adopted Constitutions after the termination of the late war, containing provisions for exemptions similar to those in the Constitution of this State, these doubts prevailed, giving rise to litigation which was pursued through various channels into the Supreme Court of the United States. See *Gunn* v. *Barry*, 15 Wall., 610; *Edwards* v. *Kearsey*, 96 U. S. R. (6 Otto), 595.

But it is argued by the learned counsel for the defendant in error, that although the right to the exemption is granted by the Constitution to the householder or head of a family, yet, in order to secure the benefit of it, he must comply with the provisions of the statute enacted to give it effect; he must select and set apart the property claimed in the mode prescribed by the statute. This may be true. He may never assert his right. It is optional with him to assert it or not. He may waive the benefit of it and thus be barred. It has been so held by this court. *Reed and others* v. *Union Bank of Winchester*, 29 Gratt., 719.

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But it cannot be said that he intends to waive the benefit of it or not to claim it, when he expressly declares the contrary intention.

If the officer in this case had proceeded to levy the execution on the property claimed, the debtor, if entitled to the exemption, had his remedy under the statute to secure it. Code of 1873, ch. 183, §§ 16, 17. As he had declared his intention to claim it, he would, no doubt, have carried that intention into effect in the mode provided by the statute, if a levy had been made. When applied to by the sheriff with the execution, he had not made his declaration of intention by deed as required by the statute, because of his ignorance of the necessary proceeding, the statute having been approved only a short time previous; but he then made known his claim and his intention to assert it; and if a levy had been made, he would, no doubt, have consulted counsel, and under advice, would have pursued the requirements of the sections of the act already cited. The fact is, he did file his deed of homestead within a short time after the return day of the execution, thus manifesting his good faith in the assertion of his claim in the first instance.

At all events, under the peculiar circumstances of this case, we are of opinion, that when the officer was required to levy the execution in his hands, there was a doubt whether the property of the debtor was subject to levy, sufficient to authorize him to require for his protection an indemnifying bond precedent to the levy. It is fair to infer, that the plaintiff himself entertained such doubt; for, it does not appear that, when the indemnifying bond was demanded, he specially directed a levy, but he seems to have left the officer to be guided in his conduct by the exigency of the writ, nor did he institute his action until after the lapse of more than three years from the time the alleged cause of action arose, nor until after the decision in the "Homestead Cases," already referred to, and the report of that decision in 22 Grattan.

Under the circumstances, if he desired to have the property of his debtor levied upon, he ought to have given the indemnifying bond, and taken upon himself the risk of damage incurred by seizure and sale, and not sought to impose it upon the officer, who seems to have acted prudently and in good faith throughout.

The loss of his debt was the consequence of his own neglect or fault, and the law will not visit it upon the officer, who was free from blame.

The instructions given to the jury, at the instance of the

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plaintiff, are in conflict with the views expressed in this opinion, and the second instruction offered by the defendant and rejected by the court, is in harmony with those views. The latter should have been given and the former refused.

If there was any error in admitting as evidence the answer of the witness, John F. Jones, set out in the defendant's first bill of exceptions, it could not have prejudiced the defendants in the trial, because there was evidence before the jury on the part of the defendants to the same effect.

The judgment of the Circuit Court must be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial in conformity with the views expressed in this opinion.

JUDGMENT REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

WYTHEVILLE.

BROWN *v.* TAYLOR'S COMMITTEE.

August, 1879.

The *mere possession* of a *bond* is not such an evidence of property as will justify a payment to the holder, without authority, express or implied, from the owner to collect the same.

From the Circuit Court of Tazewell county.

The facts are sufficiently stated in the opinion of the court.

Stras & Henry for the appellant.

May & Graham for the appellee.

CHRISTIAN J. The record in this case presents a single question.

The facts are few and simple, and may be stated as follows: W. W. Brown purchased of D. H. Gillespie in April, 1860, a tract of land, and after paying a certain amount in cash, executed his bond for the sum of $540, due and payable on the 1st day of September, 1861, that being the balance of the purchase-money. This bond was assigned by Gillespie to S. S. Taylor for value. Taylor left the State of Virginia in the early part of the year 1860, and left the bond in the

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hands of S. L. Graham, who executed and delivered the following paper: "S. S. Taylor left in my hands a note on Wm. W. Brown for $540, executed to D. H. Gillespie, due the 1st day of September, 1861; which I will hold subject to the order of S. S. Taylor." Signed S. L. Graham, and dated April 20th, 1860.

The record further shews, that on the 29th December, 1862, Brown paid over to Graham the sum of $440 in Confederate money, which was received by Graham, credited on the bond, and deposited by him in the Northwestern Bank to the credit of Taylor. Taylor afterwards became a lunatic. His committee, the sheriff of Tazewell county, filed his bill in the Circuit Court of said county, in which he set forth the above facts, and also alleged the insolvency of Graham, and insisted that the payment of $440 in Confederate money was without authority; that Graham was the mere custodian of the bond, and had no authority to collect the same, and that Brown paid the same at his peril, and was still bound to the plaintiff for the whole amount of said bond; and the bill prayed that the credit on said bond might be cancelled and annulled, and that Brown might be required to pay said bond, principal and interest, to the plaintiff, the committee of Taylor.

Brown and Graham were made parties defendant to this bill. Both answered the bill, and their depositions were taken and read in the cause. And the cause coming on to be heard on the bill and answers and depositions of witnesses, before the Circuit Court of Tazewell, that court, "being of opinion that the defendant, S. L. Graham, had no power or authority to receive the sum of $440 of W. W. Brown, as alleged to have been paid by said Brown to him, and credited on the bond filed, with the answer of defendant, Graham," adjudged, ordered and decreed, "that the said credit be annulled, and that the complainant recover of the defendant (Brown) the full amount of said bond, to wit, the sum of $540, with interest from 10th April, 1865 (the court abating the interest from the maturity of said bond to the 10th April, 1865, the plaintiff consenting to said abatement); and it appearing to the court that the sum is a lien upon the land of said Brown, it was further ordered, that unless said Brown should pay and satisfy the decree before the — day of October, 1878, then the said land should be sold by commissioners appointed for that purpose, according to the terms specified in said decree.

To this decree, an appeal was allowed by one of the judges of this court.

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The court is of opinion that there is no error in the decree of the Circuit Court.

Graham was neither the attorney nor the general agent of Taylor. He had only a special authority, as special agent, constituted by the very terms of the paper executed by him, and that was simply "to hold the bond subject to the order" of Taylor. As between Taylor and Graham, there can be no question as to the special agency and special authority conferred. As to third parties, it is true, that this special authority might not be known, yet in order to relieve Brown of the payment of this debt, it must be held that the *mere possession of the bond* carried with it the authority to collect it. It is upon this theory, and this alone, that the appellant can succeed here. Therefore, the only question we have to determine is, Did the mere possession of the bond in the hands of Graham authorize him to receive the money of Brown, and does the payment by Brown discharge him from liability *pro tanto?* We think not. We do not mean to say that there may not be circumstances connected with its mere possession which will show apparent authority to collect and justify payment, but no such circumstances relied upon are sufficient to take the case out of the general doctrines herein asserted. The possession of certain kinds of commercial paper, such as negotiable notes and bills of exchange payable to order, and which pass from hand to hand by delivery, and are used as money in the multiform transactions of trade and commerce, carries with it the authority to collect by the holder. This grows out of the necessities of commerce and the usages of trade. But the mere possession of a bond or other documentary evidence of debt, is not such an evidence of property as will justify a payment to the holder without an authority, express or implied, from the true owner. To hold otherwise, would produce mischiefs without remedy. Bonds and other documentary evidence of debt, are often pledged as collaterals or held as security. They are often lost or stolen. It will not do, therefore, to say that a party having possession of such a paper, no matter how obtained, or for what purpose held, may collect it without authority, either express or implied, from the true owner. Indeed, at common law, the property in these *choses* in action could not pass even where they were actually assigned and delivered. Under our law, assignments are permitted, and sometimes a transfer without assignment is held to pass the right of property. But to such transfer two things are necessary: 1. Consideration; and 2. The act of transfer. It is not a mere de-

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livery of possession, without intent to pass the property, that constitutes the transfer. There must be an intent to transfer, and if there is no such intent, the holder has no right of property. He has no right to sell, nor has he a right to receive payment from the debtor, unless by authority express or implied.

Every consideration that applies the principle of *caveat emptor* to the case of sales of property by one having possession without title, has additional force in the case of bonds and other *choses* in action; and accordingly the courts have uniformly decided that as to them the rule *caveat emptor* applies. See opinion of Tucker P. in *Wilkinson & Co.* v. *Holloway*, 7 Leigh, 277.

The court has approved the doctrine of *caveat emptor* in a very recent case, and one which was much stronger than the one at bar. It was held in *Hess, &c.*, v. *Rader and wife*, 26 Gratt., 746, and *Lloyd* v. *Erwin's adm'r*, 29 Gratt., 598, that the payment of a bond given for the purchase of land, made by a commissioner of a Chancery Court, and paid by the purchaser to the commissioner named in the decree, was a void payment, because the commissioner had not given the bond required by the court, and was therefore without authority to collect the bond of the purchaser in his hands.

Upon the principles herein declared, and in accordance with the decisions of this court, it is plain that there is no error in the decree of the Circuit Court of Tazewell county, and that the same be affirmed.

ANDERSON and BURKS JJ's concurred.

STAPLES J. concurred in the results, but not in all the reasoning.

MONCURE P. absent (sick.)

DECREE AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

MAJOR'S EX'OR AND ALS. *v.* MAJOR'S ADM'R.

May 1, 1879.

1. Testator, after directing the payment of his debts, says: I direct that all the property I have, or in which I have an interest, both real and personal, be sold as is customary in such cases, and the net proceeds of the sale to be divided into four parts, namely: My brothers, J., W. and L., to have each a fourth part, and the other fourth part to be divided among my brother W's children—each one to have the amount of his share when he arrives at the age of twenty-one. The debts due me from my brother W., I give to him. HELD:
The bequests to the children of W. did not vest at the death of the testator, but only as and when each child arrived at the age of twenty-one; and therefore the children dying before attaining that age took nothing under the will.

This was a suit in equity in the Circuit Court of Culpeper county, brought in March, 1875, by the administrator of Edmund P. Major, deceased, and of Bettie Major, deceased, to recover from John C. Major, the executor of Samuel Major, deceased, the share of the estate of Samuel Major, to which the plaintiff claimed that his intestates were entitled. The whole case turned upon the construction of the will of Samuel Major, deceased. The will was written by himself, and contains but a single clause, which is as follows: First, I direct that all my debts be paid as soon after my decease as possible, out of the first moneys that shall come into the hands of my executor from any portion of my estate either real or personal. Also, I direct that all the property *I have*, or in which I *have* an interest, both real and personal, be sold as is customary in such cases, and the net proceeds of the sale to be *divided into four parts*, namely: My brothers, John C. Major, Winfield S. Major and Langdon C. Major, *to have* each a fourth part, and *the other fourth part to be divided* among my brother William Major's children, *each one to have* the amount *of his share* when he arrives at the age of twenty-one. The debts due me from my brother, William Major, *I give to him.* All other debts due me to be collected and divided in the same way as moneys arising from the sales of my property. I do hereby appoint my brother, John C. Major, or Langdon C. Major, executor of this my last will and testament.

In witness whereof, I, Samuel Major, have hereunto set my hand and seal, this 29th day of November, 1851.

SAMUEL MAJOR [Seal.]

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The three brothers, John, Winfield and Langdon, had each received their share of the estate; and the question was, when the share left to the children of William vested, whether at the death of Samuel Major, the testator, or when the children came of age. If the first, the intestates of the plaintiff were entitled to shares; but if the latter, as they died before arriving at the age of twenty-one years ,and before any one of the children attained that age, they had no interest in the estate.

It appears that there were two children of William who were born in the lifetime of the testator, who were alive and had arrived at the age of twenty-one years, and there was one born since the death of the testator who was still an infant.

The cause came on to be heard on the 7th of September, 1875, when the court held that the bequest in favor of the children of William Major vested on the death of the testator, and made a decree in favor of the plaintiff for the two sums of $1,266.66, to be paid by the executor, John C. Major, out of his own estate—it being agreed that this sum of $1,266.66 was the amount due to each child under the construction of the will given by the court. And from this decree, John C. Major, in his own right and as executor, and the other adult children of William Major applied to this court for an appeal, which was allowed.

Wm. J. Robertson and *P. B. Hiden* for the appellants.

James W. Green, *Williams* and *Spilman* for the appellee.

CHRISTIAN J. delivered the opinion of the court.

HELD as stated in the head-notes.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

CITY OF PORTSMOUTH *v.* NORFOLK COUNTY.

April 3, 1879.

The county of Norfolk and the city of Portsmouth, in March, 1877, enter into an agreement by which they submit all matters in dispute between them to the arbitration of R. H. Baker, of the city of Norfolk, and John R. Kilby, of Nansemond county, men of high standing as men

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and lawyers. The agreement states the subjects of disputes under fourteen heads, and they include suits both at law and in equity, questions of law and fact, questions in relation to land, docks, ferries and money; and the parties waive the plea of the statute of limitations, and all other technical pleas which would interfere in any manner with the award of the arbitrators, except upon the very right and justice of the case as to all matters in controversy; the award to be entered of record in the Circuit Court of the city of Norfolk and the court of Hustings for the city of Portsmouth. In June, 1877, the arbitrators made their award, passing upon each of the subjects submitted to them. Upon a summons to the city of Portsmouth to show cause against entering the award as the judgment of the Circuit Court of Norfolk county, the city of Portsmouth filed numerous exceptions to the award, which were overruled by the court. Upon appeal, HELD:

1. It is manifest, from all the papers in the case, that the arbitrators intended to settle all matters of law and fact upon the very right and justice of the case.
2. But conceding that they intended to decide according to law, and that they have not done so in every instance, it does not follow that the award is invalid. The court does not set aside an award merely because it may differ with an arbitrator as to the law of the case.
3. Where the merits in law and in fact are referred to an arbitrator of competent knowledge, and there is not any question reserved by him, the court will not open the award, unless something can be alleged amounting to a perverse misconstruction of the law, or misconduct on the part of the arbitrator.
4. Where arbitrators mean to decide according to law, and they mistake the law in a palpable material point, the award will be set aside. But their decision, upon a doubtful point of law, or in a case where the question of law is designedly left to their judgment, will generally be held conclusive. It must appear they grossly mistook the law; and the court will not interfere merely because it would have given a different decision in the particular case.
5. It does not appear that the arbitrators have committed any very material or palpable errors in the various points decided by them.

In March, 1877, the city of Portsmouth and the county of Norfolk entered into an agreement, which, reciting that certain questions and disputes between these parties have arisen and are now depending, they agree to submit them all to arbitration, except one pending suit named; and they proceed to set out these disputed subjects under fourteen separate heads—the fourteenth of which is as follows: "14th. And all other questions of accounts or rights or title to real estate (with the exception before mentioned), including all matters and questions in dispute between the said city and county, and all cases which are now pending in the Circuit Court of Norfolk county and the Hustings Court for said city, and all matters that are in dispute in any way, together with all other matters which either party may deem proper to submit to the arbitrators, shall be and are referred and submitted to the final award and determination of R. H. Baker, of the city

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of Norfolk, and John R. Kilby, of the county of Nansemond * * so as the said arbitrators do make their award or determination of and concerning the premises, in writing under their hands and seals." And they waived the plea of the statute of limitations, and all other technical pleas which would interfere in any manner with the award of the arbitrators, except upon the very right and justice of the case, as to all matters and questions in controversy. And the award was to be entered of record in the Circuit Court of Norfolk county and the court of Hustings for the city of Portsmouth.

In June, 1877, the arbitrators made their award, passing upon each of the subjects submitted to them, and with their award they returned to the Circuit Court of Norfolk county various statements of accounts made to shew the basis on which they fixed the results of the several claims submitted to them.

It appears that when the arbitrators had made out their award, they addressed a communication to the Board of Supervisors of Norfolk county and the Council of the city of Portsmouth, in which they say: In announcing the conclusions to which we have come on the various questions submitted to our arbitrament, * * it seems to be proper that we should state briefly the reasons which have led us to those conclusions. And they proceed to give the reasons for their award upon the different questions. This paper was not returned by them with their award.

Upon the return of the award to the Circuit Court of Norfolk county, on the motion of the county of Norfolk, a summons was issued to the city of Portsmouth to show cause why the court should not proceed to give judgment in accordance with the award. And at the next term of the court the city of Portsmouth appeared and filed her answer, setting out numerous objections to the award, and insisting that the communication of the arbitrators to the supervisors of the county of Norfolk and the city of Portsmouth, which is called the report of the arbitrators, should be treated as part and parcel of the award. But the court refused to admit the paper as part of the award; but permitted it to be offered as evidence, and duly considered the same. And to the refusal of the court to admit the paper as a part of the award, the city of Portsmouth excepted.

The court being of opinion that the objections filed by the city of Portsmouth to the award were not valid, overruled them, and adjudged that the award be affirmed as a judg-

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ment of the court. And thereupon the city of Portsmouth applied to a judge of this court for a writ of error, which was awarded.

Holladay & Gayle for the appellant.

J. Alfred Jones and *John Goode* for the appellee.

STAPLES J. delivered the opinion of the court, in which the other judges concurred.

HELD as stated in the head-notes.

JUDGMENT AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

WHITEHEAD'S ADM'R *v.* COLEMAN'S EX'ORS.

April 24, 1879.

1. In an attachment at law by W.'s administrator against J., the executors of C. are summoned as garnishees, and the plaintiff in the attachment seeks to subject a legacy left by C. to J. to the payment of his debt. A common law court has not the jurisdiction to compel the executors to pay the legacy.
2. The court below having taken jurisdiction of the case, and a verdict and judgment having been rendered in favor of the defendants, on appeal this court will reverse the judgment, and set aside the verdict, and direct that the proceedings on the garnishee summons be dismissed, but without prejudice to the right of the plaintiff to assert his claim in a court of chancery.

This was a proceeding by garnishment in the Circuit Court of Pittsylvania county instituted in August, 1873, by John D. Glenn, administrator of A. J. Whitehead, deceased, who in his lifetime had recovered a judgment against Thomas S. Jones and others against George W. Coleman and Thomas G. Coleman, executors of Stephen Coleman, deceased, as debtors to or having effects of said Thomas S. Jones, as a legatee under the will of said Stephen Coleman, in their hands. There was a verdict and judgment in favor of the defendants, and the plaintiff applied to this court for a writ of error, which was awarded.

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Jno. A. Meredith, *E. Barksdale, Jr.*, and *Wm. M. Treadway, Jr.*, for the plaintiff in error.

Ould & Carrington for the defendant in error.

STAPLES J. delivered the opinion of the court, in which the other judges concurred.

HELD as stated in the head-notes.

JUDGMENT REVERSED.

SPECIAL COURT OF APPEALS OF VIRGINIA.

STROTHER'S ADM'R, &C., *v* STROTHER'S ADM'R, &C.

A. was the only child of J. by his first marriage. On the second marriage of J., A. became displeased and determined to go away from home. J. was devoted to his son A., and by certain promises induced him to remain at home, and A. and J. then made an agreement in the shape of a bond for $10,000, payable to A., his heirs, executors, &c., with the following conditions; That J. should, by his will, give A. one full half of all of his estate of which he should die seized (and should any be conveyed by J. during his life, it should be accounted for in the allotment aforesaid). Should A. die before J., then the same bequest to be made in the manner directed by the will of A. to his heirs, if he should have any; that A. should faithfully discharge the duties of manager of J.'s farm in F. county, Va., for the year 1840, receiving as compensation for his services, one-sixth of the crops, and should, after that period, reside in said county of F. during his own life or that of his father. If J. performed the conditions on his part the bond was to be void, and if A. failed to perform them on his part the bond was to be void. At the time of the execution and delivery of the bond to A., in October, 1839, he was a minor, but became of age the year 1840. A. resided on the farm, superintending it in 1840, and after that resided in the county of F. till his death, which occurred in the lifetime of J., his father. A. married and left four children. J. died in 1864, leaving his second wife and three children. By his will he left one-third of his estate to his wife for life, the residue to be divided into four parts, one to each of her children, and the remaining fourth to the children of A., charging this fourth with any debts he had paid or might be required to pay for A. By a clause of this will he referred to the paper executed to A. in 1839, and said he desired to revoke that paper, and that the terms of the will should be carried out; and that if any claim should be asserted under that paper, the children of A. should have no part of his estate. Much, if not nearly all of the estate was derived through J.'s first wife, the mother of A. On a bill filed by the administrator, with the will annexed of J. to ascertain the respective rights of the distributees of J.'s estate under the bond and will. HELD:

1. Although A., at the time of entering into the agreement with J. in 1839, was a minor, yet, as he came of age in 1840, and elected to and

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did perform the conditions of the bond on his part, his heirs are entitled to receive one-half of J.'s estate, according to the terms of the bond, subject only to the dower rights of J.'s widow. And any debts paid for A. by J., and intended to be charged as advances, should be so charged against the share to be allotted to his heirs.

2. Whenever a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants and is bound to do so.
3. For some of the doctrines as to when a cross-bill should be required, and a decree for specific performance rendered, see opinion of BARTON J.

From the Circuit Court of Fauquier county.

The facts of the case are sufficiently stated in the opinion of the court.

Tucker & Noland, Brooke & Scott for the appellants.

E. Hunton and *J. M. Forbes* for the appellees.

BARTON J.—Alpheus J. Strother was the only child of John Strother by his first marriage. His father married again. Alpheus was displeased by this marriage, and at the prospect of other children sharing with him his father's estate, to which he considered himself entitled by reason of his mother's property being its foundation.

He determined to go to Texas to live, and left his father's house for that purpose, refusing to return unless his father would secure him in a certain proportion of his property.

His father, between whom and the son the warmest affection existed, was distressed at the proposed separation, and the idea of his son's emigration to a distant country, then represented to be the scene of much disorder and violence, the dangers of which would be enhanced to the son by his somewhat reckless disposition. He was induced to return to his father's house by some promise made to him, and an agreement was subsequently arrived at between them, which, under the advice of Wm. F. Randolph, Esq., then a prominent member of the bar, who prepared the instrument, took the shape of a bond for ten thousand dollars, payable to Alpheus," his heirs, executors, administrators and assigns," with the following condition: "That if the above named John Strother shall, by his last will and testament, bequeath to the said Alpheus J. Strother, who is his only son, the full one-half of all the property of which he dies possessed, whether real, personal or mixed, and should the said John Strother

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convey away by deed of gift any portion of his estate, it shall be accounted for in the allotment aforesaid, and should the said Alpheus J. die before the said John Strother, then the same bequest to be made, or in the manner which he may direct, by his last will and testament, to his heirs, if any he should have, and as a further consideration, the said Alpheus J. Strother covenants that he will faithfully discharge the duties of superintendent of the farm of the said John Strother, lying in the county of Fauquier, for and during the year 1840, receiving as compensation for his services one-sixth part of all the crops of corn, wheat and oats made on the said farm during the year 1840, and shall, after that period, remain in the county of Fauquier as the place of his residence during his own life and that of his father, the said John Strother. On a compliance of the foregoing covenant on the part of the said John Strother, then the above obligation to be void; and on the failure to comply on the part of the said Alpheus J., the above obligation is also void, or else to remain in full force and virtue."

This bond was executed and delivered on the 22d October, 1839, to Alpheus, who did superintend his father's farm for the year 1840, receiving the compensation for his services as therein provided. And did, after that period, continue to reside in the county of Fauquier until his death, which occurred in the lifetime of his father.

He had married in 1840, and left four children, who are parties to this suit.

John Strother died in 1864, leaving his second wife and three children by her surviving him.

By his will he left one-third of his estate to his wife for her life; the residue to be divided into four parts, one to each of her children, and the remaining fourth to the children of Alpheus, which was to be charged with all the debts he had paid or might thereafter have to pay as surety for him.

The fourth clause of his will, dated 1st February, 1861, is as follows: "Shortly after my inter-marr.age with my present wife, I gave to my son, Alpheus J. Strother, a paper writing touching the disposition of part of my estate; the exact purport of that paper I do not now remember, but I desire to revoke the same, and substitute the provisions of this, my will, in lieu thereof, but if any claim upon my estate be established by reason of that paper, then I direct that the children of my said son, Alpheus J. Strother, shall have no part of my estate, but that the residue of my estate, after the payment of my debts, and the allotment of the one-third part to

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my wife, shall be equally divided among my children by my present wife."

The widow, who had been nominated as executrix having renounced, the estate was committed to Wm. M. Hume, sheriff, &c., who filed his bill against the widow and children of John Strother and the administrator *de bonis non*, and the children of Alpheus J. Strother, alleging that having notice of the 'paper writing,' as referred to in the 4th clause of his testator's will, but knowing nothing of its provisions or validity, he "is advised that he cannot safely proceed in the settlement of his testator's said estate, unless the said paper shall be produced, and its validity passed upon by some tribunal of competent jurisdiction, and that he is entitled to ask the aid of a court of equity to compel the production of said paper, and to require the parties representing the several estates of said John Strother, deceased, and A. J. Strother, deceased, to interplead touching the same, so that such decree may be made concerning the same as will protect your orator in the discharge of his duties as administrator;" and the prayer of the bill is, that all the parties may be required to answer; that the administrator of A. J. Strother "may be required to produce the said 'paper writing,' if in his possession or under his control; that all parties interested therein may be required to interplead before your Honor; that your Honor will make such orders, from time to time, as may be lawful and proper to protect the estate of your orator's said testator, and to direct your orator in the proper administration of the same; that the accounts of your orator may, from time to time, be settled under the supervision of the court," and for general relief.

Mrs. Strother, the widow of John Strother, filed her answer to this bill, as well for herself as her children, whose interests she asked may be protected in like manner as her own, calls for full proof of the paper, and submits the legal questions arising upon it, and her husband's will to the court. Refers to the paper with an accurate statement of its substance. Denies that it was upon valuable consideration, or other than a mere voluntary obligation. Denies that there was any valid or binding contract. And prays "the court to declare it null, and let the true will of her husband be carried out."

Lewis, the administrator of A. J. Strother, who had married one of his daughters, answered, filing with his answer the bond, which he had found among the papers of his intestate, averring that Alpheus had fully performed all the con-

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ditions on his part; that John Strother, by the terms of his will, had committed a breach of the conditions of the bond, and insisting that he had the right to demand payment—that the consideration upon which it was executed was valuable, and that it was a valid and subsisting charge upon the estate of John Strother.

The depositions of many witnesses were taken, and the cause coming on to be heard on the 22d April, 1868, the court was of the opinion that the obligation, dated the 22d October, 1839, was a valid and subsisting obligation upon the estate of John Strother, performance of which would be enforced in a court of equity, but that in the then state of the pleadings no decree for specific relief could be rendered; retained the cause and gave permission to the defendants, the heirs at law of Alpheus J. Strother, to file their cross-bill asking for specific execution of said obligation, and such relief as they might be entitled to.

The cross-bill was accordingly filed by the heirs at law of Alpheus J. Strother, to which Mrs. Strother filed her demurrer and answer; and at the September term, 1868, the court overruled the demurrer, and appointed commissioners to divide into two equal parts the real estate of which John Strother died seized, having reference to quantity an quality, and to allot one of the moieties to the heirs at law of Alpheus J. Strother, and make report to the court; and a further order of inquiry as to the property held by John Strother at his death.

The widow of John Strother and her children obtained an appeal to the District Court at Fredericksburg, which has been transferred to this court.

The Circuit Court considered this a case for specific performance. If that view were correct, the cross-bill was indispensable; for no such claim had been then made on behalf of Alpheus J. Strother's estate, and no such issue had been presented by the pleadings. The cross-bill would, therefore, have been necessary as a foundation for such decree. I do not consider this a case for technical specific performance. The contract is not for any property in *specie*, but only for gross value. It is for the full half of all, whether real, personal or mixed. One-half in value would fulfill the contract. A bequest of a certain amount in money, which proved to be equal to the value of one-half of John Strother's estate, would have satisfied the condition of the bond. Alpheus could not claim the one-half of any particular piece of property, whether it was real, personal or mixed, but only the value of one-half

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of all, which is a mere claim for money. So far, then, as the cross-bill was required to present that question to the court, it is deemed to have been unnecessary.

Nor is it considered to have been required for any other purpose. The object of such a bill—not being also for discovery— is "to obtain full relief to all parties touching the matters of the original bill." Story's Eq., pl. § 389.

Under the frame of the original bill in this case, a cross-bill was unnecessary for full relief as between the plaintiff, and the administrator, and heirs at law of Alpheus J. Strother.

President Tucker in *Hubbard* v. *Goodwin*, 3 Leigh, 522, thus refers to the subject of decrees between co-defendants:

"A defendant, who answers the plaintiff's bill, does not always go on to state his own case as it relates to the difference between him and his co-defendant. There is no issue made up, nor any provision for taking their testimony in reference to the peculiar matters in controversy between them. And hence, in many cases, the contest between them cannot come fairly before the court."

In a case where the defendants had stated the case fully as it related to the difference between themselves, when, as here, that difference was the very subject of controversy in the case—when the issue was made up, and the testimony taken, so that the case did come fairly before the court, it would follow, by necessary implication, that the court should proceed to decree between the co-defendants without requiring a cross-bill.

And accordingly we find the note laid down by Lords Eldon and Redesdale before the House of Lords, in Chamly and Lord Dunsang et al., 2 Sch. & Lef., 718, cited by Judge Allen in *M. Blair* v. *Thompson*, 11 Gratt., 446, as follows:

"Whenever a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants, and is bound to do so."

In the case at bar, the defendants have mutually stated the case in respect to the difference between them; the issue was made up; the testimony taken on their respective behalf; indeed, all was taken prior to filing the cross-bill, except a merely formal proof of hand-writing. And the case was fairly and fully before the court, without any objection on either side, that there was any defect in pleadings or proofs, or that the case was not ready for hearing as to their respective claims.

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And there is here the less occasion for a cross-bill, from the fact, that the original bill, if not a technical bill of interpleader, is in the nature of a bill of interpleader, and is in terms a bill filed by an administrator *de bonis non*, "to obtain the direction of the court upon the adverse claims of different defendants," which, of itself, and without any cross-bill, "puts the defendants to contest their respective claims." See 3 Danl., Ch. Pr. 1765.

It seems, therefore, in this case, unnecessary to consider the cross-bill, or many of the questions arising under it, however interesting they may be from the learning and ability with which they have been discussed on both sides.

It is contended by the counsel for the appellants, that the considerations expressed in the bond in the form of conditions to be performed by Alpheus do not constitute valuable consideration on his part, because, as to the condition that he should superintend his father's farm for the year 1840; that he was not of age when the agreement was made, and was therefore incapable of binding himself; that he was under the legal control of his father, who was entitled to his services until his arrival at full age; and that those services, therefore, furnished no consideration for any agreement on the part of the father; and as to the condition of his continued residence in the county of Fauquier, that it did not of itself constitute valuable consideration.

If Alpheus was not of full age when the bond was executed, he certainly became so during the year 1840. And after his arrival at age continued to act as his father's manager for the rest of the year, and to reside in the county of Fauquier during the remainder of his life.

In the absence of proof to the contrary, the presumption of law would be, that the acts of performance on his part related to the conditions he was required to perform. The burden of proof lies on the other side to show that they were to be ascribed to some other cause. No such proof is offered. On the contrary, it appears from the bond, independently of the legal presumption from his performance of the conditions after his arrival at age, that he did ratify and elect to hold his father to his obligation. By this election the father was bound equally as if Alpheus had been of full age when it was originally made. 3 Rob. Pr. (new), p. 221, and authorities there cited.

While I think it could be shown by reason and on authority, that the services rendered by Alpheus, and his continued

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residence in the county of Fauquier would constitute valuable consideration, I do not deem it necessary to discuss the point, as in the view which I take of the case, it is not material, however important it might be, if this were a case of specific performance appealing to the discretionary power of the court.

Suppose this bond is to be considered, as is contended for the appellants, as made without valuable consideration, to be a mere voluntary obligation. Such obligation is good and valid between the parties, and constitutes a debt due by the obligor to the obligee.

By our statutes prescribing the order in which the debts of a decedent shall be paid, voluntary obligations are put in the last class. But they are classed as debts to be paid out of the estate; which is bound for their payment, both realty and personalty, before an heir or devisee can claim. Code of 1860, chap. 130, sec. 25; 131, sec. 3.

If this were a single bill for the payment of ten thousand dollars at the death of the obligor, it cannot be denied that the administrator of the obligee would be entitled to recover the whole amount.

If the only conditions were that Alpheus should act as his father's manager for the year 1840, for the stipulated compensation, and should afterwards continue his residence in the county of Fauquier during their joint lives, and Alpheus had performed these conditions, the result would be the same, without regard to the question whether the conditions separately or jointly amounted to valuable consideration.

If, in addition to the conditions to be performed by the obligee there was the further condition that the obligation should be discharged by the payment of a certain amount, the rights of the obligee, upon his performance of the conditions imposed upon him, would only be varied, so as to enable him to claim, instead of the full amount of the bond, that amount only by which it was provided that the bond might be discharged. That amount need not be stated in express words; it would be sufficient that it was so expressed as to be capable of being ascertained.

I consider it the true construction and legal intendment of the condition to be performed by John Strother in discharge of the bond, that the obligation was to be discharged by the payment, at the death of the obligor in the manner provided, of so much as would be equal to the value of one-half of the estate, which he had the right to dispose of by will. And thus the obligee would only be entitled to that amount, which

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could be readily determined by simple calculation, when the value of the estate was ascertained.

In an action of debt on this bond, the judgment would be for the ten thousand dollars, to be discharged by the payment of this amount, which had been ascertained.

It might be necessary to go into a court of equity to obtain a discovery of the estate, and to have the administration account settled so as to ascertain the amount of the estate. If so, the court would, as auxiliary to that jurisdiction, proceed to administer full relief, according to the legal rights of the parties.

In this case, the appellees did not seek the aid of a court of equity as plaintiffs. They were brought into court by the personal representative of John Strother. He acted prudently and rightly in so doing. Why should the parties now be required to go into a court of law to establish their legal rights, when the whole subject matter is within the jurisdiction of the court of equity—and to which resort would be finally necessary to enforce these rights.

It is only in the court of equity that the administration account could be settled, and the real assets subjected to the payment of debts. And its jurisdiction is the usual and far more convenient one for ascertaining the amount and value of the estate, and the allotment of the widow's dower. It would be contrary to all settled rules and the uniform practice of the court were it to fail, having all the parties before it, and full jurisdiction over the subject matter, to proceed to adjust the rights of all the parties, whether they be legal or equitable.

The objection to the court of equity proceeding in this case to administer full relief, is based upon the idea, that equity will not interfere in favor of a volunteer. But as was said by Vice-Chancellor Wigram, in *Fletcher* v. *Fletcher*, 4 Hare, 74 (36 Eng. Ch. Rep.), "That proposition, though true in many cases, has been too largely stated. A court of equity, for example, will not, in favor of a volunteer, enforce the performance of a contract in specie. That it will, however, sometimes act in favor of a volunteer, is proved by the common case of a volunteer on a bond, who may prove his bond against the assets;" exactly what is desired in this case. Again on page 76, "The rule against volunteers cannot, I conceive, in a case like that before me, be stated higher than this—that a court of equity will not, in favor of a volunteer, give to a deed any effect beyond what the law will give to it. But if the author of the deed has subjected himself to a lia-

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bility at law, and the legal liability comes regularly to be enforced in equity, as in the cases before referred to, the observation that the claimant is a volunteer is of no value in favor of those who represent the author of the deed."

The case of *Fletcher* v. *Fletcher* was this: Ellis Fletcher by a voluntary deed covenanted with trustees that in case John and Jacob, his two natural sons, or either of them should survive him, his executors and administrators should within twelve months after his death pay to the trustees $60,000 upon trust for such of them (John and Jacob) as should attain twenty-one, and be living at the time of his death. And if neither of them having survived him should attain the age of twenty-one, then upon trust for him, his executors, &c. By his will, dated some years after the deed, he bequeathed all his property upon trust for the benefit of his wife, his two natural sons, and three legitimate children. John died an infant. Jacob became of age in 1862. The trustees named in the deed declined to take any steps to enforce it, either at law or in equity, or to permit their names to be used, except under decree of the court, and being indemnified, and declined the trust. The executor admitted assets. Upon a bill filed by Jacob, it was held, that although the deed was voluntary, it was perfect. That the covenantor was liable at law, and the court was not called upon to do any act to protect it. And no reason being given for trying the case at law, it was retained in the court of equity, and a decree was entered for the amount.

This case goes further than is necessary to support the full jurisdiction of the court of equity in the case before us.

I think, then, that even admitting this bond to be without valuable consideration, and merely voluntary, the case coming before the court in its ordinary jurisdiction *ex debito justitiæ*, and not appealing to its discretionary powers, it should be retained, and full relief administered according to the legal rights of the parties.

The Circuit Court, by its decree, appointed commissioners to lay off the moiety of the land of which John Strother died seized for the children of Alpheus, without any regard to the dower rights of John Strother's widow.

This was error, even if it were a case of specific execution. For by the very terms of the condition, Alpheus could, in no event, claim more than one-half of what John Strother could dispose of by his will. He could not interfere with the widow's dower. She held by title paramount. And it is only in what remains, after satisfying her rights, that those representing Alpheus have any interest.

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John Strother, in his will, refers to debts he had paid, and might have to pay as surety for Alpheus. And there is evidence in the record of such payments. These debts due by Alpheus would constitute a part of the testator's estate, and would go to swell the amount, to the one-half of which those representing Alpheus would be entitled. But the amount of those debts should be charged against that share as being advances already made by the testator on account, as should also any other sums paid to or for Alpheus, which may be proved to have been intended as advances on account of the obligation.

I think, therefore, that the decree should be reversed, and the cause remanded for further proceedings.

WINGFIELD P. and MCLAUGHLIN J. concurred.

DECREE REVERSED.

MISCELLANY.

TRIAL BY JURY.—The *Albany Law Journal* thus sums up the opinions it has formed on the jury question :—*Imprimis :* the jury system has suffered in public estimation from excessive adulation on the one hand, and excessive denunciation on the other. Like every other social system, it is probably susceptible of improvement; at all events, it demands modification to suit the changed circumstances of society. *First:* It is our firm belief that the jury is invaluable as a political system, in educating the citizen to feel a personal responsibility for government, in dividing the responsibility for legal decisions, and in standing between the individual and great monopolies, such as banks, and railway and insurance companies. *Second :* The system as it stands has not worked ill. Wrong verdicts and disagreements are exceptional. The public always hear of disagreements and wrong verdicts, while little is said of the vast majority of just verdicts. The ablest judges in this country have assured us that they have rarely known an absolutely unjust verdict. *Third :* Disagreements and wrong verdicts are very frequently the fault of the judge rather than of the jury. Disagreements are often produced by excessive refinements and balancings in the charge, and wrong verdicts sometimes are the result of the judge's usurpation of the advocate's office. *Fourth :* Except in large cities, the intelligence and honesty of jurors is much underrated by the public. *Fifth :* We can conceive nothing more ill-advised than an unchanging bench of judges to decide all questions of fact arising in a community. Such centralization of power is certainly extremely inconsistent with republican institutions. If two suitors desire to have their differences decided by one man, they have the privilege, but the right of either to demand a jury is inestimable. *Sixth :* The single change we would make in the system is to allow nine to pronounce a verdict

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in all cases but capital cases and those punishable with imprisonment for life; in the latter, unanimous verdicts should be required. But with all its imperfections, we should as little think of pronouncing the system a "nuisance" as it stands, as of pronouncing sunshine and water nuisances because of occasional sunstrokes and malaria.

ROMAN ADVOCACY.—Pliny the Younger does not present us with a very attractive picture of the advocate's profession. "Before my day," he says, "young men, even of the highest families, were not admitted to practice, except on the introduction of some man of consular rank; such was the respect paid to this noble profession. Now-a-days, all barriers of shame and respect are broken down; everything is open to everybody; they are no longer introduced—they rush in." And it seems that advocates were in the habit of hiring persons to applaud their speeches in court. A *claqueur* of this kind was called, in the slang of the day, a "Sophocles," and Pliny relates how two of his own slaves were retained for this purpose at the wages of about two shillings a head. Rhetoric found its great arena in the law courts, and the lengthy "displays" of pleaders seem to have become such a nuisance that, as Pliny mournfully notices, the custom had come in of limiting the speaker to so many "water-clocks." Pliny was very proud of his oratory, as appears from many artless passages; in particular, it is related how a young man, whose tunic had been torn in the enthusiastic throng of the audience, stood with his toga huddled about him for seven hours while Pliny discoursed.

ARREARS IN THE UNITED STATES SUPREME COURT.—Three hundred and seventy-nine cases were disposed of in the United States Supreme Court during the term just ended. The number of cases on the docket, including those considered this term, has increased to 1,150. The court is now more than three years behind in its business. New York State heads the list on the docket, with 146 cases. Every State and territory in the Union, except Delaware, is represented by at least one case. Twenty-four cities, counties and towns sought to evade the payment of their bonds. In twenty-three of these, the court held the bonds must be paid. All but four of the bond cases came from Illinois, Missouri, Kansas, Arkansas, Iowa and Louisiana. The comparison of work this term with that of last shows a decrease of thirty-two in the number of cases finally cleared from the docket. The court is now seventy-two cases further behind than at the close of the October term, 1877.—*Law Journal.*

POPULAR KNOWLEDGE OF LAW.—It is often said, and we fear with too much truth, that no people are so ignorant of the laws of their country as the English. The most strange absence of knowledge of elementary legal principles may be met with, even among persons of considerable general information, and no one is ashamed to admit a want of acquaintance with special laws, although they may affect the most ordinary human relations. It is an old story how often novelists and playwrights go astray when they bring the law into the working out of their plots. Some one has said that such authors should always keep a legal adviser at hand to save them from the mis-

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takes into which they are so liable to fall. One of our most popular novelists, who is distinguished by the range and accuracy of his knowledge of common things, published a story a few years since, in which his hero, an ex-Solicitor-General, commits suicide, because, in forgetfulness of a well-known statute, he thought a large property had been left away from his wife, which, in fact, descended to her absolutely. Still more recently, our interest has been invited to a trial for bigamy, in which, in defiance of all principle, the chief witness against the man charged with the offence is the woman with whom his first marriage was said to have been contracted. It is almost an every-day occurrence for newspapers to report the refusal of a magistrate to hear evidence from the first husband or wife, as the case may be, in a charge of bigamy; yet we are favored with a very clever report of a trial at assizes in which this objection seems to have occurred to neither judge nor counsel. When the opportunities of obtaining information are so ample, the lack of it is all the stranger. In no country are the proceedings of the courts chronicled from day to day with such fidelity and completeness as with us, and nowhere, as it would seem, are they so little turned to account.

It is the dream of many that the study of the law will one day become again what it was accounted in bygone generations—a necessary part of a liberal education. It is certainly strange to read the details showing how three centuries since noblemen and gentlemen frequented the Inns of Court, in even greater numbers than they frequented the Universities, for the simple purpose of learning something of the laws of the country they might have a share in governing. Since then, knowledge of law has become a strictly professional accomplishment, and it will not again become a branch of popular education until the law has been made at once simpler and more scientific in its conceptions and procedure. The efforts of law reformers are directed to these ends; but while we await these great results in the future, we know not why opportunities that are now open to all should be neglected as they are. A criminal trial excites attention through an apparent fascination in crime; why should not the adjudication of civil rights have an attraction of its own as connected with the organization of men in society and the attributes of property in the material objects of possession?—*Times.*

Crime in the United States.—Meanwhile the time described in Byron's "Vision of Judgment" seems to have arrived when "the devils have taken a long pull, a strong pull, and a pull all together, as they say at sea," and when the melancholy predictions of the horrible year of the "perihelions" seem likely to be verified. Every Friday somebody is hanged, and nearly so it has been done for a dozen years, and yet crime is on the increase, and never before was so rampant. We venture the assertion that during the last fifteen years there have been more executions than there were murders in the preceding fifty. Jealousy, wounded honor, revenge, greed, religious fanaticism, strife between capital and labor, drunkenness, all the conceivable motives to the highest crime have seemed to spring into existence at one dark birth. In the last volume of Texas Criminal Reports, we find twenty-nine murder cases during one term and part of another. Nor is this tide of

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crime confined to any part of our country, but, from law-loving Massachusetts to lawless Texas, it sweeps on apparently beyond control or check. Severity does not stay its course; nor does leniency, for in the volume of Texas Reports referred to, there were only eight capital convictions out of the whole number. Some have attributed the astounding prevalence of crime to the demoralization wrought by the late war, In respect to monetary offences, this may be correct; but in regard to homicide, it is noticeable that an old soldier is rarely an offender. Indeed, the quiet and order with which soldiery subsided into the peaceful and industrious pursuits of society have been the wonder and admiration of political students. Strict religionists are apt to ascribe it to the devil. Men are always fond of finding a scapegoat for the crimes of mankind. But human wisdom can only just conclude that there are cycles of crime and depravity as of progress and civilization. —*Albany Law Journal.*

Supreme Court of Appeals of Virginia.—This Court has just adjourned its session at Staunton, and meets in Richmond on the 13th *proximo*. All of the judges are well.

At one of the examinations for admission to the bar, before one of the appellate courts, the question, "What is the rule in Shelley's case?" was asked. One of the class answered, "The rule in Shelley's case is the same as in any other man's case. The law is no respecter of persons."

"What I want to get is the animus of the transaction," said the Judge. "But, your Honor," said the complainant, "there wasn't *any muss* at all. He came up quiet like, and grabbed the coat, and was off with it before I saw what he was at. No, sir, there wasn't any muss at all."

At a law school, the professor asked a brilliant youth, on his final examination, what legal principle it was that prevented a woman who had been seduced from bringing an action against her seducer. After a moment's hesitation, the youth said, "*Contributory Negligence.*"

Justice is blind and with a pair of scales, so that she may weigh the evidence, and not see the wink of the leading counsel for the defence.

BOOK NOTICES.

Third Bradwell's Reports.—In our notice of this book in our September No. we referred to, and commented on, the fact that all of the cases reported in it were *reversals*. We have been informed since that, by the laws of Illinois, only the opinions in cases which are *reversed* are required to be in writing, which readily accounts for the fact then referred to.

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THE

VIRGINIA LAW JOURNAL.

NOVEMBER, 1879.

WHAT IS MUNICIPAL LAW?

Knowing the cautious and conservative spirit with which the law imbues its votaries, I anticipate every objection that may be urged against this essay, on the ground of its being irreverent, presumptuous and speculative beyond the bounds of professional decorum and utility. I also recognize and admire the wisdom of that extreme reluctance with which even judges have ventured to construct a legal definition, and doubtless their example should admonish all others, who would be interpreters of the law, to reflect and hesitate before departing from so safe a rule; for I can easily understand that the consequences of blundering in such a performance would be likely to afford as little encouragement to the self-complacency of the inventor, as if he had been repulsed in the bold but disloyal effort to overthrow some venerable precedent or system, whose time-worn aspect he had mistaken for a sign of weakness rather than of strength. As, for instance, when Mr. Justice Ashhurst had occasion to remark, "The counsel who argue in favor of the will cannot but own that the current of authority is against them; and if they are so, and those authorities are not of yesterday only, but have the stamp of antiquity, and have been sanctioned by the most respectable authorities almost down to the present times, that seems to me a decisive reason why they should not now be shaken." *Goodtitle* v. *Otway*, 7 T. R., 419.

Quieta non movere ought, unquestionably, for most purposes, to be an authoritative maxim, especially for judges, but not being burdened with judicial responsibility, I feel more free to inquire, What is municipal law?

Blackstone defines it as "a rule of civil conduct prescribed

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by the supreme power in a State commanding what is right and prohibiting what is wrong;" and further on he adds, that "in laws we are *obliged to act* without ourselves determining or promising anything at all."

Christian, Stephen, Ch. Kent, and, perhaps, Judge Cooley, concur in viewing it as "a rule of civil conduct prescribed by the supreme power in (or of) a State."

Judge Sharswood calls it a "rule of civil conduct prescribed by the supreme power in a State commanding what is to be done and forbidding the contrary."

And lastly, in deference to the American theory of government, it has been defined as "a rule of civil conduct prescribed by the *law-making* power in a State;" and Ch. Kent gives strong countenance, if not express approbation, to this view.

But are these definitions strictly accurate, so far as they limit municipal law to being a *mandatory rule of civil conduct?* In other words, do they really embrace the whole subject which they are intended to describe?

I think not; for they are evidently framed with special, if not exclusive, reference to *crimes*,* and are, therefore, of necessity, fragmentary and defective.

A law may be a rule, and yet not be *mandatory*, nor at all *referable to civil conduct*, and I make this observation, because municipal law, in the sense of a *rule*, is uniformly stated by modern English commentators to be a *command*;† while *civil conduct* is admitted to be nothing more nor less than the *behavior* of a man as a member of society. 1 Bl. Com., 45, 124.

*Mr. Henry Dagge, in his "Considerations on Criminal Law" (1772), has this language: "Every author who has *wrote* on the subject of law, agrees that the rules prescribed by it are obligatory; and this obligation supposes a lawful power in some superior *to punish our omissions and transgressions.* Law, therefore, in its general signification, may be defined as follows: Law is that faculty whereby some lawful superior prescribes rules of *action* which those in subjection are *obliged to perform under certain penalties expressed or implied*" (my italics). The influence of the criminal law in the construction of this definition is unmistakable.

†That I am not at fault in this conclusion, will further appear from the following extract from Sir Henry Sumner (Maine's work on "Ancient Law" (ed. 1875), pp. 6–7). "Bentham in his 'Fragment on Government,' and Austin in his 'Province of Jurisprudence Determined,' resolve every law into a command of the law-giver; an *obligation* imposed thereby on every citizen, and a *sanction* threatened in the event of disobedience; and it is further predicated of the *command*, which is the first element in law, that it must prescribe not a single act, but a series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence, and by a little straining they may be made to correspond with all law of all kinds at all epochs" (the author's italics). It is needless to remark that this view accords with the spirit, if not the language, of the definitions quoted above.

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Municipal law, therefore, according to these definitions, is an absolute commandment that the citizen shall or shall not *behave* in a specified manner; or rather its sole function is to *oblige* him to do certain *acts*, and to abstain from doing certain other acts.

It follows, then, that the *proper subjects* of municipal law are things which the citizen must *do*, and things which he must *not* do; and that the prescribed legal regulations applicable to *all other* things and conditions of things, form no part of that law.

Now, Blackstone's definition, as thus interpreted, might serve well enough to describe the criminal law, so far as it is a system of prohibitions; and would apply to all laws and public rules which require certain positive acts to be performed, such as returning a tax-list, taking out a license, or aiding in the arrest of a felon. But where, under such a definition, are we to locate the statute of descents, the statute of limitations, the statutes prescribing the jurisdiction of the courts, and many others that might be mentioned? The real estate of an intestate shall descend to his heirs. So the municipal law ordains; but manifestly this is not "a rule of civil conduct." On the contrary, it might more properly be called a rule respecting the *behavior of property* under certain circumstances. For if it be a rule, in the sense of a *commandment*, to whom is it addressed, and who is to execute it? Again, the law permits a defendant to insist upon the statute of limitations, in a proper case, but the act of making the defence by plea depends entirely on his own discretion; and yet we are told that the law admits of no discretion in the citizen. Its language, says Blackstone, is, "Thou shalt or shalt not do it;" and consequently, since that statute only *permits*, but does not *command*, an act to be done, it is not a part of the municipal law. Again, a legislative enactment declares that a certain court shall have jurisdiction of particular causes, but as this is only *establishing a state of things, i. e.*, creating a *capacity* to act under given conditions, and not *commanding* anything to be done, such a statute must also be omitted from the category of municipal law.

It is needless to multiply examples. These will suffice to show that all legal regulations applicable to any matters other than *acts commanded* or *forbidden* to be done, are not provided for by Blackstone's definition.

It may be answered that these laws constitute rules of civil conduct, when we come to act with reference to the specific

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matters, which they are designed to regulate. But this does not meet the question. Do they indicate any act which the citizen is *commanded* to do or not to do, as a necessary part of his civil conduct or behavior? If not, they are plainly excluded from the foregoing definition, and yet it is equally clear that they are included in the body and substance of the municipal law.

Now, I do not insist upon any favorite definition of my own, but I wish to inquire, by way of experiment, whether or not a more comprehensive, and hence a more satisfactory, description of the subject may be given, than the one which is commonly accepted as the best. True, Blackstone's definition has the merit of brevity, which is of great value in a *witticism;* but brevity is not always a substitute for every other virtue. If a carrier should undertake to transport you from Richmond to Norfolk, where you had important business, and his steamer should break down at Dutch Gap, he would, indeed, have given you a very brief passage, but you could hardly congratulate yourself on having reached your destination.

CORRELATIVE RIGHTS AND DUTIES, it seems to me, would furnish a better basis for a definition than the principles of merely *mandatory* law, and I therefore suggest the following formula or scheme:

Municipal law is a system of general rules founded either on the customs or on the express enactments of a State, and designed to effectuate the following objects, namely:

To ascertain and enforce the correlative rights and duties which depend upon the various relations subsisting between the CITIZENS AND THE STATE;

To ascertain and enforce the correlative rights and duties which depend upon the various RELATIONS *and* CAPACITIES *subsisting among the citizens* WITH RESPECT TO EACH OTHER;

And to ESTABLISH SUCH ORDER *and* CREATE SUCH POSITIVE RIGHTS *as have, from time to time, been found expedient for the general welfare.*

It is not difficult to see that any definition less comprehensive than the foregoing, would be imperfect. What is wanting to render it complete, however, it is not so easy to determine, nor do I purpose to decide the question. In fact, I ought probably to feel some of that mortal trepidation which seems to have agitated Mr. Hargrave, after he had written his celebrated treatise on the Rule in Shelley's Case, in which he said: "In the opinion of the present observer, all controversial writing, more particularly on the very serious and sol-

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emn topics of the law, unless it be to effectuate some real and substantial good, is an indefensible employment of time. But he now fears that there is danger of having his present labors considered as an officious interposition of himself where no such inferior assistance was either desired or wanted."

This, it must be confessed, is very suggestive language, but I remember what Lord Nottingham once said to Mr. (afterwards Lord Chancellor) Somers when he wished to excuse himself from arguing a case, "Pray go on, sir; I sit here to hear everybody;" and I will not believe that the professional public are, in most instances, less amiable and considerate than was that good-natured judge.

A reasonably short definition, capable of being developed and expanded by easy deductions into a frame-work of the whole system, is so great a desideratum, that experiments in that direction, however abortive, are not to be unconditionally discouraged and condemned; for the practical value of a good definition is illustrated in the case of a rent, a remainder, a lease, dower, curtesy, etc., and why should we not, at least, aim at an accurate and useful definition of *law?*

But to return. I will now endeavor to explain and justify my use of the several terms employed in the foregoing formula.

I.—Municipal Law is a System.

Since we cannot conceive of a State as having but a *single* rule for the regulation of all its affairs, both public and private, we must conclude that it is a *system* composed of many different rules; and thus we have the conception of a *code*, or collection of laws.

II.—Of General Rules.

It is essential to the very idea of law that it should be applicable alike to all the citizens within the jurisdiction of the State, beyond which it can have no *binding* authority, for obvious reasons, although effect may sometimes be given to it upon the ground of international *comity*.

Legislation is a proceeding of the highest solemnity and importance looking to *general* objects, and no citizen ought to be of so great consequence, that the dignity, the power, and the wisdom of the whole State should be interested in elevating him above, or in degrading him below, the plane occupied by the other citizens. Either case would show a conditions of things unfavorable to civil liberty—the weak-

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ness of an obsequious and servile spirit inviting despotism, on the one hand; and the weakness of timidity or passion, resulting in cruelty and injustice, on the other. All class legislation, therefore, which benefits a few at the expense of the many, comes within the influence of this principle, and is an abuse and a perversion of the powers of government. Upon this principle, we may also explain, in part, at least, why it is that *charters of incorporation* are never granted as a matter of course, but always subject to certain limitations and conditions, because they are sought only in order that special privileges may be conferred upon small bodies of the citizens.

A general *custom* may also properly be termed a law, because it has necessarily received the sanction of the whole community; though the word custom alone would more accurately describe any local or special usage.

Some of these general rules have the force of *commands*, for when they confer or regulate a *relative* right or duty, there is no alternative but to comply, or suffer the consequences of non-compliance—which may be punishment for a crime, damages for breach of a civil duty, or the forfeiture of a right, as of an office or a franchise. But it seems there can be no *command*, except in the case of a *relative* right or duty, as when A owes B a sum of money. It is the right of B to receive, and the duty of A to pay; and it is to be observed that the right and duty here involved are not *created*, but only regulated by the municipal law. It will enforce the right of B, and so it operates as a command on A to perform the duty, which, perhaps, explains what is meant by *the* (legal) *obligation of a contract*, as distinguished from the *moral* duty.

But when the law declares that A shall inherit his father's lands, we have an instance of a right *created* without any corresponding or correlative duty, and, therefore, the law is not a command, because it requires nothing to be done by another in order that A may enjoy his right (unless, indeed, some creditor of A might consider it the duty of the father to die at his earliest convenience, and that without a will).

Some of these rules are bare *regulations*, as when they prescribe certain *forms* or *methods of procedure*, but then they are, for the most part, *permissive* and not *mandatory*,* unless

*The distinction between *obligatory* and *permissive* rules is too old and too obvious to be overlooked in any definition of law. Ja, says Glueck, sie ist selbst in den Roemischen Gesetzen deutlich gegruendet, denn so sagt Modestinus ausdruecklich. Legis virtus haec est; imperare, vetare, *permittere* punire. *Permissiv-gesetze* legen nun zwar demjenigen dem dadurch etwas verstattet, oder ein gewisses besonderes Recht ertheilt wird, der Regel nach,

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we could say that a public highway is a *command* that every citizen shall travel over it, whether he will or not; for saying *how* or *where* a thing is to be done, is very different from saying that it *must* be done.

Some of these rules are mere *regulations*, as when they *establish a certain order of things*, of which there are many various and seemingly incongruous examples—such as the system of public offices and institutions; or the status of persons or property not depending on contract, as heirship, citizenship, bastardy, etc. Or, to take a less obvious illustration, the law declares that a judgment shall be a lien on the real estate of the debtor, but this is not by force of any *contract*. It is true, the existing law forms a *part* of the contract, but after all it is not the mere stipulation of the parties, but the *law in* the stipulation, that produces the effect; and this is proved by the fact, that if there was no such law, the effect could take place only by express agreement.

Thus laws may be divided into—

1. *Mandatory* rules, applicable to civil conduct' and prescribing *what* must, or must not, *be done*.

2. *Regulative* rules, applicable to civil conduct, and prescribing *how* certain things are to be done, if done at all; and

3. *Regulative* rules, applicable to *other matters* than civil conduct, and prescribing the mere *status of* persons or things.

III.—Founded either on the Customs or on the Express Enactments of a State.

Laws may arise from *custom*, but the theory that every general custom is itself based upon some statute, no longer extant, is, perhaps, not strictly correct; for "it is certain," says Maine, "that in the infancy of society, no sort of legislature, and not even a distinct author of law, is contemplated or conceived of." And this accounts, in large measure, for the origin of the common law of England—general usage "notified by universal tradition and long practice," and gradually absorbed into the municipal code, by aid of judicial decisions, without any formal act of legislation.

Keine Verbindlichkeit auf, sich desselben zu bedienen, sondern ueberlassen solches seiner Willkuehr. *Obligativ gesetze*, hingegen, schliessen alle Willkuehr zu handeln aus, und legen allen und jeden die vollkomene Verbindlichkeit auf, dasjenige, was dieselben befohlen haben, zu thun, und was sie verboten haben, zu unterlassen, wenn man sich nicht die auf den entgegengesetzten Fall eintretenden nachtheiligen Folgen zuziehen will. *Erlaeuterung d. Pandekten*, 1 B,, 1 T., § 14a.

Ces régles, ces lois sont de plusieurs sortes: 1. *imperatives*; 2. *prohibitives*; 3. *permissives*.

Demolombe, *Cours de Code Civil*, § 15.

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Whenever a *general rule is enacted* by a State in its aggregate capacity, that can be nothing else but a *law* of the State; and the agency or organ through which its will is so declared, must be the *law-making power* of the State, whether it be the people acting *en corps*, or by representation. Therefore, if a general rule be a law, at all, it must have proceeded from a law-making power, so that a general rule enacted *by a State*, is the same as if it were said to be enacted "by the law-making power in" a State.

I will not stop to explain at large why I also reject the word "prescribed" from the definition, but will only remark that I do not consider *the function of legislation completed* until the law has been made known.* Before that time, it would be simply absurd to require or expect it to be observed, and since the Legislature is interested in having its enactments carried into effect, it must be presumed that it will itself, as a matter of course, take care that they are duly promulgated. Hence law, *ex vi termini*,† imports a *rule prescribed*, for where the law-giver *conceals* the law, as Caligula is said to have done, I should conclude that there was a total absence of law according to the maxim *idem est non esse et non apparere*.

IV.—And Designed to Effectuate the Following Objects, Namely:

The great *purpose* of municipal law is undoubtedly to ascertain and enforce certain rights and duties—never to violate or suppress them. And this proposition is not contradicted by the fact that the public exigencies sometimes justify a temporary departure from the principle, as in cases of war or insurrection. A right or duty is *ascertained* by the municipal law, when it is either *created* by that law, or *adopted* from some other system, as from the law of nature. And inasmuch as all law is supposed to be founded upon principles of common sense and natural equity, any legislative requirement or permission which is repugnant to reason, or to morality, or to humanity, cannot consistently have the au-

*Von dieser Willenserklaerung des Gesetzgebers hængt also die Gueltigkeit positiver Gesetze lediglich ab, und so lang diese nicht auf die gehoerige Art geschehen, verbinden solche Gesetze die Unterthanen nicht, wenn diese auch schon einige Wissenschaft davon gehabt haben sollten. Glueck's *Erlaeut d. Pand.*, 1 B. 1 T. § 19.

†This is shown by the etymology of the word—Anglo-Saxon *lag* or *lah*, from *lecgan*, to lay, hence a rule *laid down* or prescribed, not suppressed or kept out of view. Bracton says, in the largest sense, *Dicitur* LEX *omne quod* LEGITUR. Lib. 3., c. 8.

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thority of law. But there can be no right and consequently no duty *under* the law, unless it has first been ascertained *by* the law; and once admitted *to be a right*, it cannot be withheld without defeating the very object for which, *ex hypothesi*, all legislative power is given, whether we regard it as originating *jure divino*, or from the will of the people. This consideration involves the doctrine of *vested rights*, and demonstrates the iniquity and absurdity of retro-active statutes, such as *ex post facto* laws, and laws impairing the obligation of contracts, whether public or private.

It is familiar to all, that the objection to *ex post facto* laws is usually founded on the necessity of having the law as "a rule of civil conduct" *prescribed*, *i. e.*, promulgated beforehand. But it may be more directly argued that an accused person has the *right* to be tried, and it is the *duty* of the State to try him, according to the law as it was when the offence was alleged to have been committed, and not by any new or different law, which might place him in a worse condition. For he might have been willing to run the risk of conviction and punishment in one state of the law and not in another; and hence the palpable wrong of punishing him (for example) with death for an offence punishable only by imprisonment, at the time of its commission. Of course, we know that a different rule applies in the construction of retrospective laws affecting merely *civil remedies*.

V.—To Ascertain and Enforce the Correlative Rights and Duties which Depend upon the Various Relations Subsisting Between the Citizens and the State.

These relations are the following, viz.:
1. *Private*, as of individuals.
2. *Quasi-public*, as of corporations.
3. *Official*, as of public functionaries.

1. It is the duty of the citizen, in his private capacity, to abstain from all violations of the peace and dignity of the State, as guarded by its criminal code; and to contribute his due proportion of the expense and labor necessary for the maintenance of the government and the well-being of society.

We are thus introduced to the criminal law, the law applicable to the public revenue, and to the minor public duties, which the citizen, as a private individual, is required to render to the Commonwealth, such as serving on juries, working on the roads, etc.

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On the other hand, it is the duty of the State to abstain from all violations of the rights of the citizen, as recognized by law, and to afford him all requisite means and opportunities of redress, when those rights are invaded by itself or by another. Instances occur whenever the citizen is unlawfully deprived of his personal security, his liberty, or his property; as by an unlawful bodily injury inflicted or even threatened by another; or by an illegal imprisonment, or by the larceny, destruction, injury or confiscation of his property.

Our attention is thus directed to the *absolute rights of persons* and the various *safe-guards* designed to protect them (1) against invasion by the State, such as the constitutional prohibition against suspending the writ of *habeas corpus*, the right to own property exempt from liability to public use without compensation, etc.; and (2) against invasion by another citizen, which involves the duty on the part of the State to preserve the peace, to prosecute criminals, and to provide adequate remedies for the redress of private as well as of public wrongs. Hence we infer that it is the duty of the State also to establish a judiciary and a police system possessing all the powers and agencies necessary to effectuate these important objects of social organization.

2. The second relation between the State and its citizens depends upon the *artificial* character with which they may be invested, as when they are associated in the form of *corporations* or bodies politic. It may be briefly remarked that the special *duty* which they owe to the State, in their *corporate* capacity, is the lawful, regular and continuous prosecution of the objects for which they were created; and any wilful and material violation of that duty may forfeit not only the franchise, but by consequence, the very life of the organization. And on the other hand, the State is bound to afford them the same protection for their rights of property as it does to individuals. Hence is evolved the whole law of corporations, their several kinds and incidents, modes of creation, action, dissolution, etc.

3. The third relation between the State and the citizen arises from the *official* character. It is the duty of all public officers to render faithful service to the State according to the requirements of their official undertakings; and it is the duty of the State, among other things, to compensate them for their services, when it is so provided by law, and to sustain them in the discharge of their public functions.

From this stand point we may consider all kinds of public officers, with a statement of their respective duties, modes of

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election, duration of terms, impeachment, *quo warranto*, and all other matters appertaining to the subject.

VI.—To Ascertain and Enforce the Correlative Rights and Duties which Depend upon the Various Relations and Capacities Subsisting Among the Citizens with Respect to Each Other.

The *relations* here contemplated are the following, viz.: Husband and wife, parent and child, guardian and ward, contractor and contractee; and for the sake of convenience, I would limit this last relation (which manifestly is a very comprehensive one, including even that of husband and wife) to cases where some act or duty, other than the naked, unconditional *payment of money* is the subject of the contract, as for example, master and servant, principal and agent, landlord and tenant, vendor and vendee, assignor and assignee, indorser and indorsee, covenantor and covenantee, warrantor and warrantee, guarantor and guarantee, promisor and promisee—express or implied—bailor or bailee.

All of these relations, except the last one, may give rise to that of *creditor and debtor*, that is, *to a liability to pay, and the right to demand, a sum of money unconditionally;* as when a vendor has sold his property, or a servant has performed his services, or a surety has paid the debt of his principal, etc. But the relation of creditor and debtor may arise in another way, as where there is a *loan of money* either directly or indirectly.

There are two relations not originating in contract, which must not be overlooked, namely, *donor* and *donee*, and *tortfeasor* and the injured party, who, for want of a better term, may be called a *tortfeasee*.

The relation of donor and donee—not however in the feudal sense of the words—is really an anomalous one, though fully recognized in law. *Gift* is a mode of acquiring title to property. But when the possession has once *been acquired*, the donor, as such, has ceased to be an object of legal contemplation, and the donee has become as absolutely the owner of the property, as if he had bought or inherited it. If, on the other hand, the possession has *not* passed, either actually or constructively, the supposed giver is not a *donor*, nor is there any legal method of coercing him into that relation.

What the rights and remedies of third persons may be in respect to an *intended* but *ineffectual* gift, is a totally differ-

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ent matter, and might depend upon the relation of creditor and debtor, vendor and vendee, bailor and bailee, etc.

The *capacities* in which correlative rights and duties may be claimed, are the following, viz.:

(1) *Private* or *natural.*

(2) *Artificial.*

(3) *Quasi-official, fiduciary or representative.*

In a *private* capacity, as when a contract is made between A and B, or between C and D, either *jointly* or as *partners*, of the one part, and E and F of the other part; in an *artificial* capacity, as when A or B is a corporation; and in a *quasi-official, fiduciary* or *representative* capacity, as when A or B is entitled or liable as the executor, administrator, guardian, committee, curator, trustee, heir, or distributee of another.

I refrain from attempting even briefly to develop the several topics here suggested, as it would obviously require more space than I can command.

VII.—And to Establish such Order and Create such Positive Rights as have, from Time to Time, been Found Expedient for the General Welfare.

I. The laws *establishing order* are numerous, various and hard to be systematically arranged. They may, however, be roughly presented under the following view:

(1) The *fundamental* law of a community—whether arising from custom or from a written constitution—prescribing the form of government and the distribution of its powers.

(2) The law, whether customary, constitutional or statutory, creating the system of public offices and institutions, and the modes of transacting business therein, including *the law of evidence.*

(3) Laws defining or regulating the *status of persons*, in certain cases, as who may vote, who may hold office, who is an alien, who is, or may become, a citizen, who may testify, etc.; or defining the *status of property*, such as the various kinds and qualities of estates, escheat, inheritance, and many other things depending on merely *regulative* law, whether common or statutory.

II. The *rights*, which have from time to time been *created* by law, appear most frequently in the form of *statutory remedies*, or of *remedial doctrines* influencing the courts, and are such as have been dictated by the growing necessities of mankind, as civilization has enlarged and diversified the fields of enter-

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prise and refined the tastes and morals of society. The right to bar an entail by a common recovery, the right to charge and alienate land, the rule in Shelley's case, the rule against perpetuities, the right to use the *subpœna* in chancery, the doctrine of equitable waste; *pretium affectionis*, and, in fact, a large portion of the jurisdiction of equity may be referred to this category. But I will not pursue the inquiry any further, having sufficiently indicated the general scope of my plan, which, however, is not presented with the ambitious view of superseding or changing the established methods of teaching law, nor would such a result be either practicable or desirable.

And now I have abruptly finished this imperfect analysis of an imperfect scheme, not realizing, perhaps, how very imperfect it is.

Whatever it may be, though, I leave it, not in the self-complacent spirit of Horace, when he wrote *Exegi monumentum!* but rather with the less confident feeling of another who said, "Brethren, I count not myself to have apprehended."

And so I say to the profession.

SAMUEL D. DAVIES.

Richmond, July, 1879.

SUPREME COURT OF TENNESSEE.

NEEDENER *v.* THE STATE.

After a judgment of fine and imprisonment, the court has no right to suspend the judgment as to imprisonment "during good behavior." Costs may be taxed against a defendant who voluntarily assumes to pay costs in the trial of indictments under which he has been adjudged not guilty.

NICHOLSON C. J.—Defendant was indicted in nine separate indictments for selling liquor on Sunday. By consent, all the cases were tried together by the court. Defendant plead guilty in one case, and was fined $10, and ordered to be imprisoned ten days, but the imprisonment was suspended during his good behavior. He pleaded not guilty in the other eight cases, and was adjudged not guilty by the court, whereupon he assumed all costs in four of the cases. The judge had the right to imprison as part of the punishment, but he had no right to suspend the imprisonment during the defendant's good behavior. This portion of the judgment was

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void, leaving judgment for fine in force. There was no error in adjudging full costs in four cases upon the assumption thereof by the defendant.

The judgment is affirmed, except so much as suspends the imprisonment; reverse as to that.

SUPREME COURT OF TENNESSEE.

CARRIGAN *v.* LEATHERWOOD.

1. An assignment of a *chose* in action is not complete, so as to vest an absolute title, until notice is given to the debtor. This is so, not only as regards the debtor, but likewise as to third persons; and an attachment by a creditor in the period intervening between the assignment and such notice, will take preference over the assignment.
2. An attorney who has recovered a judgment which is subsequently attached, has a lien for his fees, that is prior to the rights of the attaching creditor.

FREEMAN J.—The only matter before us in this case arises on the claim of Carrigan, in the cross-bill to the judgment attached by Leatherwood in his original bill.

Without going into a statement of the complicated facts shown in the record, as preliminary historical matters on which the question to be decided are raised, it suffices to say, that two questions are presented by the record for adjudication.

First, did Carrigan by the assignment made by McGee, in November, 1873, of the judgment to which Rhodes was equitably owner, acquire a title to said judgment that would override the attachment of Leatherwood, a creditor of Rhodes?

To this we answer, it is certain he did not, it being in any view of it, an assignment of a judgment, and no notice of such assignment given or brought home to the debtor.

This is almost the precise case of *Clodfelter* v. *Cox, adm'r*, 1 Sneed, 338, and falls unmistakably under the principle therein settled.

The other question is, whether Carrigan, as an attorney, can hold the judgments by virtue of his lien as such as against Leatherwood's attachment? The Chancellor held that he could not. In this he is in error, we think, to this extent.

The facts are that the judgments had been assigned to Carrigan, but as we have said, that assignment was not perfected as to him against an attaching creditor for want of notice. Carrigan certainly had no general lien on these judgments,

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as papers in his hands for his other fees for services rendered Rhodes in the case of *Pitt* v. *State*, but he had obtained this judgment of $503, or about that sum, on the *certiorari* suit in the Circuit Court, and as such had a lien for a reasonable fee on said judgment, so obtained by lien, and of this Leatherwood had notice, he being the party against whom it was rendered. We think, under this state of facts, the attaching creditor gets the benefit of the judgment, subject to this lien of the attorney. In other words, his attachment to the judgment takes it subject to this lien, which is entitled to priority. The amount of such fee is not shown in the record, we therefore direct a reference to the clerk of this court, who will report at present term, if practicable, what is a reasonable fee for attention to the *certiorari* case in which the $503 judgment was rendered in the Circuit Court, and Carrigan will be entitled to such sum in preference to the attaching creditor. To this extent the decree below is modified. Costs of this court will be divided between the parties. Costs below as directed by the Chancellor.

SUPREME COURT OF APPEALS OF VIRGINIA.

TERRY *v.* FITZGERALD AND AL.

May 1, 1879.

T. conveyed to S. a tract of land of eleven hundred and seventeen acres, in trust to secure a debt of $4,000, with interest, to F., and the deed provided that the trustee should sell the land or so much as should be necessary to pay the debt. S. declining to act. F. has W., who was his counsel, and was insolvent, substituted as trustee, and W. advertises the land, or so much as might be necessary to pay the debt, for sale. T. then applies for, and obtains an injunction, on the grounds that W. was insolvent and the counsel of F., and because they refused to divide the land and sell it in parcels, alleging that there were four separate improvements on the land, and insists that the trustee shall not sell without giving security for the safety of the trust fund. HELD:

1. Insolvency does not disqualify a person to act as trustee; but when money of the trust fund is to pass through the hands of an insolvent trustee, upon the application of one who is interested in the right disbursement of the money, and who is apprehensive that it may be misapplied or misused, a court of equity ought, undoubtedly, to require of the trustee security before he is allowed to proceed with the execution of the trust.
2. Although W. was substituted as trustee by an order of the court, on motion of which T. had notice, he is not thereby precluded from applying to a court of equity to require of him bond and security before he proceeds to execute the trusts.

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8. The trustee being the agent of both parties, it was his duty to sell the land as a whole, or in separate parcels, as would be conducive to its bringing the most money. It was his duty to sell so as to get the best price for it.
4. If the land will bring a better price by dividing it, and selling in separate lots, and the owner desires and requests it, and the trustee refuses, the owner may invoke the intervention and assistance of a court of equity, in a proper case, to control the trustee in the exercise of his discretion.
5. The court having possession of this case, ought, instead of dissolving the injunction, to have retained the case, and directed the execution of the trust. It had authority to appoint commissioners to view the land and take testimony, and to report whether it was susceptible of division into different tracts, and in what way, with power to employ a surveyor to lay it off into as many different tracts as would promote an advantageous sale. And if, upon the coming in of the report, the court is satisfied from it and the testimony, that it would conduce to an advantageous sale to have it so divided and sold in separate parcels, it would have authority to decree a sale in that way, and the order in which the tracts should be sold, until enough was sold to pay the debt, interest and expenses.

This was an appeal by Wm. C. Terry from a decree rendered by the Judge of the Circuit Court of Pittsylvania county in vacation, on the 10th of November, 1875, dissolving an injunction which had been granted to restrain the trustee in a deed of trust from selling certain lands conveyed to secure the payment of a debt to Wm. R. Fitzgerald. The case is sufficiently stated in the opinion of the court delivered by Judge ANDERSON.

J. Alfred Jones for the appellant.

Ould & Carrington for the appellees.

ANDERSON J.—This case comes up on a motion to dissolve an injunction on bill and answer. The injunction was to enjoin the sale of a tract of eleven hundred and seventeen acres of land in the county of Pittsylvania, by a substituted trustee, under a deed of trust, to satisfy a debt of $4,000, and the interest which had accrued on it, and five per cent. commissions to the trustee.

One of the grounds of the injunction was, that the trustee, as alleged by the bill, was insolvent, and otherwise unfit for the execution of such a trust, and ought at least to be required to give security, before he should be allowed to proceed with the execution of the trust. Another ground is, that the land is a large and valuable tract, and ought to be divided and sold in separate parcels. That there are now four settlements on it, and two others have been commenced,

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and that it might be divided into six convenient and valuable farms. The plaintiff alleges that he knew persons who would bid for, and pay a fair price for the different parcels, if sold separately, but knew of no one who would bid against the creditor, Wm. R. Fitzgerald, if the land was sold in one body. He alleges that the said Fitzgerald positively refused to allow the trustee to sell in any other way than for cash, and the land in one body, his object being to bid it off for himself at a great sacrifice.

He also alleges that he went to the said Fitzgerald, and desired him to sell the land in separate lots and parcels, and proposed to advertise and sell himself, notifying the purchaser to pay the purchase-money to the said Fitzgerald, but he positively refused to allow him to sell at all; and he then insisted that he should direct the trustee, Treadway, to sell the land in different lots and parcels to suit purchasers; and he alleges that if it is fairly and properly sold in parcels, it will not require the sale of the whole to pay said debt, but enough can be sold to pay what is due, and leave him a comfortable home. The trustee himself represents the land as very fertile and highly productive for all crops raised in that section. "There are," he says, "good and valuable improvements, consisting of large dwelling house, outhouses, stables, barns, &c.; in fact, the property is well improved, in a high state of culture, and considered one of the best farms in this whole region of country."

Insolvency does not disqualify a person to act as a trustee, though it has not been uniformly so held. Mr. Hill says, for the removal of an insolvent trustee, and the appointment of a new trustee in his place, a bill must be filed in a court of chancery; and the insolvency would unquestionably be sufficient foundation for such an application. Hill on Trustees, top p. 832, side 534. But in 1 Perry on Trusts, 2d ed., p. 353, § 279, it is said that generally the insolvency or bankruptcy of a trustee does not disqualify him for the trust. Yet he says that, in the United States, trustees are, or may be, required, in the great majority of cases, to give bond or security for the safety of the trust fund. In *McCullough and al* v. *Sommerville*, 8 Leigh, both the trustees were wholly irresponsible individuals, owning no property of any description; and this court held that the Circuit Court acted with entire propriety in relieving the trustees from the execution of the trust, and in taking a control of the funds for the purpose of distribution. Pp. 439–40. There were other grounds urged also in the lower court for the removal of the trustees, but

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this court does not appear to have sustained the removal upon them.

We think that when money of the trust fund is to pass through the hands of an insolvent trustee, upon the application of one who is interested in the right disbursement of the money, and who is apprehensive that it may be misapplied or misused, a court of chancery ought, undoubtedly, to require of the trustee security before he is allowed to proceed with the execution of the trust. Whether the sale of the land by the trustee in this case would be a discharge *pro tanto* of the debtor's obligation to the creditor, in case the trustee fails to pay over the money to him, is a question about which there may be different opinions. It is implied by a declaration in the answer of Fitzgerald, that he would in that case consider the debtor absolved. And if that declaration could be regarded as a release of the debtor from responsibility in case of a diversion and misuse of the money by the trustee, he had not the benefit of it when he filed his bill, and it could not indemnify him for any surplus the land might bring over paying the debt, if used by the trustee. Suppose the land should sell for three or four thousand dollars more than the amount of the incumbrance upon it, which is not an unreasonable supposition, from the trustee's description of it, and the trustee refused to pay it over to the owner, when and to whom could he look for indemnity?

The answer does not deny the insolvency of the trustee. The trustee has not answered at all, and the creditor in his answer says, although the said Treadway might be utterly insolvent (which the defendant does not admit), yet such insolvency could entail no loss on the complainant, &c. On a motion to dissolve an injunction, the allegations of the bill, which are not denied, must be taken to be true, although they are not admitted. The allegation of insolvency not being denied, must be taken to be true, although it is not admitted by the answer. Although the said Treadway was substituted as trustee by an order of the court, on motion of which the debtor had notice, we are of opinion that he is not thereby precluded from applying to a court of equity, to require of him bond and security, before he proceeds to execute the trust. And it would be no hardship on the creditor if it devolved on him the necessity of going his security, as it seems, according to his view, it would not increase his responsibility; and for the debtor it is but what sheer justice requires. The bill alleges that Samuel M. Stone was appointed trustee in the deed, because he was known to the

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grantor to be a good business man, of high character, and a man of substance and entirely solvent, who would act impartially and fairly in the matter. It is true that he had notice of the motion that would be made by Fitzgerald to substitute R. H. Treadway, his counsel, in the place of Stone, who, he represented, had refused to act. As soon as he received this notice, he went to see Fitzgerald about it, and to learn from him why he proposed to appoint his counsel, R. H. Treadway, trustee in place of Stone, who informed him that Stone had refused to act. He says he had never had any conversation with Stone on the subject, but has no doubt that if he refused to act, it was because of unjust requirements made of him by the said Fitzgerald. He avers that he would have objected to the appointment of said Treadway trustee, if the said Fitzgerald had not induced him to believe that there never would be any necessity for the trustee to sell the said land. If he was thereby prevented from appearing in court and objecting to his appointment, it would have been a fraud upon him, and the order appointing him ought not to be binding on him. The answer of Fitzgerald is not directly responsive to this allegation, though he "utterly denies, that he ever at any time gave any assurance to the complainant that he did not wish to claim said deed, or that he did (not) want the principal as well as the interest of his money," which is responsive to another allegation of the bill. He does not deny that Treadway was his counsel, but denies that he is or has been his counsel in this proceeding, *since his appointment as trustee.* The bill charges "that the said Treadway is not a fit or proper person to act as trustee in the deed of trust aforesaid; that he is the counsel of the said Fitzgerald, and employed and paid by him to represent his interest entirely, and is insolvent, and ought not to be allowed to sell the land without first giving security, even if he was a fit and proper person to act as trustee.

A trustee, who is to act as the agent of both parties, should have no bias or partiality which would disqualify him fairly to discharge his duty, and to do justice to both parties. When the parties agree that their respective counsel may act as trustees, it may be done. But when there is but one trustee, he ought not to be the counsel of one of the parties, especially when, as in this case, he may have to decide questions which may be of vital interest to the adverse party.

The answer does not deny the allegations before recited, that the plaintiff applied to the creditor, and also to the trustee, to have the land laid off and divided into different tracts,

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and sold separately, and that they both refused to comply with that request. He denies only that he ordered the trustee to advertise the whole of said tract of land for sale, or that the trustee so advertised it, but affirms that he advertised strictly in conformity with the provisions of the deed, so much of said land as might be necessary to pay the debt, and refers to the advertisement, which is made an exhibit.

The advertisement is, that he will sell, by way of public auction, so much as may be necessary to pay the debt, &c. He and Fitzgerald both refused, as is alleged, the request of grantor to divide the tract, laying it off into four, five or six different farms, for which it was well adapted, and selling them separately, or so many of them as was necessary to pay the debt, &c.; and this allegation not being denied, on a motion to dissolve must be taken to be true. The plaintiff had a right, therefore, to conclude that they had no other purpose from the advertisement than to offer the whole in a body; for to do so, the creditor having no competition in the bidding, it would not sell for more than enough to pay his debt, interest and costs, if that. Under that advertisement, they might have offered it to the bidder who would pay the debt, &c., for the smallest quantity of the land, as in the sale of land for taxes. Or on the day of sale, they might have offered such part of it as they chose, and if insufficient, then offer another part of it, and so on until they sold enough to pay the debt. But this advertisement gives no notice to the public that it would be so offered, or how the tract would be divided, or description of the parcels that would be offered separately, so as to invite the attendance of bidders, who might wish to purchase portions of the tract.

It is true, that the deed of trust directs the trustee to "sell the said land, or enough thereof to pay the debt and interest then due, and the costs of sale." The trustee being the agent of both parties, it was his duty to sell the land as a whole, or in separate parcels, as would be conducive to its bringing the most money. It was his duty to sell it so as to get the best price for it. And the deed does not prescribe any particular mode for selling it. He is only limited not to sell more than enough to pay the debt, &c. It does not provide that he shall sell it in one tract, nor does it prohibit him to sell it in parcels. We hold that it was the duty of the trustee to sell it in parcels, if by that mode it would bring the best price. And although he has a discretion, it is a legal discretion, which is subject to the control of a court of equity. And if the land will bring a better price by dividing

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it and selling it in separate lots, and the owner desires and requests it, and the trustee refuses, the owner thereby invokes the intervention and assistance of a court of equity, in a proper case, to control him in the exercise of his discretion. In *Crenshaw* v. *Seigfried*, 24 Gratt., Judge Moncure, speaking for the whole court, said: "If the debtor desires that a particular and designated portion of the land, fully adequate by a sale for cash to produce the amount of the debt and expenses, such desire ought to be carried into effect." In this case, the debtor does not insist that only a part of the land shall be sold, or object to selling the whole, if necessary, for the payment of the debt and expenses, but only insists that it shall be laid off into particular and designated portions, having assurance that it will sell better, and will not require the sale of the whole to pay the debt and expenses. The principle as laid down in the cited case, we think, clearly applies to this. In that case, it was further held, that "the court, in the exercise of a sound discretion, had authority to substitute a commissioner of sale, in lieu of the trustee named in the deed," and, *a fortiori*, a substituted trustee.

The court having possession of this case ought, instead of dissolving the injunction, to have retained it, and directed the execution of the trust. It had authority to appoint commissioners to view the land and take testimony, and to report whether it was susceptible of division into different tracts, and in what way, with power to employ a surveyor to lay it off into as many different tracts as would promote an advantageous sale. And if upon the coming in of the report, the court was satisfied from it, and the testimony, that it would be conducive to an advantageous sale to have it so divided and sold in separate parcels, it would have authority to direct that it should be advertised and sold in such lots or parcels, and the order in which they should be sold, until enough were sold to pay the debt, interest and expenses; and there is nothing in the deed which is restrictive of the power of the court to so direct.

That such a mode of procedure would in this case conduce to an advantageous sale, we must conclude from what is before us. The bill so alleges, and that allegation is not contradicted by the answer; it ought, therefore, on this motion, to have been taken as true. And that allegation of the bill seems to be well supported by the consideration, as is alleged, if the tract is offered as a whole for cash, Fitzgerald would have no competition in bidding for it, and would get it at any price he might choose to bid, and the land would

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necessarily be subjected to a great sacrifice. Whereas, if it were laid off into a number of small, convenient farms, the plaintiff declares that there were persons within his knowledge who were able and willing to buy, and pay fair prices; and he believed, that in this way, the sale of a part of the tract would pay the debt and costs, and leave him a comfortable home; and these allegations of the bill are not denied in the answer. And why should not this just demand of the debtor be conceded to him, when it could not prejudice the rights of the creditor? It seems it is prevented by the refusal of the trustee, who has not answered the bill. The creditor, in his answer, says, "As to the allegations in regard to the parcelling out said land, this defendant can only say that all he desires is the payment of his debt and interest and costs, and would be satisfied with the sale of any portion of said land, however small that might be, sufficient for that purpose." That was all he was entitled to require. And the grantor had a right to require the trustee to proceed in a way to effect that object, by the sale of as little of the land as practicable. And the creditor does not now seem to object it. Why, then, should it not be done?

The court is of opinion, therefore, that the Circuit Court, instead of dissolving the injunction, should have continued it, retained the cause, and had the sale made under its supervision and direction, as indicated by its own commissioner; and might have appointed the substituted trustee such commissioner, upon his giving bond with security conditioned for the faithful execution of the trust, if not deemed otherwise unfit and disqualified for the discharge of the trust.

The court is of opinion, therefore, to reverse the decree of the Circuit Court dissolving the injunction, with costs, and to remand the cause to the said Circuit Court, to be proceeded with in conformity with the principles declared in this opinion.

MONCURE P. and CHRISTIAN J. dissented.

DECREE REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

SUMMERS *v.* DARNE AND ALS.

May 1, 1879.

In January, 1856, N. sold and conveyed to J. W. and R. H. Darne, a tract of land, and at the same time they conveyed the land to trustees to secure the purchase-money. In 1866, the trustees and R. H. Darne and wife released and conveyed the land to J. W. Darne. This deed bears date August 1st, 1866, and was acknowledged before justices on the 2d of November, 1866, and was received at the clerk's office for record on the 14th of the same month. By deed bearing date on 31st of October, 1866, J. W. Darne and wife conveyed the land to a trustee to secure a debt to N. This deed was acknowledged by J. W. Darne on the 2d of November, and by his wife on the 7th, and was received at the clerk's office on the 14th of November. In 1861, S. recovered judgments against J. W. Darne, which were docketed in 1865. On a suit in equity by S. to subject the said land to satisfy his judgments. HELD:

1. That though the deeds bear different dates, yet as they were acknowledged on the same day and received for record on the same day, it is fairly to be presumed that the two deeds were delivered on the same day, and that they were intended to take effect at the same time.
2. The second deed of trust does not show that the debt secured thereby is the same as that secured by the first deed, but it is proved, by parol evidence, that all of the principal money secured by the first deed, and a considerable amount of interest remained unpaid in 1866; and R. H. Darne being of opinion that he could not pay his part of it, at the request of said R. H. and J. W. Darne, N. agreed that the whole land might be conveyed to J. W., and he should give his notes for the amount, principal and interest, to be paid in two and three years, and give a deed of trust to secure them; and to carry out this arrangement, the deed from the trustees and R. H. Darne and wife to J. W. Darne, and his deed of trust to secure the debt was executed. HELD:
   I. Parol evidence is competent to prove the consideration on which these deeds were made.
   II. The facts stated do not constitute a novation of the debt; but it is still a debt due for the purchase-money of the land, and has priority over the judgments.
3. Though an exception is taken and entered at the time that a question asked of a witness is leading, the exceptant should bring it to the attention of the court and obtain an order for the suppression of the objectionable testimony, and if he fails to do this, the exception will not be regarded in the appellate court.
4. The County Court having made a decree in the cause, holding that the second deeds released the first deed of trust, and giving priority to the judgments, N. appealed to the Circuit Court, and that court affirmed the decree of the County Court. At the same term, N. filed his petition for a rehearing of the decree of the County Court, which was allowed. About the same time the parol evidence was filed. HELD:
   I. If the deeds alone are to be considered, it was a proper case for the rehearing of the decree.

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II. There is no rule of law which precludes the party from taking new evidence after an interlocutory decree, even before a rehearing is obtained. The introduction of such evidence depends on the sound discretion of the court, and all the circumstances of the particular case. Looking to this evidence, certainly the rehearing was proper.

5. The decree of the County Court, after declaring that the judgment liens have priority over the deed of trust, directs the sale of the land at public auction or at private sale, on credits stated, and that the commissioners should report their proceedings; and that a commissioner should ascertain and report the several liens on the land, and their priorities. This is an interlocutory decree.
6. Under the Code of 1873, ch. 178, § 25, so soon as the appeal from the decree of the County Court was allowed and perfected, the cause was at once transferred to the Circuit Court, and became a pending cause in that court. It was, therefore, not affected by the act of March 3, 1873, which applied only to causes then pending in the County Court.
7. The petition for a rehearing of the decree of the County Court having been presented and allowed to be filed at the same term at which that decree was affirmed by the Circuit Court, that court had complete control during that term of its decree, and might modify or review it at its pleasure.
8. Though the petition was for a rehearing of the decree of the County Court, and the order for a rehearing was confined to that decree, the Circuit Court acted upon the idea that the whole case was before it, in the exercise of its original jurisdiction, and that it had the same control of all the decrees and proceedings, as the County Court would have had if the cause had remained in that court. The Circuit judge, in giving leave to file the petition, must necessarily have intended to suspend the operation of the decree affirming the decision of the County Court, and the petition and order was intended to apply to both decrees.

This was a creditor's bill in the County Court of Loudoun, brought in June, 1870, by Richard H. Summers, against James W. Darne and Emily F. Darne, his wife, Wm. D. Nutt and others, to subject two tracts of land once held by James W. Darne, to satisfy four judgments recovered by Summers against James W. Darne in 1861, and docketed in 1865. The bill, after setting out the judgments, alleged that at or after the time of the rendition of the judgments, James W. Darne was seized of a tract of 213 acres and 29 poles in the county of Loudoun, which, by two deeds dated, respectively, on the 31st of October, 1866, and the 13th of January, 1869, was conveyed by said Darne and wife to Frederick B. Maguire, in trust for the benefit of William D. Nutt; also, a tract of 225 acres, two roods, which said Darne and wife, by deed dated the 22d of December, 1866, conveyed to said Maguire, in trust to secure to said Nutt the payment of $1,800, due the 22d December, 1871, and 1873, and which tract, by another deed dated the 27th of January, 1869, Darne and wife conveyed to George W. F. Hummer, in trust

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for the benefit of Mrs. Darne. That on the 23d of May, 1870, Maguire, under the two deeds of October, 1866, and January, 1869, sold in the city of Washington the tract of 213 acres and 29 poles, and it was purchased by Wm. D. Nutt at the price of $2,860. The plaintiff objected to this sale on various grounds; he prayed that an inquiry be made as to what lands Darne has had at any time since the first day of the June Term, 1861, of the County Court of Loudoun, at which said judgments were rendered, and also what were the liens thereon, and their priorities; and that the court would decree that the purchase-money of $2,800, with interest thereon, be applied to pay said liens, if sufficient for the purpose; and if not sufficient, that the sale should be set aside, and the said land, and any other realty of said Darne subject to said liens, be sold, and the proceeds applied to the payment of the said liens, and for general relief.

At the October Term, 1870, of the court, the cause came on to be heard upon the bill taken for confessed as to all the defendants, when the court made a decree directing a commissioner to ascertain and report what real estate James W. Darne is now, or has been, seized or possessed of on or since the first day of the terms at which the judgments of complainant were rendered, and all the liens thereon and their priorities, and the value and annual value of the said realty, with any other matter, &c.

On the 14th of February, 1871, Commissioner F. M. Henderson returned his report. He reported the liens upon the real estate by judgments at $3,018.49, and Nutt's second deed of trust at $808.50; the deed of trust of October 31st, 1866, as released, and therefore not a lien.

The cause came on again to be heard at the February Term of the court, upon the papers formerly read and the report of the commissioner, when the court recommitted the report, with instructions to the commissioner to inquire and report for what price Wm. D. Nutt bought the tract of 213 acres sold to him by the trustee, Maguire, and also what interest James W. Darne has in the tract of 225 acres mentioned in the bill, its value and annual value, with any matters, &c.

At the March term of the court Wm. D. Nutt filed his answer in the cause. He admitted the plaintiff's judgments, but denied they were a lien on the land, superior to that of respondent. He states that in January, 1856, he sold to James W. Darne and Richard H. Darne, a tract of land in Loudoun county, containing 213 acres and 29 perches, for

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$400 cash, and the residue of the purchase-money, $1,900, to be paid in four equal annual instalments, the interest thereon to be paid semi-annually, and for the security thereof, the said parties executed a deed of trust to Wm. B. Randolph and Anthony McLean; the deed and deed of trust were both delivered at the same time, and both entered of record at the same date. The purchasers failed to pay the deferred payments or the interests accruing thereupon; and Richard H. Darne being of opinion that he would be unable to comply with his contract, applied to respondent to be relieved; James W. Darne, however, thought that if the time of payment was extended, he would be able to meet the payment for said land. Accordingly, at their earnest request, respondent consented, that if they would pay him $242—his debt and interest amounting on the 1st of September, 1866, to $2,242—and pay him the residue in gold or its equivalent in currency, in two and three years, interest thereon half yearly, he would agree to their proposition. To effect this arrangement, it was then agreed, in order to divest any title that Richard H. Darne might have in the land, that Randolph and McLean, the trustees in the deed from James W. and Richard H. Darne, should unite in a deed to James W. Darne for the said land; and that James W. Darne should then execute his bonds with another deed of trust to secure them, in lieu of the original bonds for the purchase by Richard H. and James W. Darne. And accordingly the deeds were prepared, and executed at the same time, and admitted to record on the same day; and copies are filed with the answer. And he insists that by this last deed James W. Darne secures to him the same debt secured in the original deed, and agrees to pay the same in gold or its equivalent, that being the currency in which the original debt was contracted.

The defendant insists that the proceeding to sell under the deed of trust was regular, and the sale was fairly conducted; and that as the highest bidder at the sale, he became the purchaser, and the price paid for the land did not pay his debt by the sum of $197.45.

As to the tract of 255 acres and two roods, he sold it to James W. Darne, and that there is now due to him the sum of $1,800. That the deed therefor and the deed of trust to secure its payment were executed at the same time, and admitted to record at the same time.

In July, 1871, commissioner Henderson returned his report. He states the sale by Nutt to James W. and Richard H. Darne in January, 1856. That after sundry pay-

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ments, the amount due thereon on the 31st of October, 1866, was $2,242. That Richard H. Darne wished to be relieved, and Wm. D. Nutt did release him on certain terms, as follows: James W. Darne was to pay $242, which was done, and the amount reduced to $2,000, payable in gold or its premium at maturity, provided the same should be paid in currency. The sale by the trustee was made June 20th, 1870, and the purchaser was Wm. D. Nutt.

The commissioner then makes a statement of the debt secured by the deed of 1866, and the expenses of sale, making $2,894.45; and after deducting the purchase-money, $2,700, shows a deficiency of $194.45. He also makes a statement of the original debt due October 31st, 1866, $2,242, and makes the excess of the notes secured by the last over the debt due $191.54. He refers to the court the question whether there has been a novation of the original contract. He states that the tract of 255 acres is assessed at $2,555, and that the rents of the lands will not pay the debts in five years.

The commissioner returns with his report the deeds. The deed of trust from James W. and Richard H. Darne to Randolph and McLean to secure the purchase-money of the land to Nutt, was dated the 1st of January, 1856, and was admitted to record on the 5th of January. The deed from Randolph and McLean, and Richard H. Darne and wife, to James W. Darne, is dated the 1st of August, 1866. It is acknowledged before justices of the peace on the 2d of November, 1866, and admitted to record on the 14th of November. This deed refers to the deed of trust from J. W. and R. H. Darne, and recites that the purposes of said deed have been satisfied, and that R. H. Darne has for a valuable consideration sold all his interest in the land to J. W. Darne, and directs that the whole land shall be released and conveyed to him. The deed from James W. Darne and wife is dated the 31st of October, 1866, acknowledged before justices on the 2d and 7th of November, and admitted to record on the 14th of November, the same day that the deed from Randolph, &c. was admitted to record. The debt secured is evidenced by two notes, payable in two and three years, with interest.

The cause came on again to be heard on the 19th of March, 1872, when the court held that the deed from Randolph, &c., to James W. Darne, dated August 1st, and acknowledged the 2d of November, 1866, fully released and extinguished the lien of the deed of trust from James W. Darne, &c., to said Randolph and McLean, bearing date the 1st of January, 1856, and was a conveyance in fee of the tract of 213 acres

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and 29 poles to James W. Darne; and that said deed of August 1st, 1866, was not simultaneous with, but prior to the deed of trust from James W. Darne and wife to F. B. Maguire, trustee, bearing date on the 31st day of October, 1866; and that the judgments of the plaintiff, and the other judgments existing at the time when the said deed of trust to Maguire was recorded, are liens on said 213 acres and 29 poles, prior to the lien of the said deed of trust to Maguire of October 31st, 1866.

And it was decreed that the sale by Maguire be set aside, and a sale be made, upon credits, as prescribed in the decree. And it was further ordered that F. M. Henderson, or some other commissioner of the court, do ascertain and report what liens there are on the tract of 255 acres, and their priorities. From this decree Nutt appealed to the Circuit Court of Loudoun.

On the 13th of October, 1873, two depositions which had been taken by the defendant, Nutt, on the 7th of the same month, were received by the clerk of the Circuit Court, and filed in the papers of the cause. These were the depositions of James W. and Richard H. Darne. James W. Darne was asked by Nutt's counsel: 2d question. Did you in the year 1866 agree to take upon yourself the whole liability for said purchase, and was Richard H. Darne agreed to be released therefrom by W. D. Nutt, and state the circumstances and the mode by which said release of Richard from the purchase was effected? (Question excepted to by counsel for plaintiff.)

Answer. I did agree to take upon myself the liability of the whole of said purchase, the said Richard H. Darne feeling himself unable to comply with said purchase, and the deed for the said tract of land was made out and signed by Richard and his wife, and the trustees in the deed of trust.

Question 3. Was the said deed ever delivered to you?

Answer. It never was delivered to me, and I never have seen it (Excepted to by plaintiff's counsel.)

Question 4. Was it, or not, understood that the deed aforesaid to you, by which Richard was released from his purchase, was to have no effect until the deed of trust was given, and was not that the reason why the deed was not delivered? (Excepted to by plaintiff's counsel.)

Answer. It was so understood and intended; that was the reason the deed was not delivered.

And in answer to another question, witness stated that he owed to Nutt the original purchase-money and more, and it was the same money contained in the deed of trust to Maguire.

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Richard H. Darne stated that he did purchase the land in conjunction with his brother in the year 1856, and in 1866 he became dissatisfied and did not think he could get through with the debt, and his brother James took the debt upon himself, provided Wm. D. Nutt would release witness from the place and debt, which was done.

The justice, who took these depositions, in his certificate, stated that the counsel for the plaintiff, before the examination of the witnesses was entered upon, excepted to the taking of the depositions, because the case had been already submitted, heard and decided in the County Court of Loudoun, and was then before the Circuit Court upon an appeal to be heard upon the record from the court below, and for all other causes.

At the October term, 1873, of the Circuit Court, the court affirmed the decree of the County Court of March, 1872, with costs.

At the same term of the court, James W. Darne filed his answer in the cause, in which he sustained the defendant, Nutt, in his account of the transaction of 1866. And also at the same term of the court leave was given the defendant, Nutt, to file a petition for rehearing in this cause. In his petition he refers to the decree of March, 1872, of the County Court, and prays that it may be reheard; and he proceeds to state the facts as to his sale, and the two deeds of trust as he had before stated them in his answer.

On the 4th of May, 1875, the cause came on again to be heard upon the papers formerly read, and the petition for a rehearing of the decree entered by the County Court of Loudoun at its March term, 1872, upon the depositions of witnesses and the answer of the defendant, Darne, and the court being of opinion that the said decree should be reheard, it was decreed that the cause be recommitted to commissioner Henderson, with instructions to inquire of and state the liens, with their priorities, after considering the evidence now in the record, or which the parties may hereafter adduce. And thereupon the plaintiff, Summers, applied to this court for an appeal; which was allowed.

John M. Orr for the appellant.

H. W. Thomas and *Wm. W. Crump* for the appellees.

STAPLES J. delivered the opinion of the court.

HELD as stated in the head-notes.

DECREE AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

SEPTEMBER TERM, 1879.

GRUBB'S ADM'R *v.* SULT.

1. An action for breach of promise of marriage will not lie against the personal representative of the promisor, either at common law or under our statute (Code 1873, ch. 126, § 19), in a case where no special damages are alleged and proved. In such a case, the maxim, *actio personalis moritur cum persona*, applies.
2. *Quære:* Can such an action be maintained against the personal representative of the promisor where special damages are alleged and proved?

This was an action of *assumpsit*, brought in the Circuit Court of Wythe county by Nancy Sult against Francis Grubb, administrator of Isaiah F. Grubb, deceased, for an alleged breach of promise of marriage, made by the decedent to the plaintiff in his lifetime. No special damages are alleged in the declaration. The defendant demurred to the declaration and to each count, but the court overruled the demurrer. He then pleaded *non assumpsit*, and *non assumpsit* within one year. To the latter plea, the plaintiff demurred, and the court sustained the demurrer. Issue having been joined on the plea of *non assumpsit*, the jury rendered a verdict for the plaintiff, and assessed her damages at $600, for which judgment was entered, and the defendant applied for and obtained a writ of *supersedeas* to this court. The case was heard at Wytheville, and decided at Staunton.

G. J. Holbrook and *R. C. Kent* for the plaintiff in error.

J. H. Gilmore and *C. B. Thomas* for the defendant in error.

STAPLES J. The only question to be decided in this case is, Whether an action for a breach of promise of marriage lies against the personal representative of the promisor?

The counsel for the defendant in error insist, that at common law the personal representative may sue or be sued upon all contracts of the deceased, especially where the breach has been incurred in the lifetime of the parties, and that a contract founded on a promise of marriage is no exception to the rule. They further insist, that if they are mistaken in this view, and the action is not maintainable according to the rules of the common law, it is plainly provided for by statute.

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These two propositions may be considered in the order in which they are stated. At common law, if an injury was done either to the person or the property of another, for which damages could only be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done. In other words, where the declaration imputed a tort to the person or property of another, and the plea must have been not guilty, the maxim was *actio personalis moritur cum personâ*. According to the earlier authorities, this maxim of the common law is only to be understood of a tort, and had no application to causes of action arising upon contract, especially if broken in the lifetime of the decedent.

The proposition that the personal representative is liable upon every contract of the deceased, was, however, always to be understood as not applying to those cases in which the damage consisted in the personal suffering of the deceased, or in a personal wrong done by him—unless, indeed, some injury to the personal estate could be stated on the record. So that, whenever the injury is merely personal, whether resulting from breach of contract or from tort, the maxim, *actio personalis moritur cum personâ*, prevails. 2 Williams on Executors, bottom pages 786-7-790; 4 Minor In., Part I., pages 793-4; Broom's Legal Maxims, side page, 907-8-9-10; Wharton's Legal Maxims, page 19.

One of the earliest cases on this subject is that of *Chamberlaine* v. *Williamson*, 2 Maule & Sel., 408, in which it was held that an administrator cannot maintain an action for a breach of promise to the plaintiff's intestate where no special damage is alleged. This case has always been recognized as a leading one. Lord Ellenborough took time to examine the decisions, and afterwards delivered a carefully prepared opinion. He said "the action was novel in its kind, and not an instance had been cited or suggested in the argument of its having been maintained, nor had he been able to discover any by his own researches or inquiries; and yet, frequent occasions must have arisen for bringing such actions." He further said, "executors and administrators are the representatives of the temporal property—that is, the debts and goods of the deceased—but not of their wrongs, except where these wrongs operate to the temporal injury of the personal estate." Where the damage done to the personal estate can be stated on the record, that involves a different question. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage subsists in the previous personal suffering of the testa-

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tor, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased, all such as arise out of the unskilfulness of medical practitioners, the imprisonment of the party brought on by the negligence of his attorney; all these would be breaches of the implied promise by the persons employed to exhibit a proper skill and attention. He was not aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case.

This opinion of Lord Ellenborough was delivered more than sixty years ago. The researches of counsel have not produced a case during all the intervening period controverting the opinion or the conclusions in *Chamberlaine* v. *Williamson*. On the other hand, we have the opinions of all the commentators and text-writers, and the decisions of several courts of the highest respectability and standing, fully sustaining the case of *Chamberlaine* v. *Williamson*. One of these is *Stephens* v. *Williams*, 1 Pickering Rep., 71, in which it was expressly held that an action for breach of promise of marriage does not survive against the administrator of the promisor where no special damage is alleged. The Supreme Court of Massachusetts, after quoting the language of Lord Mansfield in *Hambly* v. *Trott*, Cowp. R., goes on to say: "The distinction seems to be between causes of action which affect the estate and those which affect the person only —the former survives for or against the executor, and the latter die with the person. According to these distinctions, an action for the breach of promise of marriage would not survive, for it is a contract merely personal—at least it does not necessarily affect property. The principal ground of damages is disappointed hope; the injury complained of is violated faith, more resembling, in substance, deceit and fraud than a mere common breach of promise. The damages may be, and frequently are, vindictive, and if they could be proved against the executor, might render the estate insolvent, to the loss and injury of creditors. For these and other reasons, it has been settled in England that such an action does not survive for an executor. If this was rightly settled, it is decisive, for the law is unquestionably the same whichever party may die."

The case of *Smith* v. *Sherman*, 4 Cush., 408, involved identically the same question, and was decided the same way, Chief-Justice Shaw, delivering the unanimous opinion of the court.

In *Lattimore et als, ex'rs of Rogers*, v. *Simmons*, 13 Sergeant &

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Rawle, 183, substantially the same question was involved, and the same conclusion reached as in the Massachusetts decisions. In that case, however, the action had been brought in the lifetime of the contracting parties. The defendant having died during the pendency of the action, the question was, Whether it survived against his executors?

Tilghman C. J., in delivering the opinion of the court, said: "The counsel for the plaintiff rely on the contract in this case, and on some general *dicta* that all actions founded on contract survive. The position is too general. If true, it must extend to contracts implied as well as expressed. Suppose the case of a physician or surgeon, who, by unskillful treatment, injures the health of a patient. Here is a breach of an implied contract, and yet it will hardly be contended that in case of death the cause of action would survive. It seems reasonable, therefore, to confine the survivor of action to cases in which actual property is affected, even though there be an express contract. A promise of marriage is undoubtedly a contract, though one of a singular nature. By its breach, the feelings of the injured party may be deeply wounded, but it is not perceived that his property is in any manner affected. I speak now of the case as stated on this record."

After this array of authorities—English and American—after the failure of counsel to produce a single case, or even the dictum of one author or writer to the contrary, it would seem the height of rashness to insist that an action of this sort can be maintained at common law against an executor or administrator without averring and proving some special damage sustained. Whether upon such an averment the action can be maintained has not been fully determined. Nor is it necessary now to decide the point, as the question does not arise upon this record.

It only remains to inquire whether the rule of the common law has been changed by statute.

The provision relied on by the defendant in error is contained in the 19th section, chap. 126, Code of 1873: "A personal representative may sue or be sued upon any judgment for or against or on any contract of or with his deceased."

The learned counsel did not claim that this enactment had altered the common law rule. On the contrary, he was inclined to consider it merely declaratory of the common law. He insisted, however, that its terms are broad enough to cover any contract of the deceased, and the courts are bound so to construe it.

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It will be universally conceded, that, in the interpretation of statutes, the leading idea is to find out the intention of the Legislature. In ascertaining that intention, we must, of course, look at the terms used. As a general rule, where they are explicit, the courts are not at liberty to say that the Legislature intended something different from what the language expresses. This general rule is, however, subject to the qualification that if the court is satisfied, the literal meaning of the words would extend the act to cases the Legislature never designed to include; it will restrain their operation within narrower limits so as to carry out what was the manifest intention. *Brewer* v. *Blougher*, 14 Peters, 178.

It must be borne in mind that this provision has been substantially in force since 1785. The only difference between the act of 1785 and the present law is, that the former declare that executors or administrators might sue or be sued "on all personal contracts of the deceased," whereas the word "personal" was omitted at the Revisal of 1849. Whether this change be material or not, it has no effect upon the present question.

Although nearly a hundred years have passed since this statute was passed, no case has been found in which it has been held to apply to actions for breach of promise of marriage against the personal representative of the promisor. Certainly our reports furnish no such case. It is safe to say the profession generally have not entertained any such idea. These considerations, although by no means conclusive, are certainly entitled to some weight in the interpretation of the statute.

Although a breach of promise to marry is a violation of contract, it is yet essentially a tort to the person, and comes so fully within the reason and influence of the principle governing actions *ex delicto*, it is impossible to distinguish between them.

In all other cases of breach of contract, as a general rule, the damages are limited to the direct pecuniary loss resulting from the breach, and no regard is had to the motives or feelings of the parties. But in the action for breach of promise of marriage, though in form *ex contractu*, this rule does not prevail. It being impossible to fix any rule or measure of damages, it is permissible to take into consideration all the circumstances of the case, the loss of comfort, the injury to the feelings, affections and wounded pride of the plaintiff. The jury being the proper judges of damages, having unlimited discretion over the subject, the court will not interfere

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with their verdict unless there be some reason to impute either undue prejudice, passion or corruption. Field on Damages, sec. 534, 5 and 6; Sedg. on the Measure of Damages, side page 210, top 248.

If, under the statute, the action survives against the personal representative of the promisor, it must also survive in favor of the personal representative of the promisee. In such case it might become a grave question whether the latter would not be guilty of a *devastavit* in failing to sue for the benefit of creditors and distributees. It would certainly be the first instance on record of an action prosecuted by one personal representative against another for the recovery of mere vindictive damages, as assets for the benefit of creditors.

In the case of *Dillard* v. *Collins*, 26 Gratt., 346, this court held that a right of action which is merely personal and dies with the party, is not transferred to an assignee in bankruptcy; that the assignee in many respects stands in the same relation towards the bankrupt's estate as that of an executor towards the personal estate of the testator. The distinction was there taken between rights of action for torts to the person which do not survive, and rights of action for injuries to property which do survive. The former, it was said, do not pass to the assignee. But if the proposition now contended for be correct, a right of action founded on a breach of promise of marriage would pass to the assignee in bankruptcy, and be the subject of a suit against a personal representative for the benefit of the bankrupt's creditors.

As was said by Lord Mansfield in *Humbly* v. *Trott*, Cowp., 376, all public and private wrongs die with the offender. And this was pre-eminently a wise rule of the common law, founded on considerations of the soundest public policy. In actions based upon torts to the person, such, for example, as slander and breach of promise of marriage, the motives and feelings of the parties are often involved, everything relating to their character and conduct is the subject of investigation. Sometimes the chastity of the plaintiff is assailed with every circumstance of aggravation; and on the other hand, the bad faith of the defendant is made the occasion of the severest animadversion. In this class of cases, not unfrequently the most private and sacred family relations are unveiled and exposed to public gaze and criticism. The common law wisely proceeded upon the maxim that with the death of either party these investigations should cease, and when the injured party is dead, no pecuniary damages can compensate for violated faith, wounded pride and outraged feelings, and that

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the courts should never become the arenas for unseemly controversies involving the reputation and the feelings of those who are in their graves.

The Legislatures and the courts have wisely adhered to this rule through all the innovations of modern times. There may be exceptional cases—cases of undoubted hardship—but the rule is found to be generally wise and salutary in its operation.

The learned counsel for the defendant in error has depicted in eloquent and forcible language the injury often resulting from breach of promise of marriage, loss of position and health, and not unfrequently pecuniary ruin; and for these injuries it is said the party aggrieved ought not to be deprived of compensation by the death of the offender. The argument of the learned counsel applies with much greater force to cases of slander and libel, malicious prosecution and false imprisonment, which often involve loss of character, station and health, as also loss of fortune.

In all this class of injuries it may be said the injured party should not be denied redress because the offender may die, and in many cases this would be perfectly true. But no one seriously thinks of changing the law on the subject; because all understand that such a change would be productive of far greater mischief than benefit.

In the State of New York they have a statute substantially the same as ours, which was the subject of consideration in *Wade* v. *Kalbfleisch*, 58 New York Rep. It was there held that an action for a breach of promise of marriage is not an action upon a contract within the meaning of the statute, and cannot be revived against the personal representatives of the promisor. Church C. J., in delivering the opinion of the court, said: "The wrongs for which this statute authorizes an action to be brought by or against executors are such as affect property or property rights and interests, or in other words, such as affect the estate. Executors represent property only. They can take only such rights of action as affect property, and cannot recover for injuries for personal wrongs. Although in form it resembles an action on contract, in substance it falls within the definition of the exception as an action in the case for personal injuries."

These views of the highest court of the State of New York, in the construction of a statute like our own, upon a question of this sort, are deservedly entitled to great respect. Upon a doubtful question they would be decisive of the case.

In considering this question, we have not deemed it necessary to inquire whether our statute was designed to provide

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for cases not reached by the common law, or is simply declaratory of that law. Because in either aspect, cases of breach of promise of marriage are not embraced by its provisions.

It was asked in the argument what possible use or benefit is there in the statute. This court is not called on to hunt up imaginary cases for the application of the statute. All we have to do is to decide upon its operation and effect as the question comes before us. Every one familiar with the doctrines of the common law knows that difficulties constantly occur in determining whether the action survives to the personal representative, or to the heir upon a covenant real. For example, it has been held that if the covenant has been broken in the lifetime of the testator, the right of action passes to the executor; otherwise, however, if the substantial damage has taken place since his death. And so at common law no liability attached to the executor where the contract was personal to the testator, unless a breach was incurred in his lifetime. Williams on Executors, 802, 5 and 6; 2 Lomax on Executors, top 430, mar. 254.

Whether the statute in these and kindred cases was intended to give a right of action to the personal representative without regard to the time of the breach of contract, or was intended to remove all doubts and uncertainties as to the right of action, or was simply and fairly affirmative of the common law, we repeat, it does not concern us now to decide. And these examples are simply given to show there was good reason for such an enactment without applying it to cases of breach of promise of marriage.

We are, therefore, of opinion that the Circuit Court erred in overruling the demurrer to the declaration, and in sustaining plaintiff's demurrer to the defendant's plea of the statute of limitations, and as a necessary consequence, it erred in refusing to set aside the verdict and grant the defendant a new trial. The judgment must therefore be reversed, the verdict set aside, and a new trial awarded. This court, proceeding to enter such judgment as the Circuit Court ought to have entered, sustains the demurrer to the declaration. It cannot, however, enter a final judgment in the case, because the plaintiff may be able to state on the record some special damage, as to which this court expresses no opinion. She ought to have leave to amend her declaration. And the cause is remanded to the Circuit Court that the case may be further proceeded in in conformity with the views herein expressed.

JUDGMENT REVERSED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

SHINN *v.* THE COMMONWEALTH.

May 1, 1879.

1. Although one of the forty-eight persons directed by the judge to be summoned to serve as grand jurors for the ensuing twelve months, may be incompetent to serve as a grand juror, a grand jury of sixteen selected from this list, all of whom are competent, is a legal and duly qualified grand jury.
2. Where one of the grand jury finding an indictment was incompetent, and for that reason the grand jury is dismissed and the indictment quashed, the court may direct a special grand jury of eight to be summoned and empannelled at the same term; and an indictment found by this grand jury is valid.
3. Upon an indictment against S., the Secretary of a Building Fund Association, for the larceny of a check, the property of said Association, the records of the Association whilst he was in office, and oral evidence relating to the organization, objects and business of the Building Association, the appointment and duties of S. as Secretary, his conduct with respect to the funds of the Association in his hands, and his disposition and appropriation of the check, for the larceny of which he was indicted, are competent evidence against him.
4. In such a case, whether the Building Fund Association was organized strictly in conformity with the requirements of the statute, is not a proper subject of inquiry. S. having, as Secretary of the Association, received and wilfully appropriated its funds or property, cannot be heard upon a criminal prosecution therefor, to contradict its legal existence.
5. The check having been given to S., the Secretary, in payment of a debt due to the Association, was the property of the Association, and though payable to S., as Secretary, it was also payable to bearer, and it was the duty of S. to turn it over to the Treasurer. If S. had accounted for the money, that fact would, of course, show that he had no intention to appropriate the check. Not having done so, it was a question for the jury, whether he intended to embezzle the check. And to convict him, it was necessary that the jury should be satisfied that this intention existed before, or at the time the check passed into the possession of the bank.
6. Though the Building Association was organized under the act of 1852, even if that act applied to a prosecution for the embezzlement of a check by an officer of the Association, the act of February 24th, 1874, p. 81, sec. 11, being subsequent in date, must control the case.
7. If S. drew the money on the Avery check with the intention of using the same for his own purposes, and not for the liquidation of the Avery debt, though probably with the intention to return the same at some future day to the Building Association, he is guilty of the embezzlement of the check.
8. Where there is ground to believe that certain jurors named, had not formed such decided opinions as disqualified them from giving the prisoner a fair trial, the verdict will not be set aside on the ground that they were incompetent jurors.

At the December Term, 1878, of the Corporation Court of

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Alexandria, a grand jury of eight members indicted George R. Shinn, for the larceny of a check, which was in the following words and figures:

Alexandria, Va., August 18th, 1874.

The Citizens Bank of Alexandria,

Pay to Geo. R. Shinn, Sect'y, or bearer, six hundred and fifty three dollars and fifty cents.

$653.50. WESLEY AVERY.

The indictment contained two counts—the first stating that the check was the property of the Alexandria Co-operative Building Association of Alexandria, Va.; and the second, that it was the property of Wesley Avery.

The defendant filed two special pleas, to which the Attorney for the Commonwealth demurred, and the court sustained the demurrer. The first special plea stated, that of the list of forty-eight persons directed by the judge to be summoned to be grand jurors for twelve months thereafter, one of them, Herbert Bryant, had been adjudged by the court to be the owner of a mill, and disqualified to act as a grand juror; and that the grand jury which found the indictment in this case was summoned from said list, and not summoned to fill vacancies in a grand jury; and so the said list so furnished as aforesaid was not a list of forty-eight persons suitable in all respects, to serve as grand jurors, as required by law.

The second special plea, after setting out the fact that Herbert Bryant, one of the grand jury of sixteen empannelled and sworn at said December term of the court, had been adjudged by the court incompetent, and the grand jury discharged, states that the court directed the clerk to issue a *venire facias* for a special grand jury of eight, returnable the next day; that said special grand jury was summoned from the said list furnished as aforesaid; that said eight persons so empannelled and sworn, the said Herbert Bryant not being one, presented the paper purporting to be an indictment, which is the paper upon which the defendant is about to be tried. And he says, that the said December term, 1878, was a regular grand jury term, at which there should have been a regular grand jury of not less than sixteen qualified jurors; that the sixteen persons sworn as aforesaid, did constitute a regular grand jury at the December term, 1878, and the summoning the said special grand jury at said December

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term, 1878, was illegal, and that the paper presented by said special grand jury at said term, purporting to be an indictment against the defendant, and on which he now stands charged, is of no effect, null and void.

The defendant then moved the court to quash the indictment; but the court overruled the motion. He then demurred to the indictment and each count thereof, which being overruled, he pleaded not guilty.

On the trial, the jury found the prisoner guilty on the first count in the indictment, and fixed the term of his confinement in the penitentiary at three years.

In the course of the proceedings the prisoner took seven bills of exceptions to rulings of the court, which will be best understood by a brief statement of facts.

The Alexandria Co-operative Building Association of Alexandria, Va., was incorporated in 1870, and was organized on the 8th of September of that year; though it was one of the questions made in the cause whether its organization had been regular. Of this Association, Edward S. Leadbetter was President, the prisoner was the Secretary, and continued as such until the 10th of October, 1876. A. H. Smyth was Treasurer until after September, 1875, when he resigned, and J. H. Reid was elected his successor. The meetings of the Association were held on the first and third Tuesday evenings of each month, and at these meetings the stockholders paid the subscription on their stock, and the borrowers paid the premiums on their loans. The Secretary was on the left, and the Treasurer on the right of the President at said meetings, and the stockholder would hand the book with the money owed by him, to the President, who would generally count it and say it was correct; then the Secretary would receipt in the pass-book of said stockholder, and enter it on the Secretary's book to the credit of the stockholder, and the President would credit to said stockholder the amount so paid, on the check-sheet, and the money would be handed to the Treasurer.

The Secretary kept the books of the Association, and frequently during the intervals between the meetings, he received money of stockholders, and settled the loans and received payments of such loans, and, as a rule, the money or checks were reported and accounted for by him at the next succeeding meeting, and entered on his Secretary's book to the credit of such stockholders or borrowers. The President would also credit it on the check-sheet as of that meeting, and the same was receipted for by the Treasurer to the Sec-

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retary. Borrowers were permitted to settle their loans with the Secretary at any time, and he was the only person to settle with them; and the Secretary received payments thereof in currency or checks as money, and turned over to the Treasurer what he so received.

In August, 1874, Wesley Avery was a member of the Association, and was indebted to it for money borrowed. On the 18th of August, 1874, he called upon the prisoner at his place of business in the city of Alexandria, to settle with him, as Secretary of the said Association, his indebtedness to it; the prisoner informed him that the amount of his said indebtedness was $653.50, and drew up a check payable to himself as George R. Shinn, Secretary, or bearer, for that amount, and handed it to Avery, who signed it and returned it to Shinn, not giving Shinn any directions as to the use of it, but intending it as a payment of his indebtedness to the Association. This check was paid by the bank to Shinn, but was not returned or accounted for at the meetings of the Association, nor was it known to the Association that Avery had paid his debt until after Shinn left Alexandria in October, 1876, when, on application to Avery for payment, he produced the check; and upon examination of the books of the Association, and application to the persons who appeared to be debtors, there appeared to be other instances in which Shinn had received payments of debts without accounting for the money.

It appears that eight indictments had been found against Shinn, one for forgery, and the others for embezzlement and larceny, of which the present is numbered seven. On three of these indictments he had been tried and acquitted by the jury; and on two others, one of which seems to have been an indictment for the embezzlement and larceny of the same check of Avery, the jury could not agree upon a verdict, and were discharged.

The first bill of exceptions relates to the refusal of the court to send to another county or corporation for a jury, on the ground that an impartial jury could not be obtained in the city of Alexandria.

The second relates to the refusal of the court to exclude from the jury as evidence, the articles of association of the Alexandria Co-operative Building Association of Alexandria, Va.

The third was to the admission as evidence of the annual statement of the Secretary in the prisoner's hand writing

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rendered to the first meeting in September, 1874. It had been proved that the Constitution of the Association required the Secretary and Treasurer to make quarterly reports on the first meeting in December, March and June of each fiscal year, and a statement annually on the first meeting in September, the end of each fiscal year, which annual statement of the Secretary was required to show the standing of each member, on stock and loan account, and the condition of the Association, its assets and liabilities.

The fourth bill of exceptions was to the refusal of the court to exclude from the jury all the evidence offered in behalf of the Commonwealth, and set out in this and the second and third bills of exceptions.

After all the evidence, both for the Commonwealth and the prisoner, had been introduced, and the case had been argued, the prisoner moved the court to give to the jury nine instructions. Of these the court gave the 4th, 5th, 6th and 7th, but refused to give the rest; and of its own motion gave the following:

1st. If the jury believe from the evidence, beyond reasonable doubt, that the Alexandria Co-operative Building Association was a body corporate, duly incorporated by the laws of this Commonwealth; that the check described in the said indictment was delivered to the prisoner by Wesley Avery, the said check (or proceeds thereof) to be paid over to the said Association in payment of an indebtedness from the said Avery to the said Association; that the prisoner received the said check for the said Association; that the said check was the property of the said Aasociation; that the prisoner presented the said check to the bank upon which it was drawn and obtained the money therefor; that he has not paid the said money to the said Association in payment of said indebtedness, but has used the same for his own purpose without the permission or authority of the said Association; then if the jury shall further believe that the prisoner, whilst the check was in his possession, and before it had passed from his possession to the possession of the bank, conceived the purpose of obtaining the money on said check, not for the payment of the said indebtedness, but using the same for his own purpose, without obtaining permission or authority of the said Association, then the jury may find the prisoner guilty under the first count.

2d. If the jury believe from the evidence beyond reasonable doubt, that the check described in the indictment was

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delivered to the prisoner by Wesley Avery, the check itself (or the proceeds thereof) to be paid by the prisoner to the Alexandria Co-operative Building Association in payment of an indebtedness of the said Avery to the said Association; that the said Association was a body corporate, duly incorporated under the laws of this Commonwealth; that the prisoner presented the said check to the bank upon which it was drawn, and obtained the money therefor, and had not paid the said money either to the said Association in payment of the said indebtedness, or to the said Avery, but had used the same for his own purposes without the permission or authority of the said Avery; that said check was the property of the said Avery—then if the jury shall further believe from the evidence, beyond reasonable doubt, that the prisoner, whilst the check was in his possession, and before it had passed to the possession of the bank, conceived the purpose of obtaining the money on said check and using the same not for the payment of the said indebtedness or of paying the same to the said Avery, but to use the same for his own purposes, without obtaining the permission or authority of the said Avery, the jury may find the prisoner guilty under the second count.

3d. To justify the jury in finding the prisoner guilty under the first count, they must believe, from the evidence, beyond reasonable doubt, all the facts as stated in the first instruction. To find the prisoner guilty under the second count, they must believe all the facts as stated in the second instruction. If they do not believe all the facts as stated in one or the other of said instructions beyond reasonable doubt, they will find the prisoner not guilty.

To the refusal of the court to give said instructions as asked, and to the action of the court in giving the 1st, 2d and 3d instructions, the defendant excepted, and prays that this, his fifth bill of exceptions, may be signed, sealed and enrolled, which is accordingly done.

The sixth exception is to the answer of the court to an inquiry of the jury. And the seventh is to the refusal of the court to set aside the verdict and grant the prisoner a new trial; which was asked, on the grounds that the verdict was contrary to the evidence and law, and other grounds; and among them, that three of the jurors named were not competent jurors on account of prejudice and bias against the accused.

The court having sentenced the prisoner in accordance

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with the verdict, he applied to this court for a writ of error; which was awarded.

Chas. E. Stuart for the prisoner.

Attorney General and *Sam'l G. Brent* for the Commonwealth.

STAPLES J. delivered the opinion of the court.

HELD as stated in the head-notes.

JUDGMENT AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

JULY TERM, 1879.

ST. JOHN'S EX'ORS *v.* ALDERSON.

The executors of S. brought suit in the County Court of Washington against A. and his sureties, for a debt alleged to be due by A. to the estate of S. On the trial, the receipt of the sheriff of the county was produced, shewing that A. had paid the debt to him; but it was also shewn, that he had received it after a forthcoming bond had been taken and forfeited, and the court then held that the sheriff had no authority to receive it. Evidence was then offered tending to shew that the sheriff had paid the amount received by him over to S. in his lifetime; but on this issue, the County Court rendered a judgment against A. and his sureties for the debt, interest and costs. A. afterwards filed his bill for an injunction and new trial against the executors of S., alleging that since the trial at law, he had discovered evidence which was conclusive of the payment by the sheriff to S. in his lifetime; that he had no knowledge of this evidence before the trial at law, and setting out the nature of the newly-discovered evidence. The injunction having been awarded, and an issue tried by a jury, a verdict was rendered to the effect that the debt had been paid over to S. in his lifetime; whereupon, the injunction was perpetuated, and judgment for costs rendered in favor of A. From this decree, the executors appealed, principally on the ground that the after discovered testimony could have been obtained by due diligence; that it was merely *cumulative*, and that, therefore, a new trial should not have been granted. HELD:

1. To obtain a new trial on the ground of newly-discovered testimony, it must be shewn—1st, that the testimony has been discovered since the former trial; 2d, that the new testimony could not have been obtained with reasonable diligence on the former trial; 3d, that it is material to the issue; 4th, it must go to the merits of a case, and not to impeach the character of a former witness; 5th, it must not be merely cumulative; that all of these prerequisites are complied with

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in this case, and that there is no error in the decree of the Circuit Court in granting the new trial, and perpetuating the injunction, with costs to A.

2. In determining whether or not evidence is *cumulative*, the courts must see if the *kind and character* of the facts offered, and those adduced on the former trial, are the same, and not whether they tend to produce the same effect. It is their *resemblance* that makes them *cumulative*. The facts may tend to prove the same proposition, and yet be so *dissimilar in kind* as to afford no pretence for saying they are *cumulative*.

From the Circuit Court of Washington county.

The facts are sufficiently stated in the head-notes and opinion of the court.

White & Buchanan for the appellants.

Johnston & Trigg and *Campbell & Trigg* for the appellees.

CHRISTIAN J. The bill in this case is filed by the appellee, George W. Alderson, to enjoin all further proceedings on a judgment rendered in the County Court of Washington county, against him and others who were his sureties, in favor of the appellants, A. F. St. John and A. Whitaker, who are the executors of Berry St. John. The bill alleges that on the trial in the County Court, it was proved that the debt claimed in the suit at law was paid to Heiskell, sheriff of Washington county; but it was held that the said sheriff had no authority to receive the money at the time it was paid; that in said suit at law, it become necessary for the said Alderson, in order to protect himself against a judgment for the said sum of money paid to Heiskell, to prove that Heiskell had paid over the same to Berry St. John; that St. John being dead, Alderson could not testify as a witness in his own behalf; that he relied, in that suit, upon the evidence of a witness who was a grandson of Berry St. John, who had voluntarily stated before the trial that he had heard St. John say that the Alderson debt had been paid, and made the same statement on the witness-stand, but afterwards was recalled, at his own instance, to explain and correct his evidence.

The bill further alleges, that after the trial and judgment in the suit at law, he had discovered evidence, not only material, but absolutely conclusive, of his case; that of this evidence he had no knowledge, and only accidentally discovered the same since the trial. The bill further sets forth the

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character of the newly-discovered evidence, and gives the names of the witnesses and the facts he expects to prove by each of them.

To this bill, the executors of Berry St. John were made parties, and an injunction was awarded accordingly, restraining all further proceedings upon said judgment.

The executors answered the bill. They do not deny that the debt had been paid to Heiskell, the sheriff (for the receipt of Heiskell for the debt is filed with the bill), but deny that it was ever paid over to their testator. They insist that the issue made up in the suit at law was, whether the money paid to Heiskell (who had no authority to receive it) was ever paid over to their testator; that witnesses had been introduced to shew that it had been paid, and that their testator had admitted its payment; and that upon this issue of payment directly made and relied on, the County Court held the debt had not been paid, and rendered judgment for the same. They further insist, that the alleged after-discovered evidence is *merely cumulative*, and is evidence *of like import* as that heard at the trial, and therefore furnishes no ground for a new trial.

The Circuit Court held that the plaintiff in the injunction suit (the defendant in the suit at law, and appellee here) was entitled to a new trial, and accordingly directed an issue to be tried on the law side of the court, "whether the debt of $261.20, with interest thereon from the 10th day of May, 1861, mentioned in the writing obligatory, commonly called a forthcoming bond, made by the plaintiff, Geo. W. Alderson, and James Fulcher and James L. Cole (his sureties), for the penalty of $522.40, to Campbell St. John for the benefit of Berry St. John, dated 10th May, 1861, was paid to Berry St. John in his lifetime," and it was further ordered, that the said George W. Alderson be plaintiff in said issue.

Upon the trial of this issue, the jury found the following verdict (which was certified to the chancery side of said Circuit Court): "We, the jury, find that the money was paid to Berry St. John." Upon this verdict thus certified, the Circuit Court, on the chancery side thereof, entered its decree, by which it was adjudged, ordered and decreed "that the injunction heretofore awarded in this cause is made perpetual, and that the plaintiff recover against the defendants his costs in this behalf expended, including his costs of the trial of the issue heretofore directed, to be paid out of their testator's assets, and the cause is stricken from the docket."

From this decree, an appeal was awarded by one of the judges of this court.

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The court is of opinion that there is no error in the decree of the Circuit Court.

The single question we have to determine is, Whether the after-discovered testimony relied on by the plaintiff in the injunction suit (the appellee here) *was merely cumulative*, and was material, and such as was discovered since the former trial, and could not have been discovered by due diligence?

With respect to granting new trials on the ground of newly-discovered testimony, there are certain principles of law which must be considered settled.

1. The testimony must have been discovered since the former trial. 2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the character of a former witness. 5. It must not be merely cumulative. The first four requisites above named are clearly met in the case before us, and the only question we have to determine is, Was the newly-discovered evidence merely cumulative? As to what constitutes cumulative evidence is a question of some nicety.

As was said by Judge Murry in *Guyot* v. *Butts*, 4 Wend., 579, "I find no case in which a very distinct definition is given of cumulative evidence. The courts have sometimes used expressions seeming to warrant the inference that proof which goes to establish the same issue that the evidence on the first trial was introduced to establish, is cumulative. If the evidence newly discovered, as well as that introduced on the trial, had a direct bearing on the issue, it may be cumulative. But we are not to look at the effect to be produced as furnishing a criterion by which all doubts in relation to this kind of evidence are to be settled. *The kind and character of the facts make the distinction.* It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so *dissimilar in kind* as to afford no pretence for saying they are cumulative."

It is said by Mr. Hilliard, in his valuable work on New Trials, "Although the rule, that a new trial will not be granted on account of newly-discovered cumulative evidence, is a rule that will be relaxed with great caution, yet it is said that the courts ought not to shut their eyes to injustice on account of facility of abuse, in cases of this sort. And it is sometimes held that they will not refuse a new trial on the ground of newly-discovered evidence, for the reason that such evidence is cumulative, merely if it is sufficient to ren-

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der clear that which was before a doubtful case, or in a nicely-balanced case, or if it is conclusive, or of such a character as *prima facie* to raise a strong probability that it will be decisive of the case." See Hilliard on New Trials, sec. 17, p. 304, and cases there cited.

Without adopting in full these views of the learned author, it is sufficient to say that the case before us comes within the rule so clearly stated by Judge Murry (*supra*). *The kind and character of the facts* offered as newly-discovered evidence make the true distinction. The facts offered may tend to prove the same issue, and yet be so dissimilar in kind as to afford no pretence for saying they are merely cumulative. Now, in the case before us, the issue in the suit at law was, whether the money paid by Alderson to Heiskell, sheriff, was paid over to St. John. Certainly there was an admission tending to shew the admission by St. John that the debt was paid. But in the newly-discovered evidence offered, a witness is produced to prove, and who does prove, that he saw St. John receive this money from Heiskell, sheriff, on account of the Alderson debt. This evidence, it is true, tends to prove the issue of payment, but is dissimilar in kind, and if true, is conclusive of the case. It cannot be said to be merely cumulative. It makes certain that which before was uncertain. It enables a jury to reach a conclusion which meets the demands of justice. It produces a different result upon the second trial, which is consonant with right and truth, and prevents the payment for the second time of a debt already discharged. Evidence producing these results, and especially being dissimilar in kind to that offered on the first trial, cannot be said to be merely cumulative.

The court is, therefore, of opinion, that there is no error in the decree of the Circuit Court, and that the same be affirmed.

DECREE AFFIRMED.

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SUPREME COURT OF APPEALS OF VIRGINIA.

REDD AND ALS *v.* THE SUPERVISORS OF HENRY COUNTY.

April 3, 1879.

1. Though the act of January 15th, 1875, Sess. Acts, 1874, ch. 37, p. 29, provides a mode by which the qualified voters of a county or corporation may contest the due returns of the election or decision of the voters of said county or corporation upon the question whether the county or corporation shall subscribe to the stock of an internal improvement company, a court of equity still has jurisdiction of the question upon a bill filed by fifteen or more of the citizens and taxpayers of the county or corporation, and to enjoin the issue of the bonds of said county or corporation in payment of said subscription if the proceeding has not been properly conducted.
2. In the proceeding under the statute, Code of 1873, ch. 61, §§ 62, 63, 64, 65, in relation to subscriptions by a county or corporation to the stock of an internal improvement company, the provisions of the law must be strictly pursued; but a literal compliance in every particular, however unessential, is not required. Substantial compliance with the law in every essential feature is all that is necessary.
3. The failure to comply strictly with the provisions of the statute, which are not mandatory but merely directory, will not vitiate the proceedings so as to render the subscription invalid.
4. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which, the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute.
5. The order of the County Court, directing the sense of the qualified voters to be taken, directs the election to be held by the commissioners of election in conformity to law. Though the order does not expressly require the sheriff to act, so far as the agency of the sheriff was rendered necessary by the law, although not named in the order, he was within its operation.
6. It was not necessary, under the statute, that the commissioners of election should be designated by name in the order, as there were already commissioners legally appointed. They were appointed at the May Term of the court; and though the statute directs they shall be appointed at the April Term, this provision of the statute is clearly directory.
7. The commissioners of election are the body to compute and ascertain the number of registered voters in the county, the number of votes cast at the election, the number voting for and the number voting against subscription. In ascertaining and reporting the number of registered voters in the county, they are to be guided and controlled by the registration books. But where the register had noted on the book the death or removal of a person registered, it was proper to omit his name from the count.
8. It was for the supervisors to fix the amount of the subscription to the stock, not exceeding the sum limited by the statute.
9. The supervisors of the county having resolved to subscribe the sum of

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$100,000, on condition that the town of D. subscribed $50,000, that subscription cannot subsequently be rescinded by them, and a resolution by them to this effect was invalid. And the town of D. having made the subscription of $50,000, the supervisors may carry out their subscription of $100,000, and direct the issue of the bonds of the county therefor in the mode prescribed by the statute.

10. It was not necessary that the order of the court directing the vote upon the subscription should state that the amount to be subscribed will not require an annual tax in excess of twenty cents, or that it is not more than one fifth of the capital stock of the company.
11. There being no evidence in the record that the subscription will require a tax in excess of twenty cents on the $100 of the taxable property of the county, and no such question made in the pleadings, the court cannot look outside of the record to take notice of the auditor's report and the assessor's books, to ascertain the amount of taxable property in the county.
12. The Legislature may, by a subsequent act, legalize the proceedings, if they were irregular, and so confirm the subscription.

This was a bill in equity in the Circuit Court of the county of Henry, brought by James S. Redd and fifteen other citizens and taxpayers of Henry county, to enjoin the supervisors of the said county from issuing the county bonds for $100,000, for payment of the county subscription to the Danville and New River Narrow-Gauge Railroad Company. This was a company incorporated by an act of the General Assembly of Virginia, approved March 29th, 1873.

The plaintiffs, in their bill, set out many objections to the proceedings of the court in directing the vote of the people to be taken whether the subscription should be made, to the action of the officers taking and counting the vote, and to the conduct of the supervisors in relation to the subscription. These are sufficiently indicated in the head-notes for a proper understanding of the points decided.

The supervisors answered the bill, controverting the objection made by the plaintiffs; and the cause coming on to be heard on the 23d of October, 1868, the court dissolved the injunction, and dismissed the bill with costs. And thereupon the plaintiffs obtained an appeal to this court.

J. B. Young and *J. A. Early* for the appellants.

J. A. Jones for the appellees.

BURKS J. delivered the opinion of the court.

HELD as stated in the head-notes.

DECREE AFFIRMED.

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SUPREME COURT OF IOWA.

BURLEIGH *v.* PIPER, SHERIFF.

Filed October 7, 1879.

A levy upon unripe and growing crops, made at a time when it cannot be expected to be fully executed by a sale of the crops during the life of the writ, and evincing an intention to hold such levy for a time merely as security, is invalid as to subsequently acquired liens upon such crops.

Appeal from Mitchell Circuit Court.

Action to replevy certain grain. The plaintiff claims the grain by virtue of a chattel mortgage executed to him on the thirtieth day of June, and while the grain was growing. The defendant claims the grain by virtue of the levy of an execution against the mortgagor, made by him as sheriff of Mitchell county on the 10th day of May previous. The grain was raised by the execution debtor upon leased premises. No actual possession was taken of the grain by the sheriff until August 30th, when it had been harvested and stacked by the debtor, and some of it threshed. The execution, in the meantime, had expired and been returned, and another issued commanding a sale of the property levied upon. There was a trial by jury, and verdict and judgment were rendered for the defendant. The plaintiff appeals.

ADAMS J. The material question in the case arises upon an instruction given by the court in these words: "If the officer who holds an execution for service and levy on growing crops, before they are ripe or in a suitable condition to be removed, goes on the premises where the crops are situated, and enters the levy on the execution with an accurate description of the crops levied upon, and gives the execution debtor notice of the levy, it would constitute a good and valid levy on the crops, and a levy so made would be a lien on the crops levied upon from the date of the levy." The giving of this instruction is assigned as error. The plaintiff insists that an unripe and growing crop is not subject to levy upon execution, though raised by a tenant; and even if it were, that the mode of levy set forth in the instruction, and which was the mode employed, would be insufficient. In the view which we take of the case, it is not necessary to determine either of these questions. Upon the first, there is some conflict of

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authority, and the members of this court might not be entirely agreed. Conceding that a valid levy of an execution may be made upon an unripe and growing crop, and that the mode set forth in the instruction and employed in this case is not objectionable, we have still to determine whether the levy made can, in view of all the circumstances of the case, be sustained. The plaintiff contends that the office of the writ was perverted in that it was used, for a time at least, merely to effect a lien, and the further execution of the writ suspended by the direction of the judgment creditor.

It appears to us that the office of a writ of execution is to collect a debt, and not merely to secure it. Now, the evidence in the case shows that while the sheriff was directed by the judgment creditor to make no sale until the grain had been harvested and stacked, the writ was put into his hands on the second day of May, and the levy was made as soon the grain was barely up. The general rule is that, after the levy of an execution, the suspension of the further execution of the writ, under the directions of the judgment creditor, will render the levy void as against after-acquired liens. *Hickman* v. *Caldwell*, 4 Rawle, 376. It might, perhaps, be claimed that not much importance is to be attached to the directions given by the judgment creditor, for the reason that a postponement nearly, if not quite, as great as directed was necessary in the very nature of the case. But the principle involved is the same. The writ was used. for a time, for the purpose merely of holding a lien upon the property. While mere procrastination by an officer after levy will not invalidate the levy, it is not the less his duty to proceed forthwith to advertise and sell. If he is prevented, either because the judgment creditor directed a postponement, or because he directed a levy so early as to necessarily result in a postponement, we think that the levy will be invalid as against subsequently acquired liens. In Herman on Executions, § 185, the author says: "Any act which shows that a party does not intend that a writ shall be executed before return day, or in accordance with the statutory provisions relating to final process, will, as between such party and third persons, or other judgment creditors of the debtor, discharge the property seized from the lien of such execution"—citing *Weir* v. *Hale*, 3 W. & S., 285; *Mentz* v. *Hauman*, 5 Whart., 150; *Howell* v. *Alkyn*, 2 Rawle, 282. In the case at bar, the judgment creditor knew, when he put the writ into the hands of the officer, that there was hardly a possibility that the writ could be fully executed by the sale of the crop in question during the

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life of the writ, and that in any event the execution of the writ must be suspended for several weeks.

The purpose of making the levy thus early must have been solely to require a lien to be held for a time as security, or, to use the language of Chief-Justice Gibson in *Hickman* v. *Caldwell*, above cited, "to keep other creditors at bay," which purpose, it was held in that case, was not legitimate. It follows, from the view which we have taken, that the instruction given was too broad, under the circumstances of the case. It held that the levy was valid if made in the mode described. In our own opinion, a levy of an execution upon an unripe and growing crop is not valid as against subsequently acquired liens, if made so long before the officer can properly proceed to advertise and sell as to evince an intention on the part of the judgment creditor to hold the levy, for a time, merely as security, and especially if it is reasonably certain, at the time of the issuance of the writ, that it cannot be fully executed by the sale of the crop during the life of the writ, but that the judgment debtor must be put to the expense of another writ.

REVERSED.

Northwestern Reporter.

CHANCERY COURT OF THE CITY OF RICHMOND.

UNITED STATES FOR, &C., *v.* MITCHELL, &C.

On the 15th February, 1871, M. a debtor in embarrassed circumstances conveyed to I. certain real estate, in the city of Richmond; the deed was absolute on its face, but without consideration, having been executed simply to facilitate the sale of the property conveyed, and to raise money to pay M's debts. On the 13th of April, 1874, I. conveyed the property to K., a purchaser, for valuable consideration, without notice of the fraud, in the conveyance to I., and without notice of the lien of the judgment hereafter to be mentioned. K. paid the cash instalment, and executed his negotiable notes for the deferred payments of the purchase-money, and these notes had been negotiated, and were in the hands of *bona fide* holders for value, before K. had any notice of the said fraud or judgment. On the 15th of October, 1873, the United States, for the use of Garnett, Receiver, &c., recovered a judgment in the Circuit Court of the United States for the Eastern District of Virginia, held at Richmond, against said M., which judgment was never docketed in the Chancery Court of the city of Richmond, and of which, as before stated, K. had no notice prior to his purchase and the negotiation of his notes as aforesaid. On a bill filed by the judgment creditor, to subject the property in the hands of K. to the payment of the judgment against M. HELD:

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1. Judgments of the United States Courts must be docketed in Virginia, like judgments of the State Courts, in order to bind property in the hands of an innocent purchaser for value, and without notice of the existence of such judgments. See *Dupont* v. *Thompson*, 1 *Virginia Law Journal*, 246. See, *contra*, *United States* v. *Humphrey*, 3 *Virginia Law Journal*, 589.
2. The clerks of the courts of the State in which judgments are required to be docketed, are as much required by law to docket the judgments of the Federal Courts rendered in the State, as if they were rendered by the State Courts.
3. K. was an innocent purchaser for value, and without notice, in this case, and the property in his hands is not liable to the lien of the judgment of the plaintiff; and this is so, although he has not actually paid the whole of the purchase-money, but has only made the cash payment, and given his negotiable notes which had been negotiated, and were in the hands of *bona fide* holders for value, before he had notice of the fraud in the deed to his grantor, on the lien of the plaintiff's judgment. In such a case, the innocent purchaser being bound to pay in any event, the negotiable notes in the hands of a *bona fide* holder, they will be treated as equivalent to an actual payment.

From the Chancery Court of the city of Richmond.

F. M. Connor for the plaintiff.

Cannon & Courtney and *John O. Steger* for the defendants.

The facts are sufficiently set forth in the head-notes and opinion of the court.

FITZHUGH J.—The property conveyed by R. D. Mitchell to E. Rosser Isbell, by the deed of February 15, 1871, was conveyed without consideration. While held by E. Rosser Isbell under that deed, it was as much liable for the debts of R. D. Mitchell as if that conveyance had never been made. Although the deed was absolute on its face, yet it appears from the pleadings and evidence in this case, that in fact it was made to facilitate the sale of the property conveyed, to raise money to pay Mitchell's debts. So that Isbell was only a trustee under a resulting trust to accomplish that purpose.

If, therefore, the plaintiff in this case had docketed the judgment obtained by him against R. D. Mitchell at any time while the property was held by Isbell under the deed above mentioned—or in other words, at any time before it had been conveyed by Isbell to an innocent purchaser for valuable consideration without notice, then in such case, the lien of the plaintiff's judgment would have been effective and binding on that property, not only as against Mitchell and Isbell, but also as against any purchaser who was not an in-

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nocent purchaser for valuable consideration without notice.

It is contended, however, by the plaintiff's counsel, that a judgment of a United States Court is a lien upon the property of the debtor whether docketed or not. I do not think so. Judgments were not liens at common law. Federal judgments and decrees were made liens by the process acts in the Federal districts where they have that effect under the State laws, and Congress has since provided that they shall cease to have that operation in the same manner and at the same periods, in the respective Federal districts as like processes do when issued from the State Courts. Federal judgments and decrees are liens, therefore, in all cases and to the same extent, as similar judgments and decrees are when rendered in the courts of the State. *Brown* v. *Pierce*, 7 Wall., 217. See also *Baker* v. *Morton*, 12 Wall., 158, and sections 916, 967, Revised Statutes U. S., edition of 1878; also *Dupont, DeNomours & Co.* v. *Thompson*, *Va. Law Jour.*, April, 1877, p. 246.

The law of this State has been so framed as to comprehend the docketing of a judgment of a United States Court in this State. It requires that "the clerk of each County and Corporation Court shall keep in his office, in a well-bound book, a judgment docket, in which he shall docket without delay, *any judgment in this State*, when he shall be required to do so by any person interested, on such persons delivering to him an authenticated abstract of it," &c. Sec. 4, chap. 182, Code 1873. And a heavy penalty is imposed upon the clerk for a failure of duty under the act.

The judgment in question was rendered in the Circuit Court of the United States for the Eastern District of Virginia, sitting at Richmond. It is judicially known that that court, though not a court of the State, is one within this State—and therefore a judgment of the United States Circuit Court, sitting in Richmond, is a judgment in this State, and so within the express terms of the statute. For it commands the clerk to docket "any judgment in this State." The statute is not confined exclusively to our State Courts; its language is broad enough to comprehend judgments rendered in the Federal Courts; and the clerks of our courts are as much bound by its requirements to docket a judgment rendered in a Federal Court in this State, as they are to docket one rendered in one of our State Courts, and are liable to the same penalty for a failure in duty in either case.

The judgment in this case was rendered on the 15th of October, 1873.

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On the 13th of April, 1874, E. Rosser Isbell conveyed the property in question to John J. King, and at that time the judgment in question was not docketed.

It is charged in the plaintiff's bill that the deed from Isbell to King was made with intent to hinder, delay and defraud creditors, and was fraudulent and void as to them—and that King had notice of the fraud at the time of the conveyance of the property to him by Isbell.

The question is, whether King was a purchaser of the property in question for valuable consideration without notice. I think he was. His answer, directly responsive to the bill, denies all allegations of fraud or of notice of fraud, and denies all knowledge of the existence of the judgment of the plaintiff when he bought the property, and when it was conveyed to him. After a careful consideration of the testimony, I am of opinion, that there is no proof of fraud on King's part, and no proof that he knew the condition on which Isbell held the property, or that Mitchell then had any interest in it, or that the plaintiff had a judgment against Mitchell. In short, no proof sufficient to overcome the responsive denials of King's answer. It is well settled that a party seeking the aid of a court of equity for relief against a *bona fide* purchaser must allege and prove notice. *Carter* v. *Allen*, 21 Gratt., 249, and authorities cited. I think the plaintiff has failed to prove notice, either actual or constructive, against King. On this subject see *French* v. *Loyal Company*, 5 Leigh, 655, *et seq.*

Under our statute, sections 6 and 8, chap. 182, Code of 1873, the judgment lien does not extend to real estate aliened after judgment to purchasers for value who have no notice of the judgment, unless the judgment be docketed in the manner and within the time prescribed.

And it has been held that even where the alienation was fraudulent, a *bona fide* purchaser, without notice of the invalidity of the deed, will be protected against defrauded creditors. See *Carter* v. *Allen*, *supra*, p. 248, and authorities cited.

But it is contended by the plaintiff's counsel, that if it be true that King was innocent of all fraud, and had no notice of the judgment when the real estate was conveyed to him, nevertheless it was necessary that he should be a complete purchaser before notice, in order to bring himself within the meaning and the protection of the statute. That is, he must have obtained a conveyance and paid the whole purchase-money before notice. That is the rule laid down in *Doswell* v. *Buchanan*, 3 Leigh, 365.

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But in this case the notes given by King were negotiable, have been negotiated, and had been before King had notice of the judgment. And the unpaid notes, according to the evidence, are in the hands of *bona fide* holders for value, and King is thus rendered liable to pay them at all events. He has paid the cash instalment, and some of the notes for the deferred instalments, and cannot successfully resist the payment of the residue. According to the view of the court, heretofore indicated, he is an innocent purchaser for value without notice. He had no knowledge of the judgment of the plaintiff when the conveyance was made to him, and when he paid the cash instalment and executed and delivered his negotiable notes for the deferred payments; and he then knew nothing of Mitchell's claim or interest either in the land or in the proceeds of the sale. Besides, the plaintiff is in default in not docketing his judgment as he might and ought to have done, and thus protected himself and spread upon the records a notice which would have warned King. For it is in evidence that he examined the records before he completed his purchase from Isbell.

Under such circumstances, the courts, while adhering to the rule as laid down in *Doswell* v. *Buchanan*, that a purchaser to be protected must have paid the full purchase-money and obtained a conveyance, will treat negotiable notes given by the purchaser on account of payment for the land, and so transferred and negotiated as to make the purchaser liable in any event, as equivalent to actual payment. See American note to *Bassett* v. *Nosworthy*, 2 Lead. C. Eq., top p. 117, edition of 1859, and authorities cited.

This is consistent with the rule above mentioned, and prevents what would otherwise be a harsh and most inequitable result—namely, the liability of an innocent purchaser to the loss both of the land and the purchase-money.

For these reasons, I am of opinion that the plaintiff has failed to maintain his case against John J. King.

As to the case against H. Seldon Taylor, trustee, Elizabeth A. Mitchell, &c., set out in the amended and supplemental bill, I remark, that the evidence, I think, is to the effect that the deed referred to was made upon valuable consideration, and was not made to hinder, delay and defraud the creditors of R. D. Mitchell.

In addition to this, the answers of the defendant to the amended bill responsively deny that the conveyance was voluntary, and responsively deny also all fraud, and it seems to be quite clear that there is no proof whatever to overcome the responsive denials in the answers.

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Besides the foregoing considerations, the amended bill was not filed within five years after the deed in question was made. See sec. 16, chap. 146, Code 1873, p. 1001. So that if the deed had been voluntary, the bill would be too late, and would be barred by the statute. But the plaintiff, I think, has wholly failed to prove either that it was voluntary or was made to hinder, delay and defraud creditors.

I therefore think that the plaintiff has failed to maintain his case as against the defendants to the amended bill.

For these reasons, I am of opinion that the plaintiffs' bills, original and amended, should be dismissed with costs.

DECREE MAY GO ACCORDINGLY.

MISCELLANY.

TRIAL BY JURY.—Mr. Percy Greg, in his able work, the "Devil's Advocate," makes one of his debaters say: "I am not a representative Tory. But, speaking for myself alone, the idiocy of verdicts has taught me a profound contempt for that palladium of English liberty—trial by jury." This remark, although, of course, couched in flippant and extravagant terms, represents the opinion of a not inconsiderable class of laymen on the value of verdicts and the policy of retaining trial by jury. But, like all sweeping condemnations, it has the supreme defect of a general conclusion drawn from partial knowledge and partial observation. The mere conjunction of the expression "palladium of English liberty" with "idiocy of verdicts" at once betrays ignorance or want of recognition of the diverse character and object of trial by jury. When this mode of reaching a judicial decision is belauded as the palladium of English liberty, trial by jury in a limited class of criminal prosecutions, and possibly in one class of civil actions, is really regarded. Thus, in trials for treason, sedition, seditious or blasphemous libels, ordinary libels, *scandalum magnatum*, and in cases under the Foreign Enlistment Act—in short, where the Crown is not only in name, but in substance, the prosecutor, and perhaps, also, in civil libels—trial by jury may fairly be spoken of as a palladium of liberty. So that, in order to justify the debater's opinion, it must be shown that juries display idiocy in the very limited class of cases above named. But this is manifestly not so; for the instances in which juries are called upon to act in this class are very rare indeed; and, possibly, the only fault to be found with their verdicts in modern times has been their bias against the Crown. If in any other cases juries have shown idiocy, then those were cases in which trial by jury has been in no sense the palladium of liberty.

But, apart from the criticism of Mr. Greg's debater, there is to be found in the present day a scepticism, and perhaps a growing scepticism, as to the expediency of retaining trial by jury. In order to appraise this disbelief at

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its proper value, we must endeavor to distinguish between the various kinds of trial by jury; for otherwise we shall be doing exactly what we have already said ought not to be done—that is to say, we should be indulging in sweeping condemnation through partial observation. Roughly speaking, there are four classes of juries, or rather jurors, in this country. We have the special jurors and the common jurors of agricultural districts, and the special jurors and the common jurors of the metropolis and of large cities. Now, for dealing with the class of cases coming before them, such as rights to and in land, and disputes involving character, the special jurors of the agriccultural districts are most competent, and we should think that no one would call their verdicts idiotic; and no suitor, having a genuine belief in his cause, would desire any other tribunal. So, also, before the *amendment* of the Jury Acts, special jurors in the metropolis formed admirable tribunals. They were men of great intelligence, great experience, and great integrity. At Guildhall, the experience was "commercial," and at Westminster it was "civil and social." In both places, the special juries commanded the unfeigned respect of judges, counsel and suitors: and there is no reason to suppose but that in Liverpool, Manchester, Leeds, Bristol, and other great cities and towns, the faith in special jurors was equally general and well founded.

So, also, in the metropolis, and large cities and towns, the common jurors exhibited sagacity and a fair knowledge of business of the inferior class; but the fault of them was, and is, that they are apt to be swayed by prejudice, local, personal and commercial; that their knowledge of social life is too narrow; and that their conception of human motives and tendencies is incomplete. The mischief which might have arisen from the imperfect education and limited observation of the common jurors of cities and towns was obviated, for the most part, by the use of special jurors in all cases where danger might have been apprehended from the employment of common jurors.

There remain the common jurors of the agricultural districts; and these are the persons whose bewilderments and inconsequential verdicts have supplied matter for the ridicule and contempt of trial by jury. In civil causes, it is almost painful to see counsel and judges trying to make small farmers understand a commercial transaction of complexity. Even the expressions commonly used by lawyers are enigmas to these jurors, and the verdict is often a leap in the dark; at the same time, on their own ground, these jurors are admirable, and know how to deal with a matter of parochial law, of disputed boundary, of warranty in animals, and a variety of other rural cases. Thus we see that in trials at *Nisi Prius*, if we may still use that expression, there was little room for dissatisfaction with the conduct of jurors.

In criminal cases, it is not quite so easy to know the evil from the good in juries. Every reader of a newspaper deems himself competent to find a true verdict in a prosecution, and thereby every one instinctively affirms the value of trial by jury. That country juries and town juries both make tremendous blunders now and then in criminal trials is certain. But our law is in no small degree responsible for this. We close the prisoner's mouth; and we also, in practice, prevent him from calling witnesses, so that not much more than half the case is put to the jury. When it is said that a prisoner

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is prevented by our practice from calling witnesses, it is meant that whereas in a civil case it is very rarely wise to go to the jury on the plaintiff's case in criminal cases it is very rarely wise to call witnesses for the defence. Thus, in civil cases, both sides are fully heard, because, if the defendant and his witnesses are not called, the jury is asked to draw a clear inference. But in criminal cases no such inference can be drawn, and, instead of the whole story being brought forward, only part of it is heard; and at the close of that, an astute and eloquent counsel does his utmost to confuse, confound and mislead the jury. So, also, in civil cases there is such a thing as "discovery;" but in criminal cases every one combines to advise the prisoner to hold his tongue, and burn his correspondence. Giving credit, however, to all these incidents of criminal trials, we must admit that provincial juries, and even town juries, do not grapple with criminal cases as they ought, But it by no means follows that trial by jury in such cases should be abolished, for a remedy can be found in the substitution of a higher class of persons as jurors; yet, as one great virtue of justice is to seem just, prisoners might reasonably object to being tried in certain cases by men much higher in the social scale than themselves.

We have spoken of the past rather than the present in connection with the metropolitan special jurors. The present is by no means equally excellent. Instead of a system of selection by a competent officer acting for the sheriff, we have now a mere rating test of pounds, shillings and pence for special jurors; and a grosser blunder in legislation was never known, The change arose partly from a desire to increase the number of special jurors as the work became rather onerous to the selected persons, and partly from a concession to democratic notions. The result unquestionably is, that the special jurors in the metropolis have sunk very much indeed in the esteem of the bench and the bar; and this fall has induced the bench not only to treat verdicts with less respect than was formerly shown, but also to usurp the functions of the jury by giving indications, far too plain to be mistaken, as to which way the verdict ought to go. There are judges, not the least certainly among their brethren, who deal with their cases in a spirit of absolute loyalty to the constitutional theory, and who endeavor to assist without controlling the jury. But there are judges who seem to be just as eager to get verdicts on the bench as they were at the bar—in this sense, that, when they have arrived at a definite conclusion upon the evidence, they exert their immense powers to bring about the desired result by the verdict of the jury. So, also, rules *nisi* to set aside verdicts are granted somewhat freely, and judges are very prone to make such rules absolute where they run counter to the opinion of the judge who tried the cause. The new order that all rules *nisi* for new trials shall be moved in the Division in which the judge who tried the action sits, is also indicative of the tendency of the bench to increase its control over verdicts; for it is manifest that the task of counsel in upholding or upsetting a verdict is enormously increased by the presence in court of a judge who at the trial has made up his mind as to the true verdict, and who seeks to guide the court to the result which he believes to be right.

We have limited ourselves to some observations on the present condition

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of trial by jury, without here discussing the relative merits of trial by judge and trial by jury—a subject which may hereafter be considered.—*Law Journal.*

A MODERN ATTACHMENT BOND. *No.* 1 *Attachment day in date oct* 16*th* 1879.—No. 1 Bond before J. H. c. Nunn Constable of Ecofabra Township ouchita County State Arkan-as H L Williams plaintiff against defendant J G Brummett for tow Bails of lint or thirty three hundred Pounds of seed cotton now on delivery to him or value of the sum of Eighty dollars of lawful united States money for tow B.les Cotton to be Delivered in town of Camden ark on the 27 day of october 1879 at the place Knowing as the office of lawer G. M. Barker Satfie the clame of H. L. Williams the plaintiff in this action for a Rent note on said crop for the sume of forty dollars due 1st January 1880 we undertaker that the plaintiff H L Williams shall pay to the Defendant J. G. Brummett all damages which he may sustain by Reson of this action of the order therefore is wrongfully obtaine Approved J. H. C. Nunn Cont. SIGNED BY TWO BONDSMEN.

The above is a *verbatim et literatim* copy of a forthcoming bond taken from the defendant by the negro constable of Ecore Fabre Township, Ouachita county, Arkansas, in a recent attachment suit, before a magistrate there. S.

PARISHES TO PROVIDE CHURCH ORNAMENTS.—Bee it enacted that the parrishes be enjoyned to provide att their own cost a great church bible, and two books of common prayer in folio for the minister and clarke according to the act of Parliament before the common prayer booke; as also communion plate, pulpitt cloth and cushion, that all things may be done orderly and decently in the church.—2 *Hen. Stats.*, 30, *March*, 1660–1, 13 *Charles II.*

SUMMARY WAY OF DEALING WITH A FIDUCIARY, SURETIES, &C.—Whereas, Mrs. Phœbe Smith, administratrix of the estate of Lt. Coll· Toby Smith, hath by pretence of a bond found invalid, both because the deed was not recorded, but chiefly in regard the condition is for articles not here expressed, deteyned the said estate from her husband's creditors, but having by her illegal proceedings therein, as appraising the estate without swearing the appraisers, and having made such wast, as a writt of *devastavit* may justly ly against her. It is ordered that she pay unto Jno. Whitty ffour thousand eight hundred and ffourty-one pounds of tobacco and caske, and eighty-six pounds sixteen shillings sixpence in money, for soe much found due to the said Whitty from her said husband Toby Smith, and in case that neither the estate of said Lt. Coll. Smith, nor the proper estate of the said Phœbe Smith will satisfie the premises, then Capt. Whitty to take his remedy against the surety for her administration, and in case of noe security or insufficient, then to take his remedy against the commissioners who granted her that commission.—2 *Hen. Stats.*, 36, *March*, 1660–1, 13 *Charles II.*

A RUTHLAND lawyer. in referring to some prisoners, addressed the jury as follows: "I tell you their knees shook as shook the knees of Beltiheezer when Paul said unto him, 'Thou art the man!'" And a Biddeford advocate, blushing at the conduct of his opponents client, shouted in open court, "Tell it not in Gath, publish it not in the streets of Jerusalem."

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An eloquent lawyer was prosecuting the murder of Silas Jones in North Carolina, and opened his speech as follows: "Gentlemen of the jury, Silas Jones is dead—you ne'er shall see his smiling face again, as he sat with quiet composure on the banks of the Yadkin river a jerking out the perch and trout (hesitation and embarrassment); no, gentlemen, Silas lies cold and stark in the grave, with his pale face turned up to the blue vault of heaven, and—and—and his d—d legs cocked up about two feet."

In speaking of the arrears in the courts in the city of New York, the *New York Times* says that Judge Sandford, of the Superior Court, has not been in court in a year; that Chief Justice Curtis, of the same court, has long been absent from court, and went to Europe last spring: that Judge Davis, of the Supreme Court, is very ill, absent in Colorado, and not expected to sit again; that Judge Gildersleeve is much absent; that Judge Robertson was absent for six months before his death; that Recorder Hackett has not been in court thirty days in a year. An unsuccessful attempt has been made to present the case of Recorder Hackett. The *New York Times* justly says that hopeless invalids ought not to draw salaries and embarrass the public business. But we have no doubt that the public is to blame for the illness of these judges, in not providing better ventilation for the court rooms. We know the judges complain of it, and we have no reason to doubt that they are right.—*Law Journal.*

Attorneys at Law.—It was at Boswell's house in Edinburg, just before starting on the "tour to the Hebrides." The company was Sir Walter Scott (afterwards Lord Stowell), Sir William Forbes, Mr. Boswell and Dr. Johnson. The conversation turned to the "practice of law."

Sir William Forbes said an honest lawyer should never undertake a cause that he was satisfied was not a just one. "Sir," said Dr. Johnson, "a lawyer has no business with the justice or injustice of the cause he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of a cause is to be decided by a judge. Consider, sir, what is the purpose of courts of justice. It is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie, he is not to produce what he knows to be a false deed. But he is not to assume the province of the judge or the jury, and determine what shall be the effect of evidence or the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who by study and experience have acquired the art and power of arranging the evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that the client might fairly do for himself if he could. If by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage that he is entitled to. There must always be some advantage on one side or the other, and it is better that advantage should be had by talent than by chance. If a lawyer were to undertake no cause until he was sure it was just, a man might be precluded altogether from a trial of his claim, though were it judicially examined it might be found a very just claim."

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A DEBTOR'S LETTER.—The following letter to a lawyer appears in the *Albany Law Journal*:

My Dear Sir,—I am informed by yours of the 1st inst. that the estate of the late ——— holds three notes against me respectively—81 dols., 50c.; 94 dols., 58c.; 119 dols., 50c., and desiring me to communicate with you in reference thereto. I congratulate the estate on holding a claim against a person so abundantly able to owe it as myself; in fact, were it ten times the amount, I should be able to owe it with equal prospect of payment. You speak of making me trouble and expense: the latter would be impossible, as I have nothing to spend; the former would only be a verification of the Scripture text, "Man born of a woman, his days are few and full of trouble." I trust the executor (whoever he may be) of Mr. S——'s estate is not so lost to all the nobler impulses that actuate the human heart as to desire to plunge a man (who is actuated by honest motives, however unfortunate he may have been) into unnecessary difficulty, as no benefits could possibly accrue to Mr. S——'s heirs by such a course. In order that you may form a correct estimate of the amount the estate would be likely to receive by getting out an execution and levying, I will give you a comprehensive inventory of my effects, exclusive of personals exempt by law from execution: One saw-buck, one buck-saw, one hand-saw, three wagon wheels (all odd ones), one wagon shaft (with cross-bar attached), one riding saddle, the stirrups of which have been sold for old iron; it is also minus one flop as, needing soles for a pair of boots, and being unable to purchase sole leather, this middle flop answered the purpose admirably; the surcingle has also been substituted for a pair of suspenders, as my pants (the only pair I have) needed girthing about the waist; one old harness, nearly complete, and with about five dollars expended on it for repairs, I think would bring about a dollar and a-half at auction; one old sleigh (this is in a rather dilapidated condition—it might answer, however, as a foundation for a hen-coop; one lame chicken, one pair of pine crutches. I am not sure but that the last named are exempt; I do not know, however, as the law makes any allowance for a man who is occasionally lame. This, I believe, includes all. In case of an attachment, however, according to the laws of this State, it would be assigned for the benefit of all creditors. You would probably get for your share the lame chicken or the crutches.

Throwing all jesting, aside, Mr. ——, I have really got nothing, nor do I see any prospect ahead of ever being able to pay it. The executor might just as well put those notes down as so much waste paper. I think you have made a great discovery in those notes, and that discovery is "Perpetual Motion," as there is no question but what they will run forever. Hoping you are satisfied of my ability to owe those notes, I remain, with great respect and good wishes,

* * *

DOG LAW.—In *Flansburg* v. *Rasin*, 3 Bradwell, 531, our readers will find a good current topic for dog-days. The substance of the decision is, that in an action to recover for a dog bite it is not necessary to prove that the dog had a customary inclination to bite, but it is sufficient if he has evinced it on rare occasions to the owner's knowledge. The appellant was riding home at night from a debate at the school-house on horseback, when the defendant's dogs came out from the owner's house, and one of them bit the appellant's horse, which thereupon threw him and broke his leg. From the opinion, we have difficulty in making out whether it was the horse, the dog, or the man whose leg was broken, but we are inclined to suppose it was the man. The report does not show whether the dogs had been at the "debate" and there become excited. The court say that the rights of dogs "are bet-

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ter protected now than in more barbarous times;" that "a dog wantonly kicked might lawfully bite in self-defence," but not when he had had several months for his passion to cool; and that "a dog, like men, may have idiosyncrasies," as, for example, a disposition to attack horses with or without riders, whereas he might "have refrained, from prudential motives, when there was an ally of the horse or horses, who could defend them from a fortified position of a two-horse wagon or a buggy." The court conclude "that it is not necessary to show that the keeper of the dog has allowed him to bite a very large number of his neighbors or their animals, before he commences to be liable, but that there is enough to show that there is, with his knowledge, a probability that he may do so.—*Albany Law Journal.*

An Imperial Will.—It has often been said that the true character of a man is to be found in his will; and certainly thousands of persons will discern in the will of the lamented Prince Imperial the signs of a noble nature. It presents a striking contrast to the capricious, confused, and sometimes contemptible documents which are framed to vex expectant heirs, harass the courts of law, and enrich the lawyers. The dispositions of property are simple, no one seems to be forgotten, and the sentiments expressed in that part of the testament which does not relate to money, are conceived in a spirit of good will to all men, and of devoted affection to relatives and friends.

The will is holographic; and, therefore, according to the Code, it needed no attestation or publication; and, inasmuch as the Prince must, of course, be taken to have retained his French domicile, and to have been a sojourner in our land, his will could only have been made in accordance with the law of his domicile. Our neighbors have put forward some strange ideas about the exigencies of English law in relation to wills. The *Gaulois* says that the Prince's will was opened in the presence of a solicitor and *thirty* witnesses, as required by the law of England. Wills, as we know, have often failed in this country from want of compliance with certain statutory formalities in the execution of them; but we never before heard that any particular ceremony was necessary at the reading of such a document.—*Law Journal.*

BOOK NOTICES.

Grattan's Va. Reports. Vol. XXX. By Peachy R. Grattan, Esq.

We have received from Messrs. Randolph & English, publishers, &c., Richmond, Va., the foregoing volume, containing many cases of real interest and importance to the profession. Mr. Grattan is so well known to the world as a reporter and lawyer, that nothing that we can say of his work will add to its, or his, reputation; and it is equally as well known that Virginia never had abler or purer men on the Bench of the Supreme Court than those who now adorn it, and whose opinions from January 31st to November 1st, 1878, fill this volume. The work of the printers and binders is very well done.

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THE

VIRGINIA LAW JOURNAL.

DECEMBER, 1879.

EDITIONS OF THE CODE.

About the middle of the present century there was substituted, for "all acts and parts of acts of a general nature" theretofore passed by the General Assembly of this Commonwealth, a single statute; which, though multifarious, was integral—none of its provisions being dominant among the rest by force of posteriority*—notwithstanding it was compiled, for the most part, from five several acts enacted not simultaneously.† These, while yet unoperative, were formally fused into one,‡ by an act subsequently passed on the 16th day of August, 1849§; which, among other things, provided that they, "without their respective titles and the enacting clause at the commencement of each," should be "deemed and published as one act under the title of 'The

*1 D. Chipme, 348, *Ashley* v. *Harrington*: see W. Jones 22, 26, *Standen* v. *University*; 6 Mod., 287, *St. Clement's* v. *St. Andrew's*; and references *infra* note ‡.

†The first of these was passed on the 1st day of August, 1849; the second, on the 10th; and the third, the fourth, and the fifth, separately, on the 15th, of the same month; as may be seen in the journals of the Senate and of the House of Delegates, under those dates respectively. They were all prepared in contemplation of the future mutual relation among them.

‡In effect the same thing was done by the final chapter of them all, passed (as mentioned in the preceding note) on the 15th of the month: the first words of that chapter being, "*all* the provisions of the preceding chapters shall be in force upon and after" the day therein specified. These words *verbatim* are repeated in the two publications mentioned afterwards in the text; but with by no means the same effect touching many of the provisions compiled in them, these being subject to the rule stated in 20 Gratt., 507, *Supervisors* v. *Gorrell*. As to which see 2 B. & Adol. 818, *R.* v. *Justices*; 1 Dowl. 116, s. c.; 19 Pa. St. 211, *Packer* v. *Rail-Road Co.*; 7 Ind. 570, *Quick* v. *White Water*: see also *supra* note *.

§According to the date affixed to the title, in Sess. Acts 1849–50, p. 255, c. 2 of acts passed at the *extra* session of 1849. See *post* note †.

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Code of Virginia.'" Towards this end, in the same *anno Domini*, they were printed together and as one; but unexpectedly with deviations, some intentional, others undesigned, from the bills engrossed and enrolled*. Hence further legislation upon the subject was necessitated; in consequence whereof an act was passed 20 March, 1850†, which established as law the copy so printed, subject to certain indicated corrections. And thus was then first perfected *The Code;* which still was futurely to become operative at the time originally destinated, to wit, "upon" the first day of the next July thereafter. Seemingly, therefore, with strictest propriety, some learned persons have called it The Code of 1850‡; but, it having been in the printing entituled "The Code of Virginia, passed by the General Assembly of the Commonwealth of Virginia, in the month of August, in the year One Thousand Eight Hundred and Forty-Nine"§, and every bound copy having been labelled conspicuously with that date, it is now generally, perhaps universally, cited as V. C. 1849. Shall this error be perpetuated, as well as the false date, received throughout Christendom, of our Saviour's birth?

In 1860, and in 1873, fresh editions have appeared, compiled by Col. George W. Munford; whose aim therein was to represent, on the subjects of them respectively, the then present states of our State statute-law. But, though the Legislature so far lent him its countenance as to cause both of these to be printed and copies distributed to the judges and

*V. C. 1849, c. 52, s. 26, & n.; c. 82, s. 28, & n.; c. 87, s. 53, & n.; c. 128, s. 10, & n.; list of *errata*, p. 899.

†Sess. Acts 1849-50, p. 12, c. q. In the preamble of this act, and in V. C. 1849, p. ix, and V. C. 1860, p. xii, the statute mentioned in note § above is said to have been passed "on the fifteenth day of August, 1849"; nt this is a mistake, as appears manifestly from Journ. Sen. 355-60, and ourn. H. D. 676-77 of that session.

‡Lomax, in the second edition (1855) of his Digest, and in the second edition (1857) of his Law of Executors, *passuri;* Matthews, in (at least the preface to) his Digest (1856); and others. In particular, Judge Allen at first cited it as "the Code of 1850" (7 Gratt. 201, *Bell* v. *Comm.*; afterwards he, and other judges, cited it as "the New Code" (*ibid* 216, *Somerville* v. *Wimbish;* 233, *McGruder* v. *Lyons;* 376, *Yarborough* v. *Deharo;* 392, *Bowler's ex'r* v. *Bowler's adm'r*); at last his mode of citations became settled as simply "the Code" (16 Gratt. 96, *Miller* v. *Savings Bank;* 105, *Hogshead* v. *Baylor;* 135, 137, *Davis* v. *Comm.;* 347, *Goodwyn* v. *Myers;* 501, 502, 503, 504, *Rider* v. *Comm.*); until after the so-called Code of 1860 had been published; then he sometimes cited the former as "the Code of 1849" (*ibid* 324, *Gibson* v. *Beckham;* 419, *Roy* v. *Roy's ex'r*); but by that time almost everybody had come to cite it so.

§Page 47. Doubtless all the copies of this and many subsequent pages had been printed, before anything was discovered or apprehended that would impede a *satisfactory* completion of the Code within the year 1849: in one sense it was completed (printed and bound) within that time.

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justices of the peace and others at the public expense*, besides remunerating the compiler; it has never enacted that either should be, *per se*, law or evidence of the law†. For its authority, therefore, each must depend upon the fidelity wherewith it has reproduced what, at its date, remained in force of the Code as perfected in 1850, and of the subsequent numerous constitutional and more numerous statutory changes affecting it. In this difficult task it is perhaps less discreditable, to one not a lawyer, that he has failed somewhat, than creditable, that he has succeeded so well. But the practitioner's need is of what shall not mislead him at all.

In very many places the compiler avows, that he does not there follow the wording of indicated enactments; occasionally, that he frames *de novo* sections to serve as connecting links; of course, in every such instance pursuing his own or some other private judgment. And sometimes he departs from the words, doubtless without intending it, where nothing in any note or list of *errata* makes known the departure: For example, in V. C. 1860, c. 183, s. 2, and in V. C. 1873, c. 179, s. 2, "court OF justice" is substituted for "court OR justice," which latter is the reading of the *princeps editio*. No doubt, a legal tribunal would, upon this being shewn, accept and act on it as giving the *words* of the law, even if it were discovered, on actual comparison, to be variant from the roll‡; and would, therefore, regard as needless the trou-

*Sess. Acts 1859-60, c. 85; V. C. 160, p. iii; Sess. Acts 1872-73, c. 382 V. C. 1873, p. v.

†See V. C. 1873, c. 15. s. 8; taken from V. C. 1849, c. 16, s. 16, *verbatim*, without (as there should have been) addition from, or of, Sess. Acts 1849-50, c. 9, pp. 12-13. See *infra* note ‡.

‡A preference being in this instance given to the printed statute-book, over the MS. roll, by Sess. Act 1849-50, c. 9. s. 2, p. 12. See 20 Comm. 8, *Eld* v. *Gorham*; 18 How. 595, *Pease* v. *Peak*; 5 McLean 486. s. c.; 3 Mich. 144, *Hulburt* v. *Merriam*. Where such preference is not given (thus making, in effect, the *printed* copy the *very* statute), the rule is precisely the reverse; not in England only, where authorities in point are very numerous; but in America likewise (notwithstanding what is said in 1 Greenl. Evid. § 480). See 42 Md. 203, *Legg* v. *Annapolis*; 5 Iowa, 509, *Clare* v. *State*; 12 do. 1, *Duncombe* v. *Preidle*. As where "term" was misprinted in the statute-book, for "time," which latter appeared to be the true reading, "from the original law on file in the secretary's office." 3 Ill. 462, *Beecher* v. *James*. So where the same word "term" is printed in V. C. 1873, c. 178, s. 21, erroneously for "turn," as it correctly stands *in pari materia*, both in V. C. 1849, and V. C. 1860, c. 182, s. 21. ☞ In *this* instance the compiler was misled by following the *printed* Sess. Acts 1869-70, c. 171. s. 1, sub-ch. 182, § 21, instead of consulting either the bill engrossed or the bill enrolled; in both which the word is written *plainly* "turn," as Philip C. Nicholas, Esq., found, on an inspection he made (9 Nov. 1878), for the special purpose of determining this point, concerning which a *practical* question had been raised by James Lyons, Esq. Thereupon the question evanished.

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ble of inquiry whether its decision ought not to be just the same, whichever were the true version. If Col. Munford's could be taken as such (true) version, probably the same judicial determination would and should be reached; not upon the ground, however, that a justice dealing with warrants for small claims would be within the *letter* of the law, either as being or as holding a "court* of justice," according to verbal significance of the Code (—the framers whereof manifestly were careful to distinguish between a justice in any situation and a court†, quite as much everywhere else as in their use of "court *or* justice" in the phrase here quoted—); but because a justice's tribunal, not less than what *those* legislators chose to *call* a court, would be within the *reason*, the *spirit*, and the *principle*, of such a provision. A substitution, similarly not pointed out, and unintentional, of one word for another ("term" for "turn") has been detected in V. C. 1873‡.

More serious than either of these is an alteration, necessarily not unintentional, though no wise avowed, of the language of an enactment embraced in the later of these compilations, which alteration unavoidably, though doubtless not intentionally, perverts its meaning, as has recently been very clearly shewn in this journal.§ Besides which, there are in V. C. 1873 faults both of redundancy and deficiency. Repetition, often once, sometimes twice, not never thrice, of the

*Professor Minor (4 Inst. 204) speaks of "the court of a justice of the peace," with reference to *his own* ideas of what constitutes a court (as developed *ibid*, 157).

†The Code says, "for *any court* without one the governor shall provide a seal." V. C. 1849, c. 161, s. 1; V. C. 1873, c. 157, s. 1. Probably no person ever imagined that *every justice* "without a seal" could claim one from the governor. Without entering into particulars further, it may suffice here to say, that Mayo's Guide (1850), "adapted to the new Code of Virginia," purports in the title-page, in the preface, at the commencement of the body of the work (p. 17), *et alibi passim*, to be for the use of Magistrates or of Justices "out of court"; that is, out of the county court or the corporation court, which courts respectively were at that time held by several such magistrates or justices in session together. And in the same sense the same phrase, "justices of the peace out of court," is used in the suggestions for a prohibition (against proceeding upon warrants for small claims) in *Miller* v. *Marshall*, 1 Virg. Cas. 159, and *Hutson* v. *Lowry*, 2 do. 43.

‡C. 178, s. 21; see it mentioned *supra* note ‡, p. 711.

§*Ante* 257-58. By too rashly confiding in the text of V. C. 1873, c. 49, s. 34, instead of consulting Sess. Acts 1866-67, c. 220. s. 1, § 34, the Legislature, in Sess. Acts 1877-78, c. 253, s. 1, § 34, unawares incur infringement of both our Constitutions (State and Federal), in the manner which "C. G." there very clearly points out, and against which their predecessors had *effectually* guarded *in vain*. From similar over-confidence Mr. Barton (Law Pract. s. 396) has adopted both the false readings which I have indicated *supra*—"*Satius petere fontes.*"

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same matter in the same words, increases the bulk of the volume, till we are made to *feel* that "a great book is a great evil." While, on the other hand, some enactments and other matter which should be contained therein are omitted totally. For example, sections 1 and 2, together with the preamble, of Sess. Acts 1865–66, c. 72, are altogether left out, though sections 3 and 4 thereof are inserted as sections 3 and 4 of c. 138 (in V. C. 1873), while sections 1 and 2, together with the preamble of Sess. Acts 1865–66, c. 71 are inserted as sections 5 and 6 of the same chapter 138, though the first and second sections of it (c. 138) are reprinted from Sess. Acts 1866–67, c. 270, *which* is "an act *to amend and re-enact*" those very sections (to wit, 5 and 6 of V. C. 1873, c. 138) as the same had been enacted in the session next preceding. Moreover, the preface to the Code, dated "December 1849," which was reprinted in V. C. 1860, totally disappears from V. C. 1873; though, besides valuable as well as interesting information concerning our former revisals, it gives details respecting that of 1847–9, some at least of which ought to be accessible in the same volume with the Code. Thus, it is there told how the act "for publication of the Code" provided, among other things, that the superintendents of its publication should "insert *or* omit *such* captions to sections *as may seem to them fit.*" Were this provision generally known, counsel would be less in danger of deceiving themselves by such reliance on those "captions," as was attempted in a reported case before the Court of Appeals.*

Another fault is alleged; the charge emanating from a source and in a form, that entitles it to very grave and the most respectful consideration. In the latest instalment hitherto given us, of his highly valuable contribution to the special jurisprudence of Virginia, Professor Minor, after delineating the civil jurisdiction of a justice, calls attention to the

*21 Gratt. 685, 694, *Wenonah* v. *Bragdon.* In the marginal abstract of *Hammersmith and City Railway Co.* v. *Brand*, Law Rep. 3 H. L. (Engl & Jr. App.) 171, and 4 Q. B. 738, *a.* edit. Philad. 1876, it is said: "The headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expressions in a section ranged under any particular heading." See also 9 H. L. C. 32, *Eastern Counties Railway Co.* v. *Marriage.* But those "headings" are of the following kind: "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows;" or "with respect to the carrying of passengers or goods upon the railway, and the tolls to be taken thereon, be it," &c.; so that *they* are the words of Parliament *itself*, and *part of* the very statute. And even then the Lord Chancellor (Cairns), in the first-mentioned, but last-heard of those cases, made a very strong argument in favor of allowing very little or no weight to them.

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provision in V. C. 1873, c. 48, sec. 7; which, he says, "is as follows: 'any claim for damages to real or personal estate, or breach of any contract, where the amount sought to be recovered does not exceed $20, shall be cognizable by a justice of the peace'"—adding, "and if *it* is to be considered as law, the doctrine stated above cannot be maintained. But it is believed not to be law. It is an enactment of 1861–62, by a legislature which sat in Wheeling, pretending to represent the State of Virginia, but composed of delegates from only a few counties, and they [them], for the most part, representing a minority of the population. The acts of that body have never, to the knowledge of the writer, been recognized by the people or General Assembly of Virginia (unless, perchance, such recognition is found in an act of the *extra* session at Richmond in June 1865); and had the legislature considered the provision in question to be in force, it would have been superfluous to enact the special statute* giving a justice exceptional jurisdiction as to trespassing cattle. The compiler of the Code of 1873 seems to have inserted the provision alluded to, upon questionable authority."†

But on this point the position of Col. Munford seems impregnable. It deserves, especially when *thus* impugned, a full discussion, and shall have one.

WILLIAM GREEN.

[TO BE CONTINUED.]

*"V. C 1873, c. 97, s. 18."

†4 Min. Inst. 205. This instance was not solitary. The like is done in V. C. 1873, c. 2, s. 1 (twice in the same page, 117); c. 4, s. 2; c. 42, s. 33; c. 108, s. 9; c. 120, s. 7; c. 147, s. 2 (where the reference in margin, "1861-2. c. 58, p. 52," is to, not a Richmond, but a Wheeling act). See also V. C. 1873, p. 78, note *; p. 416, note *; p. 921, note *.

THE SEPARATE ESTATE OF MARRIED WOMEN.

Judge Green, of the Supreme Court of West Virginia, has explored this subject with diligence, research and unsurpassed legal acumen; he is fairly entitled to the gratitude of the entire profession. Heretofore this has been the most uncertain, and, consequently, the most difficult branch of the law; but his opinion settles those leading and perplexing questions, upon which competent counsel have been most reluctant to give advice. He has collected and arranged in convenient groups all the cases, and his opinion does more than anything (we had almost said

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everything) previously published, to furnish clear and accurate views upon this subject. The scope and character of his examination required a *long* opinion, and it was evidently written under the pressure of business; but he has covered almost the entire field, and has opened up with great force and precision of thought, the points upon which there has been the most confusion.

If some competent lawyer will take the *material* presented by Judge Green and expand it into a book, he will find a ready sale and render infinite service to the profession. It is the purpose of this article to possess the bar of the *views* expressed in the opinion.

The interest of a husband in his wife's property is well defined by the common law. THE SEPARATE ESTATE is a creature of equity, designed to divest, *during coverture*, the husband of his marital rights. Since these rights pertain only to the personal property and the rents and profits of the land, it is obvious that, upon correct legal principles, the *separate estate* does not embrace the *corpus* of the wife's real estate. The recognition of the separate estate involved a modification of two distinct principles: (1) that the wife is *sub potestate viri;* (2) that, when the *fee* is granted, any restraint upon the power of alienation is void.

Much of the embarrassment that has attended the administration of the separate estate has arisen from the reluctance of chancellors to recognize how far these two principles must be modified in order to accomplish the objects and purposes of the separate estate. But it is now entirely settled that the extent and character of the power of alienation, being dependent on the will (intent) of the grantor, are measured and defined by the instrument which creates the separate estate. Hence, we may readily distinguish three classes: (1) Where the wife has an unlimited power of alienation; (2) Where she has only a limited (qualified) power; and (3) Where the power of alienation is denied.

Among the questions, considered as still open, we may observe the following:

1. Whether the simple (naked) grant of a separate estate confers (carries with it) the right to alienate, or whether it is inalienable?

2. Whether, where the instrument, creating the estate, specifies one mode of alienation, another and a different mode may be adopted?

3. If the wife has the unlimited (*i. e.*, unrestrained) power of alienation, is her separate estate liable for her debts?

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4. If the estate be liable for her debts, can the *corpus* be sold to pay them?

Widely different views have been expressed on each question, and it is impossible to reconcile the cases, but we may group them in three classes:

I. The *old* and the *recent* English cases.

II. The South Carolina doctrine.

These two classes, adopting very different theories, furnish two distinct and well defined rules of decision, either of which is susceptible of easy application.

III. A numerous list of conflicting decisions which, following neither the *old* and *recent* English view, nor the South Carolina doctrine, do not proceed upon any defined rule of decision or legal principle.

This class embraces the *modern* (*i. e.*, *intermediate*, between 1793 and 1840 [about]) English cases and the decisions in New York, Massachusetts, &c.

We will examine these groups in the order named, and hope to present a few clear-cut views which will be useful to the profession.

The Old and Recent English Cases.

It will be found that the decisions from 1740 to 1793 proceeded upon a well-defined theory; then, there was a departure from that theory, and that the court has returned to the old and correct doctrine. Hence, the ancient and recent cases are in accord and in conflict with the intermediate decisions.

The *old* cases, considering the power of alienation, an *incident to ownership*, held, that unless her power was expressly restricted, the wife might dispose of her separate estate in whatsoever manner she pleased; and for the same reason (namely, that it was *incident to ownership*) they held it was liable for all her debts, whether the promise to pay was written or verbal. Lord Thurlow employed this language: "A *feme covert*, acting in respect to her separate estate, is competent to act, in all respects, as a *feme sole*."

This language does not countenance the idea that she may convey the *corpus* of her land, without joining her husband, or devise it, because, as above noted, the separate estate must be confined to her goods and chattels and the rents and profits (during coverture) of her realty. Indeed, many cases, seemingly in conflict, may be reconciled simply by confining the phrase—separate estate—to its proper signification. The

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extent of this estate being thus understood, it is entirely settled that, unless her power is expressly limited, the wife *may* dispose of it by her sole deed or by her will. But, although there are cases to the contrary, the weight of the *old* authorities is against her power to devise the *corpus*, or to convey it by her sole deed.

It is important to distinguish between the cases which hold that the wife may devise the *corpus*, or may convey it by her sole deed, and those other cases which are grounded on the fact that the instrument (creating the separate estate) then before the court, gave to her a power to *appoint the corpus* by will or deed. It is believed the first class of cases will not be sustained by future decisions.

The theory of the *old* English cases is simple, satisfactory and of easy application; they held *there was no personal liability, but the separate estate was liable for the debts of the wife, because such liability is incident to ownership.*

The Intermediate Cases.

It seems, after the court had repeatedly acted upon this theory, and after it had accumulated a line of decisions, certainly sufficient to establish a settled rule of decision, it then (about 1793) made a departure, and for the first time suggested that the separate estate was liable for debts—not because such liability was incident to ownership, but because the wife, by contracting a debt, thereby created a charge (*lien?*) on her property. The application of this new doctrine occasioned the most unsatisfactory and artificial reasoning. *E. g.*, it was argued, that since she possessed the power of alienation she also possessed the *implied* power to make a charge upon her estate; and it was said, that incurring a debt was an exercise of this power to charge. Again, this new idea was first advanced in cases where a wife had executed her *bond*, which circumstance suggested a line of reasoning, very ingenious, specious and plausible, but crude, superficial and illogical. It was said, that when a married woman executes her *bond*, she must intend it to operate in *some* way, and as it is void at law, and can have no operation in equity, unless as against her separate estate, therefore the court will presume she *intended* it to be paid by appropriating to it a part of her property, and will enforce (this) her intention precisely as though she had made a specific charge, It will be observed, the *intent* to charge was inferred from the *act* of signing a written promise to pay, even although the writing

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made no allusion to her separate estate. This reasoning having been adopted, it was held, the estate was liable only when she had promised, *in writing*, to pay a particular debt. Hence, we find a distinction taken between her *bonds* or notes and her mere *verbal* promise to pay a debt—the court holding the separate estate liable for the one, but not for the other.

But evidently this distinction is not tenable, and it was not applied in many contemporaneous cases. *E. g.*, it was held, *all* her debts (bond and verbal) were to be paid ratably out of the separate estate of a deceased wife.

The contrast between the *old* and the *intermediate* cases is striking. According to the old decisions, the separate estate is liable for all the wife's engagements, because property is liable for the debts of the owner; whereas, according to the intermediate cases, it is liable only *when* the wife *intended* to create a charge. *E. g.*, if she purchased a dress with the intent to pay for it out of her separate estate, it was liable; if she made the purchase without such intention, it was not liable. It will be observed, the liability of her estate was made to depend upon a question of *fact*, viz., the existence or non-existence of a particular *intention*. Hence, the creditor was subjected to the burden of proving that fact. But the courts held, that the *fact* (intention) was established by the circumstance that she had executed a bond, or signed a note.

It is observed that these *intermediate* cases proceeded on the idea that the *written* promise was somewhat in the nature of an exercise of a power of appointment.

The Recent Cases.

But the reasoning which produced the above-noted distinction between written and verbal debts, has been exploded (*Owens* v. *Dickenson*, 1 Cr. & Ph., and especially *Vaughan* v. *Vanderstegen*, 2 Drew, and *Johnson* v. *Gallaher*, 3 DeG. F. & I), and the English court has restored the *old* doctrine.

It is to be noted, that in many of the cases the chancellor was embarrassed by the presumption that, in respect to the debts in question, the wife was an *agent* for her husband. But it is very evident this presumption does not, in any wise, affect the principle upon which the separate estate is to be subjected to her liabilities; if she was acting as *agent*, then it is *his* debt. Whether a wife was dealing as principal or as agent, is a matter of mere evidence; whether her property is liable for *her* debts, is a matter of law.

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It may be assumed, that the creditor must rebut the presumption that she was acting as an agent, and the circumstance that she signed her *own* name to a note, is competent testimony to repel the presumption of agency. We submit, the distinction here suggested, assigns to her note or bond its proper legal significance.

The *present* English doctrine, therefore, is:

1. The separate estate is liable for *all* the wife's debts, unless the power of alienation is expressly restrained.

2. A *feme covert*, unless restricted, has absolute dominion over her separate estate.

3. Although a particular mode of disposition is mentioned, she may adopt another and a different mode, because the grant of unqualified ownership carries with it the unlimited power of alienation.

(It is true, there are cases against this last proposition, and certain chancellors have regretted that the law was so settled.)

The South Carolina Doctrine.

In 1811, Chancellor Desaussure announced the old English rule of decision, but he was reversed—the appellate court holding, " * * * that a wife who has a separate estate, cannot part with it, or charge it in any way, without an examination; that as by marriage she loses all the power of a *feme sole*, a separate estate does not confer those powers on her; and, therefore, the power of appointing such estate must be expressly given, and the mode prescribed be strictly pursued. As the *bond* given by Mrs. S. has not these sanctions, I am of opinion, that they cannot be enforced against her property." " It is the settled law of this State, in contradiction of many English cases, that a *feme covert* exercises a *delegated* authority, and cannot exceed it; she is enabled to execute a power, as in some instances any third person (an infant) might be enabled to execute it and bind her by his act."

But in South Carolina, the English rule is adopted to this extent: (1) If the instrument creating the separate estate expressly authorizes the wife to alienate it, or expressly makes it liable for her debts, then it will be held subject to her alienation—not as owner, but because the power is expressly given her; and subject to her debts, not because of her ownership, but because the instrument makes it liable. (2) That a trust estate is liable for all debts incurred for its *betterment*. (The English doctrine, to the extent of these two propositions, has been followed everywhere.)

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The South Carolina doctrine has been followed in Pennsylvania, Rhode Island, Tennessee and Mississippi.

Cases which Follow Neither the English nor the South Carolina Doctrine.

These cases proceed on an idea that the separate estate is liable for the engagements of the wife, because when she creates a debt, she thereby alienates a sufficient part of her property to pay it; the liability grows out of and results from her power of alienation; that is to say, the incurring a debt is an *implied alienation* of sufficient property to pay it. The judges who adopt this view, say, they will treat as an *implied alienation* such acts as show an *intention*, on her part, that a portion of her separate estate may be subjected to the particular debt. But it has been found impossible to determine, in advance, what acts are sufficient to exhibit an *intention* to charge her estate. Herein lies the difficulty and the distinctive feature of what may be called the New York doctrine. It consists of three separate propositions:

1. That the wife has full power to alienate her separate estate.

2. That as she may alienate a portion of it to pay a particular debt, therefore she may make an *implied* alienation to pay the debt.

3. That the court of equity will treat, and will enforce, as an *implied* alienation *such acts* as show an *intention* (purpose) that a sufficient part of her separate estate shall be applied to a particular debt, viz., acts which disclose (establish) her *intention* to charge her property with a debt, will be considered as an alienation *pro tanto*.

It is perhaps impossible to formulate a rule of decision that will fairly exhibit the New York theory; the difficulty lies in the nature of the subject; it is an attempt to travel a middle course between the English and the South Carolina doctrine. But these two doctrines start from different stand points; the one, regarding the wife as a *feme sole*, and the other, regarding her as a mere instrument to execute the will (*intent*) of the grantor.

Perhaps it may serve to simplify this discussion if we run the lines somewhat roughly between these three theories.

I. According to the English view (old and recent), a wife with a separate estate, has a right, which is incident to ownership, to alienate it in any manner she pleases; and if she contracts a debt, her property can be subjected to its pay-

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ment, because, it is the property of the person who created the debt—liability for debts being incident to ownership.

II. According to the South Carolina view, a wife cannot alienate her separate estate unless invested by the grantor with an express power; hence, her alienation must be considered as an exercise of a power conferred upon her. Her alienation is not an incident of ownership, but is in the nature of a power of appointment.

Nor is the estate liable for any of her debts, unless the grantor has expressly made it so; but if such was his intention, then it will be subjected to her debts, precisely as it would be liable to the engagements of a *third* person, had the grantor so provided. In South Carolina liability for debts is not considered an incident of ownership.

III. According to the New York view, a wife with a separate estate has a right, which is incident to ownership, to alienate it in any manner she pleases. (Thus far in perfect accord with the English theory.) But its liability for her debts is not considered an incident to ownership—something *more* than *ownership* must be shown before it can be subjected to her debts. (On *this* point, New York and South Carolina are *somewhat* in accord.) The separate estate is liable for her engagements only when she has expressly or by *implication* alienated a part of it to pay a particular debt.

It will be observed, that if the New York doctrine was, that the estate was liable only when she has created a *lien* upon it (*e. g.* given a deed of trust), they would then have a theory susceptible of intelligent application, but unfortunately, the judge of this and several other States have held that it is not necessary she should appropriate by a specific alienation to pay a debt, but they have suggested the novel and anomalous doctrine of *implied alienation*, and they hold that the court must consider and must enforce as an implied alienation such acts of the wife as evince an *intention* that a part of her property shall be applied to a particular debt, viz., they consider as an alienation, those acts which disclose a design to charge her separate estate.

The attempts to determine and define what acts will amount to this implied alienation, have led to the most extraordinary results. For example, it was held in *Yale* v. *Dederer*, 22 N. Y., and in *Manhattan* v. *Thompson*, 58 N. Y., that the intention to charge must be stated in the contract itself—if a *note* omits to express that intention it cannot be enforced. It was held in *Weir* v. *Groat*, 4 Hun., that the separate estate was *not* liable under the following facts: A mer-

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chant refused to credit the husband for groceries; the wife promised to be responsible for the next bill; the merchant gave her a memorandum book, in which she charged the groceries; and she afterwards expressly promised to pay the debt. The court said, the merchant labored under the false idea that an intention to charge her estate could be inferred from her simple promise to pay. It was held in *Maxon* v. *Scott*, 55 N. Y., that the separate estate was liable for the hotel bill of husband and wife, because she had engaged board, and verbally promised to pay, and declared her intention to bind her separate property. It was held in *Conlin* v. *Cantrel*, 64 N. Y., that the intent to charge might be inferred from the surrounding circumstances. In this case, a wife was separated from her husband, and informed a seamstress that she had a separate estate; she did not declare her intention to charge, but after the work was done, made a verbal promise to pay.

Hence, if the promise to pay be *in writing*, the separate estate is not liable unless the intent to charge be expressed; but if the promise be *verbal*, the intent may be *declared*, or it may be inferred from surrounding circumstances. Therefore, if there be a verbal promise to pay a debt, and the intent to charge is either declared, or is to be inferred from the circumstances, the separate estate is bound; but if this verbal promise is reduced to writing, the estate is *not* liable, unless the writing contains an express intent to charge it.

Again, if the circumstances in *Conlin* v. *Cantrel* indicated the required intent, it would seem impossible to avoid the same inference in *Weir* v. *Groat*.

Indeed, it would seem unnecessary to demand stronger testimony to establish the intent than the two *facts:* that owning separate property a wife has promised to pay; or that owning such property she has contracted a debt; because she must know, that unless paid out of her separate estate, it will not be paid at all; hence, either the required intent must exist, or else she intends to defraud.

Many anomalies might be pointed out had we time and space. Thus, it is held in Kentucky, a *verbal* declaration of the intent to charge, is sufficient to bind the personal estate, but *not* the real. * * *

Sept. 20, 1879. J. M. M., *Charlestown, W. Va.*

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SUPREME COURT OF THE UNITED STATES.

KIRTLAND *v.* HOTCHKISS.

OCTOBER TERM, 1879.

1. Unless restrained by provisions of the Federal Constitution, the power of a State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within the jurisdiction of the State.
2. There is no provision of the Federal Constitution which prohibits a State from taxing in the hands of one of its resident citizens, a debt held by that citizen, upon a resident of another State, such debt being evidenced by the bond of the debtor, and its payment secured by a deed of trust upon real estate situated in the State in which the debtor resides.

In error to the Supreme Court of Errors of Letchfield Co., Connecticut.

The facts sufficiently appear in the opinion of the court, delivered by Mr. Justice HARLAN.

We will not follow the interesting argument of counsel by entering upon an extended discussion of the principles upon which the power of taxation rests under our system of constitutional government. Nor is it at all necessary that we should now attempt to state all the limitations which exist upon the exercise of that power, whether such limitations arise from the essential principles of free government or from express constitutional provisions. We restrict our remarks to a single question, the precise import of which will appear from a brief statement of the more important facts of this case.

The plaintiff in error, a citizen of Connecticut, instituted this action for the purpose of restraining the enforcement of certain tax-warrants levied upon his real estate in the town in which he resided, in satisfaction of certain State taxes, assessed against him for the years 1869 and 1870. The assessment was by reason of his ownership, during those years, of certain bonds, executed in Chicago, and made payable to him, his executors, administrators, or assigns in that city, at such place as he or they should, by writing, appoint, and in default of such appointment, at the Manufacturers' National Bank of Chicago. Each bond declared that "it is made under, and is, in all respects, to be construed by the laws of Illinois, and is given for an actual loan of money, made at the

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city of Chicago, by the said Charles W. Kirtland to the said Edmund A. Cummings, on the day of the date hereof." They were all secured by deeds of trust executed by the obligor to one Perkins, of that city, upon real estate there situated, the trustee having power, by the terms of the deed, to sell and convey the property and apply the proceeds in payment of the loan, in case of default on the part of the obligor to perform the stipulations of the bond.

The statute of Connecticut, under which the assessment was made, declares, among other things, that personal property in that State 'or elsewhere,' should be deemed, for purposes of taxation, to include all moneys, *credits*, *choses in action*, *bonds*, *notes*, stocks (except United States stocks), chattels, or effects, or any interest thereon; and that such personal property or interest thereon, *being the property of any person resident in the State*, should be valued and assessed, at its just and true value, in the tax list of the town *where the owner resides*. The statute expressly exempts from its operation, money or property actually invested in the business of merchandising or manufacturing when located out of the State.—(*Conn. Revision* of 1866, page 709, title 64, chapter 1, section 8.)

The highest court of the State held that the assessments complained of were in conformity to the State law, and that the law itself did not infringe any constitutional right of the plaintiff.

This writ of error is prosecuted upon the ground, as asserted by the plaintiff, that the statute of Connecticut, thus interpreted and sustained by its highest court, is repugnant to the Constitution of the United States.

In *McCulloch* v. *State of Maryland*, 4 Wheaton, 428, this court considered very fully the nature and extent of the original right of taxation which remained with the States after the adoption of the Federal Constitution. It was there said "that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, it was further said: "It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation.

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"This vital power," said this court in *Providence Bank* v. *Billings*, 4 Pet., 563, "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State Governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In *St. Louis* v. *Ferry Company*, 11 Wall., 422, and in State Tax on Foreign-held Bonds, 15 Wall., 319, the language of the court was equally emphatic.

In the last named case we said that, "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which, under the Constitution of the United States, exist between the Federal and State Governments. Upon their strict observance depends, in no small degree, the harmonious working of our complex system of government, Federal and State. It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its system of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized or secured to the citizen by the Constitution of the United States, this court, as between the citizen and his State, can afford no relief against State taxation, however unjust, oppressive or onerous.

Plainly, therefore, our only duty is to inquire whether the Federal Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by that citizen upon a resident of another State, such debt being evidenced by the bond of the debtor, and the payment of the debt or bond secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. (15 Wall., 320.) It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow-citizens of the

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same State, to contribute for the support of the government whose protection he enjoys.

The debt in question, although a species of intangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is at best only evidence of the debt, not the debt itself. The bond may be destroyed, but the debt—the right to demand the repayment of the money loaned, with the stipulated interest—remains. Nor is the locality of the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held by this court in 15 Wall., 323, already cited, the right of the creditor "to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, * * has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein," &c. (Cooley on Taxation, 15, 63, 134 and 270.) The debt in question, then, having its situs at the creditor's residence, and constituting a portion of his estate there, both he and the debt are, for purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard is beyond the power of the Federal Government, in any of its departments, to supervise or control, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exertion by Congress of the power to regulate commerce among the several States. (8 How., 80; Cooley on Taxation, 62.) Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property, without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes in return for the protection it affords them, by the value of the credits, choses in action, bonds or

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stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, and with which the Federal Government cannot rightfully interfere.

JUDGMENT AFFIRMED.

SUPREME COURT OF APPEALS OF VIRGINIA.

WYTHEVILLE.

TURPIN *v.* SAUNDERS.

JULY TERM, 1879.

(*Absent*, MONCURE P. and ANDERSON J.)

In 1830, B. holding a large tract of land called the Austin Nicholas survey, conveyed twenty-five thousand acres of it to W., and three years thereafter conveyed twelve thousand acres of the same survey to S. W. conveyed to G., G. to C., and C. to T., the defendant. A portion of the land conveyed to S. was found, on examination, to have been embraced in the conveyance to W., under whose grantees T., the defendant, claims. The case being that of an interlock, and T, and his grantors holding the older title, must succeed, unless S., Jr., the plaintiff, and his grantor can shew a title by adversary possession which is then attempted. No possession of any part of the land in controversy was shewn by S. prior to 1842. In that year, one Simpkins settled on ten or twenty acres of it. Whether he claimed title, or was a mere squatter, does not appear; but he did not claim title under S. Some time after this, there was a verbal agreement between Simpkins and S. that Simpkins should continue in possession, and have what he could make on the land, in consideration that he would salt the cattle of S., which he was in the habit of sending to this county to range on his lands there every spring—S. living in an adjoining county, and owning other lands adjoining those in controversy. This arrangement seems to have continued until S's death in 1851. About this time, C., under whom, as aforesaid, T., the defendant, claims, finding Simpkins in possession, and knowing nothing of his contract with S., agreed to give him a lease of the land in his possession, which, at Simpkins' request, was reduced to writing. Simpkins remained in possession until 1860, when he either voluntarily abandoned, or was driven from the possession. The land in controversy contains about three thousand five hundred acres, and with the exception of the small clearing made by Simpkins, was, at the time of these occurrences, an unbroken forest, and in a state of nature. In an action of ejectment brought by S., Jr., claiming title under S. against T., claiming under C., a grantee from W., as aforesaid; and claiming title by adverse possession, on the ground that the possession of Simpkins was the possession of S.; that Simpkins having accepted a lease from S., his subsequent attornment to C. was null and void. HELD:

1. The ground upon which an adversary title is established, is the supposed *laches* of the true owner. The possession of the adverse claim-

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ant must not only be with claim of title, but must be visible, and of such notoriety, that the true owner may be presumed to know of it; and Simpkins not having taken possession in this case under claim of title either in himself or in S., and S. never having exercised any notorious acts of possession over the land in controversy, either through Simpkins as his tenant, or in any other way, S., Jr., his grantee, is not entitled to recover in this action as adversary claimant.

2. Wild and uncultivated lands cannot be the subject of adversary possession whilst they remain completely in a state of nature. A change in their condition, to some extent, is essential; without such change, accomplished or in progress, there can be no occupation, use or enjoyment. Evidence short of this, may prove an adversary *claim*, but cannot establish an adversary *possession*. The only improvement on the land in controversy being the small clearing made by Simpkins, this did not constitute an adversary possession, under the circumstances of this case, in any just and legal sense of the term; the residue of the tract being in a state of nature, could not be the subject of adversary possession, and the mere fact that herds of cattle were permitted to wander over it at will, did not amount to a claim of ownership of the property.
3. *Quære:* While it is well settled, that a tenant cannot dispute the title of the person by whom he was let in possession, nor be permitted to deny that the possession so received was the possession of his landlord. Does this rule apply to the possession of Simpkins as to estop him from controverting the title of S., or from shewing that C. was the true owner?
4. *Quære:* Even conceding that S. had actual adversary possession of a part of the interlock, would that possession be co-extensive with the bounds of his deed, or be confined to his mere enclosure, the senior grantee, C., having settled on his tract, but outside of the interlock? The case of *Cline's heirs* v. *Catron*, 22 Gratt., 378, was not intended to decide this question, and explained on this point.

This was an action of ejectment in the Circuit Court of Floyd county brought in December, 1873, by John Boothe Saunders against Walter C. Turpin, to recover a tract of land lying in that county. There were eight other actions by the same plaintiff against other parties, pending in the same court at the same time, and involving substantially the same questions, and it was agreed that the same judgment should be entered in all the cases, and there should be but one appeal, and but one judgment of reversal or affirmation. Upon the trial, the whole matter of law and fact was referred to the judge, who rendered a judgment in favor of the plaintiff.

Both parties claim title under same original grantor. It appears that in the year 1830, John Belden, being then the owner of a large body of lands lying in the then county of Montgomery, known as the Austin Nicholas survey, sold and conveyed to William Wade, trustee, twenty-five thousand acres, part of said survey. In December, 1833, three years after the deed to Wade, Belden conveyed to Samuel Saunders, of

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Franklin county, twelve thousand acres, also a part of the Austin Nicholas survey. The plaintiff claimed under Saunders, and the defendants claimed under Wade. And though there seems to have been some question whether the lands in controversy were embraced in the Wade tract, this court was of opinion that they were; and the question upon which the case was decided was a question of adversary possession. All the facts necessary to a proper understanding of the case, will be seen in the opinion of Judge Staples. The Circuit Court decided in favor of Saunders, the plaintiff in that court. On the application of Turpin, a judge of this court awarded a writ of error and *supersedeas.*

J. C. Taylor and *A. A. Phlegar* for the plaintiff in error.

G. E. Dennis, Wm. D. Vaughan and *J. L. Tompkins* for the defendant.

STAPLES J. This is an action of ejectment brought in the Circuit Court of Floyd county. Other actions of a similar character were instituted by the same plaintiff against other defendants in the same court, involving substantially the same questions, and it was agreed the same judgment should be entered in all the cases. Upon the trial, the whole matter of law and fact was referred to the presiding judge, who was of opinion the plaintiff was entitled to recover, and rendered judgment accordingly.

Both parties claim title under a common grantor. It appears that in the year 1830, John Belden, being the owner, or claiming to be the owner, of a large tract known as the Austin Nicholas survey, lying in the county of Montgomery, conveyed to William Wade, trustee, twenty-five thousand acres, part of said tract. Three years afterwards, in December, 1833, Belden conveyed to Major Samuel Saunders, of Franklin county, twelve thousand acres, also part of the Austin Nicholas survey. The plaintiff claims under this latter deed. The defendants claim under John G. Cecil, whose title is derived from Wade, trustee.

It is conceded that the Saunders' deed covers the land in controversy. It is not, however, conceded that the deeds under which the defendants claim also cover it. The operation and effect of these deeds have been discussed by counsel at great length, and they, therefore, require a somewhat extended notice in this opinion. (Here Judge Staples enters into a minute and careful consideration of the deed from Belden to Wade, trustee, the deed from Wade to Glenn, from

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Glenn's devisees to Cecil, and those claiming in common with him, and the various provisions and descriptions contained in those deeds, and the parol and documentary evidence relating to the same. From all which he was satisfied, that, notwithstanding occasional errors in the description of boundaries, and the interests of parties, the land in controversy is embraced by the deeds of conveyance under which defendants claim.) Judge Staples then proceeds: The case presented is therefore simply one of an interlock, and the defendants having the elder title must succeed, unless their right is barred by the adversary possession on which the plaintiff relies. And this is the material question in the case.

In the first place, the evidence adduced to shew possession of a part of the land in controversy by Major Saunders prior to 1842, is not at all satisfactory or reliable. Indeed, it was not seriously insisted on in the argument, and may be thrown out of the case.

It appears, however, that in the year 1842, one Simpkins settled upon a small clearing of ten or twenty acres, a part of the land in dispute. Whether he claimed title, or was a mere squatter, is not very clear. Upon this point, the testimony is conflicting. One thing is very certain, he did not claim under Major Saunders. It seems that after remaining there awhile, he went to see Major Saunders; and it was agreed between them that Simpkins was to continue in possession, to have all he could make on the land, and in consideration of this, he was to salt and attend to the cattle which Major Saunders was in the habit of sending every spring to range his lands in Floyd county. This was the extent of the arrangement between them. The agreement was not reduced to writing, nor was anything said with respect to the time it was to last, although in fact it would seem to have continued until Major Saunders' death in 1851. About that time (1851), Cecil finding Simpkins in possession, and knowing nothing of his contract with Saunders, agreed to give Simpkins a lease of the land, which was regularly reduced to writing at Simpkins' request. And there is no doubt that thereafter Cecil regarded Simpkins as his tenant, and Simpkins recognized Cecil as his lessor and the owner of the land. Simpkins having thus succeeded in obtaining a lease from both parties, remained in possession until the year 1860, when he either voluntarily abandoned or was driven from the possession. The land in controversy contained about three thousand and five hundred acres, and, with the

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exception of the small clearing alluded to, was, at the time of these occurrences, an unbroken forest.

The theory of plaintiff's counsel is, that Simpkins having accepted a lease from Saunders, his subsequent attornment to Cecil was null and void; that Simpkins, notwithstanding, continued Saunders' tenant; his possession was Saunders' possession, was adversary to Cecil, was co-extensive with the limits of the deed under which Saunders claimed, and was continued sufficiently long to ripen into a perfect title.

The general rule is certainly well settled, that a tenant cannot dispute the title of the person by whom he has been let into possession, nor can he be permitted to deny that the possession so received was the possession of his landlord. In *Emerich* v. *Taverner*, 9 Gratt., 224, Judge Lee said, "The rule is not varied where the tenant is in actual possession of the premises at the time he accepts a lease, for he thereby as effectually recognizes the title and possession of the lessor as if he had entered and taken possession under and by virtue of the lease itself." It may be a question whether this proposition of Judge Lee is correct in the broad and unqualified terms in which he has expressed it. There is a strong line of authority for the doctrine that, to create the estoppel as between landlord and tenant, the tenant must enter into and obtain possession under the lease. 2 Smith Lea. Cases, 752; 1 Bing. on Real Prop., 211; Tyler on Ejectment, 822, 880; *Miller* v. *Williams*, 15 Gratt., 222.

In *Alderson* v. *Miller*, 15 Gratt., 283, Judge Allen expressed the opinion that the estoppel did not apply where the tenant in possession had been induced by fraud and imposition to accept the lease. Other decisions have gone much further, holding that where the tenant, under a mistake, is induced to accept a lease from a person having no title, or if he be threatened with a suit upon a paramount title, the threat, under the circumstances, is equivalent to an eviction, and he may thereupon submit in good faith and attorn to the party holding a valid title to avoid litigation. *Merryman* v. *Browne*, 9 Wallace, 592, 600; 1 Wash. on Real Property, 482, 492. It is not necessary, for the purposes of this case, to express any opinion upon these points, nor is it necessary to decide how far they are affected by the provisions of our statute relating to attornments to strangers. Code of 1873, p. 969, sec. 4.

The question here does not turn upon the *nature* and character of Simpkins' obligations to Saunders growing out of the elase. The real point of inquiry is, How was Cecil af-

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fected by that lease? As has been already said, he was wholly ignorant of its existence. He not only had no knowledge of it, but he had no means of acquiring such knowledge. It does not appear that Maj. Saunders made it known in the community. It is certain that but few persons in the neighborhood knew anything of it. Simpkins was careful to conceal the fact, for by doing so, he succeeded in obtaining the lease from Cecil.

It is but fair to presume that if Cecil had been informed that Simpkins was Saunders' tenant, he would at once have taken the necessary steps to protect his own rights. It is hardly to be supposed he would have permitted Simpkins to remain there long enough to acquire title by possession. No one attributes bad faith to Major Saunders in the matter, but it was through his conduct that Simpkins was enabled to obtain a lease from Cecil and to retain the possession. It would be curious, indeed, if a possession thus continued could be relied on to defeat the title of the party under whom it was held ostensibly, and without whose consent it could not have been so held. The ground upon which the junior claimant acquires title by adversary possession, is the supposed *laches* of the owner. The latter sees his boundaries invaded by an adverse claimant asserting title, and if he remains passive under such circumstances a sufficient length of time, he is held to acquiesce in the adverse claim. The principle, therefore, is, that the possession must be not only with claim of title, but it must be visible and notorious, and not secret and clandestine. Angell on Limitation, sec. 392.

As was said by the Supreme Court of Massachusetts, the occupation must be of that nature and notoriety that the owner may be presumed to know the adverse possession; otherwise he may be disseized without his knowledge. Angell, sec. 394.

In *Dawson* v. *Watkins*, 2 Rob. Rep., 259–269, Judge Allen, delivering the opinion of the court, said: "To operate a disseisin of one having right, the entry should be made under a claim of title with the intention of taking possession, and be accompanied with such visible acts of ownership as from their nature indicate a notorious claim of property in the land. To hold otherwise, would be to establish a principle by which every proprietor of vacant lands might be disseized without his knowledge, or even the possibility of protecting himself. The same doctrine is laid down in *Taylor's devisees* v. *Burnsides*, 1 Gratt., 195: *Koiner* v. *Rankin*, 11 Gratt., 420; *Kincheloe* v. *Tracewells*, Ibid., 602; *Enery, lessee*, v. *Barnett*, 11 Peters, 41.

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Tested by these principles, the plaintiff's claim of possession is lacking in one of the most essential elements to render it adversary in its character. Simpkins, although in the actual occupation of the premises, did not claim title in himself or in Saunders. On the contrary, he accepted a lease from Cecil, and claimed to hold under him.

If Saunders ever claimed Simpkins as his tenant, or that Simpkins' possession was his possession; if he exercised any such visible or notorious acts of ownership over the land as constituted adversary possession, the record does not show it. It does not matter whether Simpkins originally took possession claiming title or as a mere squatter. If in the latter character, it was in subordination to the title of Cecil, the true owner, and would never become adverse to the latter, except by an open notorious claim of title brought to the actual notice of Cecil. On the other hand, if Simpkins entered claiming title, his possession being without color, was confined to his mere enclosures; and so far as Cecil was concerned, the character of that possession could only be changed by an open adverse claim under Saunders. Simpkins having originally entered as owner, if such was the fact, Cecil had the right to suppose he continued to hold in that character until notice was brought to him of a change in his relations. A secret parol lease, such is here shewn, would be wholly ineffectual for that purpose. Practically, its effects would be, not only to disseize the owner without his knowledge, but without the means of acquiring knowledge of Saunders' claim. *Gray* v. *Fichell*, 38 Georg., 139; *Sharp* v. *Kelly*, 5 Denio., 436.

This court has repeatedly held that wild and uncultivated lands cannot be the subjects of adversary possession whilst they remain completely in a state of nature. A change in their condition to some extent is essential. Without such change, accomplished or in progress, there can be no occupation, use or enjoyment. Evidence short of this may prove an adversary claim, but in the nature of things, cannot establish an adversary possession; nor is there any reason for relaxing the rules of law on this subject in behalf of the adversary claimant of such property. There ought to be no presumption in his favor against the better title. As has been well said, "the inexorable operation of these statutes (of limitations) disregarding, as they do, entirely the original merits of the controversy, furnishes a sufficient reason for excluding mere presumptions of the facts which they require, and for exacting clear and decisive proofs of their existence."

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Judge Baldwin in *Taylor's devisees* v. *Burnsides*, 1 Gratt., 165, 190, 198.

In the present case, the only improvement upon the land in controversy, was the small clearing occupied by Simpkins. It has been already seen that this occupation did not constitute an adversary possession in any just and legal acceptation of the term. The residue of the tract being wholly in a state of nature, covered by unbroken forests, could not be the subject of adversary possession. The mere fact that herds of cattle were driven upon it, and permitted to wander over its hills without restraint, scarcely, under the circumstances, amounted to a claim of ownership. Other persons in the community owning cattle exercised the same privilege of salting and ranging without question. Major Saunders owned a large body of land adjoining the land in controversy, and a part of the same tract; and the public might conclude, as Cecil might justly conclude, that the cattle properly belonged, and were intended to be "ranged" upon lands belonging to Major Saunders, and not upon that in controversy to which he had no title.

It will thus be seen that the claim of the plaintiff, bought by him at a sale in bankruptcy for a mere nominal consideration, rests not upon any title to the premises, for the person under whom he claims had none, but upon the occupation of a small clearing of ten or twenty acres by a person, the nature and character of whose tenancy was perhaps never understood until years afterwards, and who was enabled to continue his occupation by a fraud upon the real owner, perpetrated through the negligence of the adverse claimant. In this way it is sought to recover a tract or tracts of more than three thousand acres of land, some of it of considerable value, against *bona fide* purchasers, who have paid valuable consideration and expended money in clearing and improving the property.

Therefore, without now inquiring whether Simpkins was estopped to controvert Saunders' title, or to show that Cecil was the true owner, my opinion is, that Saunders and those claiming under him cannot rely upon any possession by Simpkins as adversary to Cecil. This view places the parties in their original position—precluding either from claiming any advantage on the score of possession, and leaving their rights to be adjudicated according to the merits of their respective titles. It follows, that Cecil having the better title, judgment ought to have entered in behalf of the defendants.

This view renders it unnecessary to decide a question dis-

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cussed by counsel, which, in another aspect of the case, would have been very material. And that is conceding that Samuel Saunders had actual adversary possession of a part of the interlock, whether that possession was co-extensive with the bounds of his deed, or was confined to his mere enclosure—the senior grantee, Cecil, having settled on his tract, but outside of the interlock. The learned Judge of the Circuit Court decided that in such case the possession of the junior grantee extends to the boundaries of his deed, for if he had not so held, he could not have decided that the plaintiff was entitled to all the land in controversy. It seems that this ruling was based upon the case of "*Cline's heirs* v. *Catron*," reported in 22 Gratt., 378. It must be admitted there is an expression of the learned judge, delivering the opinion in that case, giving countenance to the ruling of the Circuit Judge.

I did not sit in the case of "*Cline's heirs* v. *Catron*," having been counsel in the lower court. But I am confident this question did not arise either upon the evidence or upon any of the instructions propounded on either side.

It is obvious that Judge Anderson did not intend to lay down any such doctrine as the reported opinion would seem to indicate. What I take it he intended to say was, that when the junior grantee has actual possession of a part of the interlock, and the senior grantee has actual possession of no part of his tract, then the possession of the junior grantee is not confined to his *pedis positio*, but is co extensive with the boundaries called for in his grant. A proposition of law, sound in itself, and sustained by the authorities. It is, however, a very different matter, where, as in this case, the senior grantee was in possession of a part of the land within the limits of his grant, although outside of the interlock. The question involved in this latter proposition was discussed by Judge Baldwin in *Taylor's devisees* v. *Burnside*, 1 Gratt., 196, 224; and again alluded to in *Overton's heirs* v. *Davisson*. 1 Gratt., 212, 224; but the judges being divided in opinion, it was not decided. It was also mentioned by Judge Lee in *Kincheloe* v. *Tracewells*, 11 Gratt., 603, and again left undecided. So that it is still an open question in Virginia. As a decision of the point is not required in the case before us, it is better it shall so remain until a thorough discussion can be had before a full Bench. What is now said is only said for the purpose of removing an erroneous impression, which has gone abroad with respect to what was actually decided in *Cline's heirs* v. *Catron*.

For the reasons already stated, the judgment of the Circuit

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Court must be reversed, and judgment entered for the defendants.

CHRISTIAN and BURKS JJ's concurred.

JUDGMENT REVERSED.

NOTE.—Although Judge Anderson did not sit in this case, he was on the Bench, and after the delivery of the opinion of the court, he remarked that in *Cline's heirs* v. *Catron*, referred to by Judge Staples in the opinion just delivered, he thought there was a verbal error in the opinion reported in 22 Gratt., in the last sentence on page 392. The sentence is, "But if he (the junior patentee) has an actual occupation and improvement of a part of the interlock, and the elder patentee has actual possession of no part of it." (It ought to read, of *his tract.*) He did not think it was the intention of the court to go further; and certainly the court did not intend to decide that when the elder patentee had actual possession of his tract outside of the interlock, the possession of the junior patentee of a part of the interlock, would be the possession of the whole. It was not intended to indicate any opinion on that question. It did not arise upon the record, and an opinion expressed upon it, would have been an *obiter dictum* and decisive of nothing.

His Honor remarked that he deemed it proper to make this explanation, that the profession might not be misled by a verbal inaccuracy in the opinion which he had prepared.

Judge *Christian*, the only other surviving judge who sat in the case, remarked that he concurred in the foregoing explanation.

SUPREME COURT OF APPEALS OF VIRGINIA.

HARRISON'S EX'ORS AND ALS. *v.* PAYNE AND ALS.

RICHMOND.

NOVEMBER TERM, 1879.

Where, in a suit in equity, brought for the purpose of subjecting the real estate of a decedent to the payment of his lien debts, and an assignment of dower to his widow, the dower cannot be assigned in kind, and it is necessary to sell the whole real estate, and to satisfy the claim of dower out of the proceeds. The court cannot, *without the consent of all the parties*, satisfy said claim of dower by the payment of a gross sum out of said proceeds, but it must securely invest one-third of said proceeds, under its order, and direct the interest on such investment to be paid to the widow during her life, in satisfaction of her said claim of dower.

Two suits in chancery were brought in the Circuit Court of Madison county, Va., one by A. B. Yager and others, on behalf of themselves and all other creditors of Robert A. Jackson and Nelson W. Crisler, late merchants, trading as

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Jackson & Crisler, against said Jackson & Crisler, T. H. Hill, trustee, and others, for the purpose of subjecting the real and personal estate of said Jackson & Crisler, and the real estate of the individual members of said firm, to the payment of the debts of said firm and partners, which debts were secured by deeds of trust, judgment liens, &c., on their said property. The other was brought a little later, by said Yager and others, suing for themselves, and all other creditors of Jackson, Crisler & Co., against said Robert A. Jackson and Nelson W. Crisler, surviving partners of themselves and Thomas B. Jackson, deceased, late merchants, trading as Jackson, Crisler & Co., and Cordelia E. Jackson, the widow and administratrix of Thomas B. Jackson, deceased, for the purpose of subjecting the real and personal assets of said Jackson, Crisler & Co., and the real estate of the individual members of said firm, to the payment of the debts of said firm and partners. The bills filed set forth the plaintiff's demand, the liens existing on the assets of said firms, and said assets liable to the debts, and asked that an account be taken of said debts and assets, and that the assets be sold for the payment of said debts. The last bill asked that dower might be assigned to said Cordelia E., the widow of said Thomas B. Jackson, in his real estate and the residue sold; and if it could not be assigned in kind, that the whole might be sold and dower assigned her out of the proceeds. The two cases were heard together, the necessary accounts ordered and taken, and special commissioners appointed to assign dower to the widow of said Thomas B. Jackson, deceased, in kind, if practicable, and if not practicable to assign it in kind, to report that fact to the court. The commissioners reported that the value of the real estate was $5,000; that it was impracticable to assign the dower in kind, and that the interest of all parties would be promoted by a sale of the whole, and an assignment of dower out of the proceeds. There being no exceptions thereto, this report was confirmed, and by consent of parties, special commissioners were appointed to make sale of the real estate in the bills mentioned, and the cause was recommitted to a master to ascertain and report the present value of the contingent rights of dower of the wives of N. W. Crisler and R. A. Jackson, but no direction was given the master to report the fee simple value of the dower of the widow of Thomas B. Jackson, deceased. The master reported the value of the contingent right of dower of the wives of the former two, and also reported the value of the right of dower of the widow of the latter. The said widow of Thos.

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B. Jackson having married Isaac N. Lindsey, the cause was revived against them as husband and wife. The master reported that the fee simple value of the dower of the widow of said Thomas B. Jackson was $1,206, to which the creditors excepted, and insisted that one-third of the proceeds of the sale of the real estate of said Thomas B. should be invested under an order of the court, and the interest annually arising therefrom, paid over to his widow in satisfaction of her dower right. But the Circuit Court overruled this exception, confirmed the report of the master, and ordered that the commissioners of sale should pay over to said Lindsay, in right of his wife, the said sum of $1,206, "in full of the fee simple value of her dower in the real estate of her deceased husband." And from this decree, the executors of John Harrison, deceased, and other creditors of said Jackson, Crisler & Co., obtained an appeal from one of the judges of this court.

A. R. Blakey for the appellants.

James G. Field for the appellees.

MONCURE P.—The question presented for the decision of the court in this case is, whether, where, in a suit in equity for an assignment of dower, it cannot be assigned in kind, and a sale of the subject in which the claim to dower exists is necessary in order to satisfy the claim out of the proceeds of the sale, such claim is to be satisfied by the payment of a gross sum ascertained to be the value of said claim; or by securely investing in a loan at legal interest, one third of the amount of the proceeds of sale of the said subject, and by paying to the claimant the interest which may accrue on the said investment during his life—the creditors of the husband having liens on his real estate subject to the said claim to dower therein, not having consented that it should be compensated by the payment of a sum of money in gross out of the proceeds of sale of the said estate, but on the contrary insisting that it should be satisfied by securely investing in a loan at legal interest one-third of the amount of the proceeds of sale of the said estate, and by paying to the claimant the interest which may accrue on the said investment during her life as aforesaid.

The Circuit Court in the decree appealed from, held that such a claim should be compensated by the payment of a sum of money in gross, and decreed accordingly. The ap-

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pellants, on the contrary, insist that the said decree is erroneous, and that instead thereof, the Circuit Court ought to have decreed satisfaction of the said claim by investing in a loan at legal interest one-third of the amount of the proceeds of sale of the said estate, and by paying to the claimant the interest which may accrue on the said investment during her life as aforesaid.

This court is of opinion that the Circuit Court did so err in so decreeing, and that instead of so decreeing, it ought to have decreed a satisfaction of the said claim in the manner and by the means insisted on by the appellants as aforesaid.

The three cases cited and relied on by the counsel for the appellants in support of their view, in the petition for the appeal in this case, seem to be conclusive in their favor. They are *Herbert and others* v. *Wren and others*, 7 Cranch, 370; *Wilson and others* v. *Davisson*, 2 Rob. Va. Rep., 384; and *Blair* v. *Thompson and others*, 11 Gratt., 441.

In *Herbert and others* v. *Wren and others*, the opinion of the Supreme Court of the United States was delivered by Marshall Ch. J. One of the marginal notes of the decision is, that "a court of chancery cannot allow a part of the purchase-money in lieu of dower, when the estate is sold, unless by consent of all parties interested." In that case, Joseph Deane became a purchaser of the land which was subject to a claim for dower. In the suit in equity brought against him and other defendants by the claimant, she said in her bill that the defendant Deane had not paid the purchase-money of the said land, and was willing, should the court decree dower in the premises, to give an equivalent in money in lieu thereof. The bill as to him was taken for confessed. The Circuit Court decreed in favor of her claim to dower, and decreed her a sum in gross as equivalent therefor. The other defendants, the trustees of P. R. Fendall, appealed from the decree. In the course of the opinion, the Chief-Justice said: "It remains to inquire, Whether the allowance of a sum in gross in lieu of dower in the land itself, or of the interest on one-third of the purchase-money, might legally be made? This must be considered as a compromise between the plaintiffs and the defendant Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist, that instead of a sum in gross, one-third of the purchase-money shall be set apart, and the interest thereof paid annually to the tenant in dower during

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her life." And in the decree which he prepared to be entered in the case, there is the following clause: "The court is further of opinion that if the parties, or either of them, shall be dissatisfied with the allotment of a sum in gross, and shall prefer to leave one-third part of the purchase-money given by the said Joseph Deane for the lands in which the plaintiff, Susanna, claims dower, set apart and secured to her for her life, so that she may receive during life the interest accruing thereon, and shall apply to the Circuit Court to reform its decree in this respect, the same ought to be done," &c.

In *Wilson and others* v. *Davison*, 2 Rob. Va. Rep., 384, the principle laid down in *Herbert and others* v. *Wren and others*, 7 Cranch., 380, that where land in which there is a right of dower is sold in a suit to which the tenant is a party, the other parties interested "have a right to insist, that instead of a sum in gross, one-third of the purchase-money shall be set apart, and the interest thereon paid annually to the tenant in dower during her life," was approved.

In *M. Blair* v. *Thompson and others*, 11th Gratt., 441, it was held by the whole court, Allen P. delivering an opinion in which, on that branch of the subject, the other four judges concurred, that there cannot be a decree for a specific sum in lieu of dower without the assent of all the parties interested. As authority for that position, the cases of *Herbert* v. *Wren*, and *Wilson* v. *Davisson* before referred to, were cited in the opinion of Judge Allen.

The same doctrine is laid down in the following cases, viz: *Beavers* v. *Smith*, 11 Ala., 20; *Johnson* v. *Elliott*, 12 Id., 112; and *Fry* v. *Merchants Ins. Co.*, 15 Id., 810. In all these cases the court was unanimous, and in none of them did any judge express any doubt on the subject. In *Johnson* v. *Elliott*, Goldthwaite J., in delivering the opinion of the court, thus declares: "It is error to decree a sum certain to a widow in lieu of dower, to be raised by a sale of the entire estate out of which the dower interest arises. The decree should be for the payment annually of the sum ascertained to be the annual value of the dower interest." See also *Francis and al* v. *Garrard*, 18 Ala., 794, New Series.

Of course, the consent of all persons concerned, supposing all of them to be competent to give such consent, will authorize the compensation of such dower claim by the payment of a gross sum. But without such consent it can only be compensated by setting apart one-third of the value or proceeds of sale of the land subject to such claim, and giv-

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ing to the claimant the interest which may accrue on such third during her life. Being entitled to the use during her life of one-third of the subject in which she has a dower interest, and that subject being incapable of division, and therefore sold, the proceeds of sale shall stand in the place of the land, and she is entitled to the benefit of one-third of such proceeds during her life, and not to a gross sum out of such proceeds, at least unless the other parties interested therein consent thereto. To allow her such gross sum without such consent, might be to take away from the said parties a substantial part of their inheritance in the event of her early death after receiving such compensation.

The appellees' counsel, in his argument of this case, cites in support of a different view for which he contends, the cases of *White* v. *White*, *&c.*, 16 Gratt., 264; *Jaege*, *&c.*, v. *Bosseiux*, 15 Id., 83; *Simmons* v. *Lyles*, *&c.*, 27 Id., 922. We do not think there is anything in either of those cases in conflict with the doctrine hereinbefore laid down or the cases hereinbefore cited in support of it. But we do not deem it necessary to review in detail the cases cited by the appellees' counsel.

Upon the whole, we are of opinion that the decree appealed from is erroneous, and ought to be reversed and annulled, and the cause remanded to the said Circuit Court for further proceedings to be had therein in conformity with the foregoing opinion.

DECREE REVERSED.

SUPREME COURT OF APPEALS OF VIRGINIA.

WILLIS *v.* THE COMMONWEALTH.

RICHMOND.

NOVEMBER TERM, 1879.

1. All homicide is presumed in law to be murder in the second degree. In order to elevate the offence to murder in the first degree, the burden is on the Commonwealth, and to reduce it to manslaughter, the burden is on the prisoner.
2. Whilst voluntary intoxication is no defence to the fact of guilt, yet, where the question of intent, or premeditation is involved, evidence of it is admissible for the purpose of determining the precise degree of the crime; and in all cases where the question is between murder in the first and murder in the second degree, the fact of the prisoner's drunk-

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enness may be proved to shed light on his mental *status*, and thereby enable the jury to determine whether the killing was from a premeditated purpose, or from passion excited by inadequate provocation. But caution is necessary in the application of this doctrine, as there may be many cases of premeditated murder, in which the prisoner previously nerves himself for the deed by liquor. In such cases as these, drunkenness is entitled to no consideration in favor of the prisoner in determining the degree of his crime, but on the contrary, tends to elevate the offence to murder in the first degree.

3. Circumstances, which reduce a homicide committed by a drunken man, from murder in the *first* degree, to murder in the *second* degree, and in which the Court of Appeals so held, notwithstanding the verdict of a jury, convicting the prisoner of murder in the *first* degree, which verdict was sanctioned and approved by the trying court, and notwithstanding the further fact that the prisoner had some time previous to the homicide, when drunk, made threats against the life of the deceased, their relations being apparently friendly till a very short time before the homicide was committed.

John D. Willis was indicted in the County Court of Lee county, Virginia, for the murder of James H. Reasor, on the 14th day of February, 1878. He elected to be tried in the Circuit Court, and his trial being had in that court at the March term, 1879, he was convicted by the jury of murder in the first degree. A motion was made to set aside the verdict, on the ground that it was contrary to the law and the evidence, which motion was overruled, and judgment rendered on the verdict, that the prisoner should be executed on the 25th of July, 1879. From this judgment he obtained a writ of *supersedeas* from one of the judges of this court. The facts upon which the opinion of the court is based, are set out by Judge ANDERSON, who delivered it.

Patrick Hagan for the plaintiff in error.

Attorney General for the Commonwealth.

ANDERSON J.—The court is of opinion that the homicide committed by the prisoner, as shown by the evidence in the record, is murder. And the only question is one of degree—whether it is murder in the first or second degree. All murders are presumed in law to be murder in the second degree, and in order to elevate the offence to murder in the first degree, the burden of proof is on the Commonwealth; and to reduce the offence to manslaughter, the burden of proof is on the prisoner. That the offence proved is greater than manslaughter, the prisoner's counsel does not deny; but contends that it is not murder in the first degree, but only murder in the second degree.

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The evidence shows that on the 14th of February, 1878, about one o'clock in the afternoon, the prisoner was on his way to Leech's shop, in Lee county, and said to Dildu Olinger, a witness, that he was going there to get a dram. He had been drinking then so much, that witness told him she thought he had enough. At Leech's shop he met the deceased, and T. S. Coldiron, another witness, who testifies that both the prisoner and deceased were drinking and were tolerably drunk; deceased had a bottle of liquor. They, together with Coldiron, went from the shop to Dr. Edmond's store, where they still had the bottle and continued to drink. After remaining there a while, all three left together on their way home, and stopped at John Brown's for supper. Whilst they were there the difficulty occurred which resulted in the death of the deceased a few days after from paralysis caused by a blow which he received from the prisoner on his head with an axe.

The only provocation which the prisoner received from the deceased, was given in conversation whilst they were sitting together at the supper table. They had spent the greater part of the day jovially together, and on terms of familiarity and friendship, and it was upon the invitation of the prisoner, that the deceased stopped with him on their way home, at the house of John Brown for supper. Prisoner ordered the supper, and when it was prepared, he sat down and invited deceased to sit with him at the table. Whilst they were partaking of the food which had been prepared for them, Mr. Coldiron engaged in conversation with Mrs. Brown, and the prisoner and deceased engaged in conversation together, which seems to have been commenced by the prisoner in a friendly way, by reminding deceased that he had not come to eat supper with him on the occasion of his son James' infair. The deceased seems to have explained the reason why he was not there in a friendly way, but then said something about the acts of prisoner to his other children; that he had made distinctions between them. The witness does not say what acts he referred to, or whether he specified anything. But his remarks, whatever they were, appear to have been, if not a reproach, an expression of the deceased's disapproval of the prisoner's treatment of his other children, to which, however, the prisoner does not seem to have taken serious umbrage at the time, as he replied, that "he would do as much for his son Henry." But the deceased then said something about prisoner's wife, who was then an inmate of the lunatic asylum. What the remark was is not disclosed by the testimo-

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ny. But the prisoner became at once greatly excited, and said when his wife's or childrens' names were mentioned, he felt like cutting his throat—pushed back his plate, and took the knife with which he was eating, and drew or jerked it across his throat, and quit eating. The witness, Brown, does not remember what the remark was, and Coldiron being engaged in conversation, did not understand what it was. But neither the deceased nor the other persons at the table seemed to have attached any importance to it, or to have been disturbed by it; for they finished their dinner, and then seated themselves around the fire, the deceased playing with a little girl, and tarried awhile after prisoner and Coldiron had passed out, and invited Mr. Brown and his family to visit him and his family. But the prisoner very much excited left the table and went out, and in a short time returned showing great excitement and violent passion, demanding to know of deceased what he was saying about him, when deceased replied he had said nothing about him, responding that "he was a God damned liar." All present said deceased had said nothing about him; he repeated, it is a damned lie, and said to Coldiron, "let's go." The prisoner's deportment was that of a drunken man whose epithets by abuse and vituperation are not thought worthy of notice, and seemed to have been so regarded by the deceased, who did not resent them or further notice them. Prisoner left, and Coldiron followed, and deceased soon after he came out after Coldiron, received the fatal blow. From all that appears by the evidence, he had no adequate motive or provocation for the horrible deed he perpetrated.

But whatever motive or provocation he had, it was sudden and unexpected. All the witnesses who testify as to the character of the prisoner, represent him to be a very quiet and peaceable man when sober, but when in liquor he is wild and excitable, rough and anxious to destroy. But for the free indulgence in the intoxicating draught that day, it is evident that this terrible misfortune would not have befallen these men—this dreadful crime would not have been committed—both of them might be alive this day, free from restraint, and discharging towards each other the offices and courtesies of neighbors and friends. It was whiskey which brought upon them this sudden, irremediable ruin.

But voluntary intoxication is no excuse for the commission of crime. Lord Hale says: "The third sort of madness is *dementia affectata*, namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a per-

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fect but temporary frenzy; but by the laws of England such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses." And so Parke, B., says, "if a man makes himself voluntarily drunk, it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go unpunished." Cited in Wharton on Criminal Law, Vol. 1., § 39, and the writer says: "In harmony with this is the whole current of English authority, and that 'in this country the same position has been taken with marked uniformity, it being invariably held that voluntary drunkenness is no defence to the *factum* of guilt.'" Id., § 40.

But while intoxication *per se* is no defence to the fact of guilt, yet when the question of intent or premeditation is concerned, evidence of it is admissible for the purpose of determining the precise degree. Id., § 41. In all cases where the question is between murder in the first degree and murder in the second degree, the fact of drunkenness may be proved to shed light on the mental status of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose or from passion, excited by inadequate provocation. By our statute, murder by poison and lying in wait, imprisonment, starving, or *any wilful, deliberate and premeditated killing*, or in the commission of, or attempt to commit arson, rape, robbery or burglary, is murder of the first degree. All other murder is murder of the second degree. (Code of 1873, p. 1188, c. 187, § 1.) To convict of murder in the first degree by wilful, malicious, deliberate and premeditated killing, the jury must ascertain, as a matter of fact, that such was the state of mind of the accused when the act was done. Any state of drunkenness being proved, said the court in *Hale* v. *State*, 11 Hump., 154, is a legitimate subject of inquiry as to what influence such intoxication might have had upon the mind of the offender in the perpetration of the deed. We know that an intoxicated man will often, upon a slight provocation, have his passions excited, and rashly perpetrate a criminal act. It is unphilosophical to assume that he should be chargeable with the same degree of premeditation and deliberation that would be ascribed to a sober man perpetrating the same act upon a like provocation. Hence, the rule has been laid down by the courts, that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved to shed light

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upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation. 1 Whart. Cr. Law, in note to § 41. Great caution is necessary in the application of this doctrine, for there are few cases of premeditated violent homicide in which the defendant does not previously nerve himself to the encounter by liquor. When that is so, drunkenness is entitled to no consideration in favor of the offender in determining whether the offence is murder in the first or second degree. On the contrary, it tends strongly to elevate the crime to murder in the first degree. Voluntary immediate drunkenness is not admissible to disprove malice, or to reduce the offence to manslaughter. But where, by reason of it, there is wanting that deliberation and premeditation which are necessary to elevate the offence to murder in the first degree, it is properly ranked as murder in the second degree, as the courts have repeatedly decided. *Com.* v. *Jones*, 1 Leigh, 612; *Pirtle* v. *State*, 9 Humph., 434; *Swan* v. *State*, 4 Humph., 131; *Boswell* v. *Com'th*, 20 Gratt., 860.

In *Pirtle* v. *The State*, *supra*, Judge Turley, in delivering the opinion of the court, said, "Where the question is whether the killing was the result of sudden passion, produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, or whether it has been the result of premeditation and deliberation, whatever is able to cast light upon the mental status of the offender, is legitimate proof, and among others, the fact that he was at the time drunk; not that this will excuse and mitigate the offence, if it were done deliberately, maliciously and premeditately (which it might well be, though the perpetrator was drunk at the time), but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse sudden passion and heat to the point of taking life, without premeditation and deliberation." Here the court explicitly lays down the rule to be, that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation. Cited by 1 Wharton Cr. Law, in note to § 41. The court, we think, very properly held that drunkenness will not mitigate

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the offence, if it was done wilfully, deliberately, maliciously and premeditatedly; it is only entitled to weight, when and so far as it tends to show that the offender did not act, and was not in a frame of mind to act with that deliberation and premeditation which is necessary to constitute murder in the first degree.

From the evidence in this case, the prisoner was greatly under the influence of liquor when he inflicted the death wound upon the deceased. About one o'clock that day, he told one of the witnesses, Dildu Olinger, that he was going to Leech's shop to get a dram. This was before he met with deceased. He had then been drinking, and witness thought he had enough, and told him so. He met with deceased at Leech's shop, and T. S. Coldiron testifies that both prisoner and deceased were pretty drunk. Deceased had a bottle of whiskey, and they drank together at the shop—how often does not appear—the probability is several times. They came on together to Dr. Edmonds' store, and were still drinking there, and still had the bottle. And Brown testifies that after they got to his house, where they stopped for supper, they were all drinking some. There is not the slightest evidence that the prisoner, through all the jovial hours he spent this day with the deceased, meditated an assault upon him to take his life, or that he drank to nerve himself to the encounter. The evidence absolutely repels such an idea, and shows that he commenced drinking before he saw the deceased, and when most probably he had no thought of seeing him that day. And when he met him at the shop, where he went to get another dram, he drank with him, and they continued together, and drank together the balance of the day, on terms of familiarity and friendship, until prisoner suddenly took umbrage at some remark which deceased made at the table, became greatly excited, left the table without finishing his dinner, went out of doors, and in a short time returned, exhibiting the most violent passion, excited and inflamed by the fumes of liquor in his brain, he gave him the blow with an axe, which resulted in his death. There can be no doubt, we think, that the giving the fatal blow by the prisoner, was the result of sudden passion, engendered and influenced by the liquor which he had been pouring into him during the day, and which caused him to take offence when none was intended, and which disqualified him for deliberation, and repels the idea that the deed was premeditated, there being nothing in the case to create even a suspicion that he imbibed the intoxicating draught to nerve him to the commission of a crime which he had premeditated.

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Whilst we hold that intoxication is no excuse for crime; and whilst murder in the first degree may undoubtedly be committed by one who is intoxicated at the time, yet a murder committed, as in this case, by a drunken man, from sudden passion, which imagines a provocation when there was none, or any adequate provocation; and, by reason of intoxication, the offender was not in a frame of mind to deliberate and premeditate, the crime, we think, under the statute, could not be elevated to the crime of murder in the first degree, which requires that it shall be wilful, deliberate and premeditated. But as intoxication is no excuse for crime, and cannot be relied on to disprove malice, we are of opinion that the prisoner in the case at bar was guilty of murder in the second degree.

We attach no importance to the declaration the prisoner is proved to have made, ten or twelve years before, when he was drunk, expressive of hostility to the deceased, and threatening to kill him; or of the more recent threat, which was nine months prior to the commission of the offence for which he is now prosecuted—such threat also having been made when he was very drunk—and the evidence showing that they were very friendly, and there being no evidence that their relations were at all unfriendly when the last threat was made in a fit of drunkenness. We say we can attach no importance to the testimony of that character, especially when the evidence in this case clearly shows that the prisoner, in inflicting the fatal blow, was actuated alone by a supposed recent provocation, though it was inadequate, but which he, under the influence of liquor, magnified into a most grievous and aggravated provocation, and which, if he had been sober, would not been have regarded as a provocation at all, and would not have given offence.

It is often difficult to apply the principles which distinguish between murder in the first and second degree. We do not think that the instructions given by the court to the jury are erroneous. We think the jury either misunderstood them, or misapplied the law to the facts, as it was laid down by the court. We are clearly of opinion that upon the law and the facts, that the offence proved is murder, and as all murders are presumed in law to be murder in the second degree, and to elevate the crime to murder in the first degree, the burden rests upon the Commonwealth, and we think she has failed to show that it is murder in the first degree, we are of opinion that it must be ranked as murder in the second degree. We are of opinion, therefore, that the verdict of the

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jury, of murder in the first degree, is not warranted by the law and the facts of the case, and that the Circuit Court erred in overruling the motion to set aside the verdict and to grant the prisoner a new trial. We are of opinion, therefore, to reverse the judgment of the Circuit Court, to set aside the verdict, and to remand the cause for a new trial to be had therein, in conformity with the principles herein declared.

CHRISTIAN, STAPLES and BURKS JJ's concurred in the opinion of ANDERSON J. MONCURE P. dissented.

JUDGMENT REVERSED

CHANCERY COURT OF THE CITY OF RICHMOND.

OCTOBER TERM, 1879.

BAILEY *v.* HILL.

1. If a sale be made under two trust deeds—one requiring fifteen days' advertisement, and the other ten—the notice must be given for the longest time; especially, if the deed requiring the longest notice be the first deed.
2. The rule is, that requisitions of trust deeds must be strictly complied with. *Gibson* v. *Jones*, 5 Leigh, 375.
3. Where a sale was advertised and made on an insufficient advertisement under a trust deed, and the purchaser paid his purchase-money, a court of equity will perpetually enjoin the purchaser from prosecuting an action at law to recover possession of the property sold, and will set aside the deed made by the trustee to him, but the bill asking the notes secured by the original trust deeds to be set aside and annulled, the court will retain the suit in equity in court, to do full justice by ordering the return of the purchase-money either by the trustees or other proper party.

F. D. Hill and A. Pizzini, Jr., were trustees in two deeds from Bailey, requiring one of them fifteen days' advertisement of sale, and the other ten days' advertisement. The trustees advertised under both deeds, but published the advertisement only for ten days. At the sale, the highest bid was made by a party who, subsequently declining his purchase, transferred it to Louis W. Pizzini. The trustees made a deed to Louis W. Pizzini. Louis W. Pizzini brought his action at law to eject Bailey, the grantor in the deeds, from possession. While that action was pending, an injunction was obtained by Bailey to enjoin Louis W. Pizzini from using or attempting to use the deed before mentioned, in the trial

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of the action at law. There were many grounds alleged for the injunction in the bill; among others, that the sale was illegal, because the notice by advertisement of the sale was insufficient. To this point, the opinion of the Chancellor responds.

Sands, Leake & Carter and *Spilman* for plaintiff.

A. M. Keiley for defendant.

FITZHUGH J. I am of opinion, that the advertisement of the sale of the property in question was defective and insufficient.

The property was sold under two deeds of trust—one dated April 18, 1877, from A. M. Bailey, substituted trustee, A. M. Bailey and Mary C. Bailey, his wife, to Frank D. Hill and Andrew Pizzini, Jr., trustees, to secure the payment of a note for $3,850. This deed required the time, place and terms of sale to be advertised fifteen days in some newspaper published in the city of Richmond.

The other deed does not seem to be in the papers, but the deed from Hill and Pizzini, trustees, to Louis W. Pizzini, dated July 10, 1878, recites this second deed as made by A. M. Bailey, substituted trustee, to Frank D. Hill, trustee, and as dated July 30, 1877. It also recites that the sale under the two deeds of trust was made after giving ten days' notice of the time, place and terms of sale. And it seems to be conceded in the proceedings that this second deed of trust only required an advertisement of ten days.

It appears from the advertisement (exhibit H H of amended bill, file No. 26) that Frank D. Hill and Andrew Pizzini, trustees, advertised under both deeds of trust as if they were joint trustees in both deeds, and the two deeds are referred to in the advertisement as follows: "The first of date April 21, 1877, and the other recorded the 1st day of August, 1877." This seems to have been a mistake. The deed of April 18, 1877, was recorded on the day of its date. And as to the second deed of trust, there is a discrepancy between the advertisement and the recital in the deed to Louis Pizzini, so as to make it difficult to determine, in the absence of that deed, whether Hill was sole trustee or not. If he was the sole trustee, the advertisement would be wrong in that respect.

But passing that by for the present, I think the advertisement is irregular and insufficient even if these discrepancies can be satisfactorily explained. One of the deeds under which the trustees sold required an advertisement of fifteen

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days. I think they could only proceed regularly to sell under that deed after an advertisement according to its terms. Selling, at the same time, under another deed which only requires an advertisement of ten days, does not help the matter. It was still a sale under the deed requiring fifteen days' advertisement. It passed title under that deed, and disposed of the trusts under that deed, as effectually as if it were the only deed under which the sale was made. Besides, the deed requiring ten days was the junior deed, and subordinate to that requiring fifteen days. The trustees under the ten days' deed only had title to, and could only sell the equity of redemption—that is, what remained after satisfying the fifteen-day deed. Now, supposing the sale under the ten-day deed to be good, it could only be so to the extent of the interest conveyed by it—which was the equity of redemption merely—and that would leave the fifteen-day deed still a prior lien on the property. So that the fifteen-day deed being a prior lien, a sale under the junior deed could not affect it. For, however valid the sale under the junior deed, that could not cure the defect in the advertisement under the senior deed, which created the prior incumbrance, and under which an estate greater than a mere equity of redemption alone could be passed.

The rule is, that the requisitions of the deed of trust must be strictly complied with; and if not strictly complied with, it will furnish ground in equity for setting aside the sale. 1 Lom. Dig., top page 427; see also *Gibson* v. *Jones*, 5 Leigh, 375.

I am, therefore, of opinion, that the sale should be set aside, the deed from Hill and Pizzini, trustees, to Louis W. Pizzini annulled and declared void and of no effect, and the injunction perpetuated. But the decree asked for by the plaintiff, making this a final disposition of the cause, is inadmissible.

Provision must be made for the payment of the purchase-money paid by Louis W. Pizzini. The court has set aside the sale and the deed to him, and must see that the trustees, or the proper parties, reimburse to him the amount he has paid.

But this comes far short of what remains to be done in this case. The bill prays for relief against notes alleged to be usurious, and against deeds of trust securing those notes alleged to have been executed by a man *non compos mentis*, and incapable, from unsoundness of mind, of making at that time (that is, at the dates of these deeds) a valid deed. The

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court should do full justice in the case. It should convene all parties in interest, and put an end to the litigation. I believe all parties in interest are before the court except Benjamin Davis, who is alleged to be the holder of the notes. He should be made party defendant. When he is brought before the court, it will proceed, when the case is ripe for decision, to the determination of the case and the adjustment of the rights of the parties.

DECREE ACCORDINGLY.

MISCELLANY.

THE VIRGINIA LAW JOURNAL.—This journal will, with the next number, begin its fourth volume, and may now be regarded as an established mode of communication between the profession in and out of Virginia. The January No., 1880, will open with a very fine article on the Virginia Married Women's Acts, from the pen of that incorruptible and able member of the Richmond Bar, John O. Steger, Esq. Those who know Mr. Steger as we do, know that anything from him is entitled to the greatest consideration in every way, and we are sure that his article will be earnestly looked for by our readers. We have several very interesting articles and opinions on hand, which we will give our readers as fast as we can publish them. The index to the Third Volume, which we publish with this number, curtails our reading matter in this No. to some extent.

We again return our thanks to Mr. P. R. Grattan, the judges and clerks of our Supreme Court, and the other members of the Bench and Bar who have so kindly aided us in our work this year.

PUNISHMENT FOR CONTEMPT TWO HUNDRED YEARS AGO.—Att a general court held at Middle Plantation, September 28, 1677.

Present, the right honourable Herbert Jeffreys, Esq., Governour, &c.

Thomas Ludwell, Esq., sec'ry.	Coll. Jos. Bridger.
Coll. Bacon.	Coll. Jno. Custis.
Coll. Cole.	

Information being made to this court that Thomas Gordon and John Bagwell, two persons adjudged by act of assembly for their rebellion and treason to appeare at the county court of Rappahannock with halters about their necks, and upon their knees, to acknowledge their said treasons and rebellions against the kings majestie, did, in contempt of the said law and the kings majesties authority in this his colony, appeare in the said court with *small tape* (instead of halters) about their necks, which was allowed and accepted of by the magistrates then sitting, not only contrary to, but in high contempt of the good laws and his majesties authority here. *It is therefore ordered by this court* that major Robert Beverley, clerk of the assemby doe make present inquiry into the truth of such information, and as

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he shall find the same, he is hereby ordered, commanded and impowered to summon all parties soe offending whether magistrates or others, and alsoe such evidences to prove the matter as he shall finde needfull to the next assembly, to answeare such high contempt before the right honourable the governour and councell, and house of burgesses, to the end such contemers, dispisers and slighters of the laws, upon due conviction, may receive condinge punishment of their fault.—2 *Hening's Statutes at Large*, p. 557.

PRISONERS' STATEMENTS.—Proposed legislation even when it goes no further than a proposal, frequently has a healthy effect on existing law. It is apt to turn the attention of the judges to the subject in question with the result of bringing out more clearly the law as it is. The criminal code proposes to allow accused persons to be examined on oath. Lord Chief Justice Cockburn has already declared himself against this proposal, and we hope to have from him shortly a full examination of the question in one of the further letters on the code which he has promised. Meanwhile, a case tried last week at the Maidstone Assizes has given him an opportunity of expressing his opinion on the extent to which the accused may be allowed to give the jury his version of the story. A man named Weston was charged with murder, and was defended by counsel. In the course of his speech for the defence, Weston's counsel made the common appeal to the jury on the ground that his client's mouth was closed. Whereupon the Chief Justice said "he could not acquiesce in that, for counsel represented the accused, and whatever the prisoner would be entitled to say, his counsel was entitled to say on his behalf." To this it was replied that Lord Justice Bramwell had in a previous case decided that the counsel for the accused could not represent any state of facts to the jury on behalf of the prisoner except by way of hypothesis. The Chief Justice rejoined that, with all respect, he was of a different opinion. "I think," he added, "counsel represent their client (the accused), and, therefore, as he might present his account of the facts to the jury, so they may do so in his instructions and on his behalf." There is no doubt that there has been a divergence of practice on this subject. The general experience, we believe, is, that at quarter sessions a prisoner's counsel is generally allowed to give the jury the version of the facts as represented by the prisoner himself; but at the assizes a stricter rule generally prevails, and the counsel so addressing the jury would be stopped. For this reason, it has more than once happened that the prisoner's counsel has declined to address the jury, but has asked that his client may be allowed to tell his story for himself. Now, however, it appears that the judges entertain a different opinion among themselves. The strict theory of a trial would seem in favor of the view of the Lord Justice. No weight must be attached by the jury to any statement which is not supported by evidence. The statement of a prisoner, whether made personally or through his counsel, is not evidence; and, therefore, can only be considered as an hypothesis. But the difficulty of accepting this view consists in the practice which has gradually sprung up of allowing prisoners not defended by counsel to tell their own story. It would be impossible to tell the prisoner that he must not profess to give the jury the facts, but must put hy-

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potheses; and so he is always allowed to say how it all was, although some judges afterwards tell the jury that this story is not evidence. If the Chief Justice is right in saying that the prisoner may tell his own tale for what it is worth, it would seem to follow that he is right in saying that the counsel may do the same. It is difficult to see how one rule can apply when the prisoner is defended by counsel, and another when he is not so defended. After the expressions which have fallen from the Chief Justice, it will not be easy for any judge to keep counsel to the strict rule of Lord Justice Bramwell. Judges are apt on such points to favor the prisoner; and, now that the Chief Justice has pronounced that the prisoner is entitled to this privilege, it will, probably, be conceded by all the judges. It is a curious example how law can be made by no higher authority than habit or practice. The criminal code ought to deal with the subject, whether its present proposal to allow prisoners to be examined and cross-examined stands or not, as questions of this kind concern every trial; and, if there is a divergence of opinion, the difference cannot well be settled by writ of error or special case.—*Law Journal.*

ANECDOTES OF JUDGE TALFOURD.—In July, 1850, Baron Parke and Mr. Justice Talfourd met at Chester, the one having traveled the South and the other the North Wales Circuit. Walking side by side downstairs at the judge's lodgings to join the high sheriff, who was about to convey them in state to the cathedral, the Baron noticed, to his surprise, that his brother judge was arrayed in his scarlet and ermine robes, instead of in the scarlet and silk costume donned in summer, and which he himself correctly wore. "Brother, brother!" cried the punctilious Baron, "you've got your winter robes on!" "Yes," said Talfourd, "my unfortunate butler made a mistake when we started from town, and put these in the luggage." "And you've traveled all through the North Wales in them?" "Oh, yes," said Talfourd, "the prisoners were tried just as well, you know, and I didn't like to hurt my man's feelings by speaking to him about them. I shall tell him before we part, so as to be right next time." "Why, I'd have discharged him," said Baron Parke. "Oh, no, brother, you wouldn't," replied Talfourd, "he's lost his mother lately, poor fellow; and, after all, it was only a fault of the head, and not of the heart." Another anecdote relating to the same judge is more of a domestic character. At one corner of Russell-square, and near the house of Talfourd, an old woman had for several years kept an apple stall, where the judge frequently made a small purchase. Standing at his parlor window one pouring wet day, Talfourd saw the old creature seated in her usual place, and crouching down wet through in the pelting rain. The sight aroused all his kind and pitying nature. It was in vain he returned to his literary or legal labors; again and again he went to the window to see the same (to him) distressing sight. At last, seized with a sudden idea, he donned his coat and hat, rushed off to a shop in Southampton row, and purchased a large gig umbrella, which he brought back triumphantly, and placed over the old woman, "Wasn't it a glorious thought?" we heard him ask a somewhat unappreciative brother judge. "The thing actually covered her and her apple stall too." Many were the half sovereigns and sovereigns which the kind, good man sent around privately by his clerk to

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the governors of gaols to be given to poor, friendless youths convicted before him, that they should not be turned penniless upon the world when their term of imprisonment was over.—*Leisure Hour.*

THE LAW OF LEAP-YEAR.—As leap-year is coming, it is well to know what the law of leap-year is. The law it is said, takes no notice of parts of days, and as to the 29th of February, it takes no notice of the whole day. The 28th and the 29th are computed as one day. For example: Suppose a note is dated on the 28th of February, 1880, payable one day from date. Ordinarily, it would be payable on the 4th of March, and so it is in leap-year, and not on the 3d. In Indiana, the question has recently come before the Supreme Court, in respect to service of process in 1876, the last leap-year. The law there requires ten days' previous service for the entry of judgment. In the case before the court, the judgment was premature if the 28th and 29th of February were to be computed as one day. The court said: "It must be regarded as settled in this State that the 28th and 29th days of February in every bisextile year must be computed and considered in law as one day. It has been held by this court that the English statute—21 Henry III.—is in force in this State. This statute, speaking of the 29th day of February in leap year, provides: '*Computitur dies ille et dies proxime precedens pro unico die.*' (And that day, as well as the day next preceding, shall be computed as one day.) This English statute is recognized as a part of the law governing this State. The service of the summons was not sufficient in law to justify either the default entered or the judgment rendered." In this State, it is undoubtedly true that the statute law of the mother country, when introduced by consent into the colony, became part of the common law. *Bogardus* v. *Trinity Church*, 4 Pai., 178, 198. But the question is here set at rest by our statute, 1 R. S., m. p. 606, s. 3, which provides that "the added day of a leap-year and the day immediately preceding, if they shall occur in any period so to be computed, shall be reckoned together as one day." This embraces statutes, deeds, verbal or written contracts, and all public or private instruments.—*Albany Law Journal.*

SPORTSMEN-NEIGHBORS.—The case of *Tanton* v. *Jarvis*, decided a few days ago in the Queen's Bench, is an illustration of the unsatisfactory state of the law of trespass in pursuit of game. The Kent magistrates convicted of this offence a gamekeeper who, two days after his master's party had been out shooting, entered a neighbor's land and picked up some of the pheasants which had dropped on the wrong side of the fence. The quarter sessions, on appeal, quashed the conviction, but stated a case finding, as a fact, that the keeper believed the birds to be dead. Two cases have already been decided on this subject. In *Osbond* v. *Meadows*, 31 Law J. Rep., M. C., 238, it was held by the Common Pleas that a man who, from his own side, shot a pheasant which was on the ground in his neighbor's land, and crossed the boundary to pick it up, was guilty of trespassing in pursuit of game; while in *Kenyon* v. *Hart*, 34 Law J. Rep., M. C., 87, it was held by the Queen's Bench that a man who shot game flying over his neighbor's land, and crossed to pick it up, was not guilty of the offence. These two cases cannot be

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easily reconciled, but the Queen's Bench now accepts the result of them to be that the game pursued must be live game. There appears to have been no evidence whether the birds were, in fact, dead or alive; but Mr. Justice Field and Mr. Justice Manisty were satisfied to act upon the finding of the quarter sessions. that the keeper believed they were dead. Justices are thus relieved, in such cases, from the difficulty of inquiring whether a bird was or was not dead; the question for them is, whether the trespasser believed the bird was dead. He must not cross the fence if the bird be only wounded; but, if it seems to have fallen dead, he may cross, and expose himself only to an action for trespass. The case will be read with interest, and some alarm, by game preservers whose property is "cut into" by a small holding. Their neighbor, who, of course, does not preserve, may not only shoot the pheasants which came from their hen-coops as they fly over and drop on his land, but he may shoot across the boundary; and, if the bird falls apparently dead, he may pick it up, subject only to an action of trespass. The unconscionable sportsman, on his part, should take care to wait until the birds get up, as *Osbond* v. *Meadows* is against him if he is guilty of shooting sitting. This case has had reflections cast upon its authority; but the gunsman who looks to his neighbors for his bag is so well off that he can afford not to run the risk of transgressing it.—*Law Journal.*

BOOK NOTICES.

THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES. By JOHN M. SHIRLEY. St. Louis: G. I. Jones & Co., 1879.

We have received from the publishers, this, to us, very interesting work. Everything connected with the history of these celebrated causes, and the great actors in them, must be interesting reading to any lawyer, and we have read this book with great pleasure. The author is well known as the Reporter of the Supreme Court of New Hampshire, and writing, as he says, in the preface, "within earshot, as it were, of the paternal homes of the Websters and Bartletts, those of Thomas W. Thompson, Worcester and their compeers, within the shadow of the lone mountain they loved so well, upon the historic ground so often trodden by them, and in the midst of the traditions relating to these causes and their origin," we may well look for something full of interest and of value from such a source.

The work commences with a summary of the five civil causes; Webster's views and plans about them; a copy of the original deed of trust, and the charter from Gov. Wentworth; together with some cotemporaneous letters and history of the foundation of the College, the appointment of the trustees, &c.; a full history of the litigation in the State and Federal Courts is then given, with short sketches of the principal actors, such as Marshall, Webster, Wirt, Pinckney and others. Many incidents are taken from the correspondence of Webster and others, which are very interesting. In speaking of the present Judges of the Supreme Court of the United States, the author says, on page 17, "The present judges are of varying, but in general, of eminently respectable attainments. Some of them

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are very eminent in special departments, but no fact is more painfully apparent, to those who have studied closely the course of that great tribunal, than that its decisions lack the unity which marked them during the dictatorship of Marshall, and under the great triumvirate of the 'old bench,' Taney, Nelson and Campbell. For years it has had no commanding spirit on its quarter-deck. It has lost its reckoning; it has been beating about in a storm; it has relapsed into the chaos of doubt and uncertainty, which marked the earlier years of its existence, when the politicians or statesmen of that day bivouacked in the Chief Justiceship on their march from one political position to another." While there are many striking passages in the work, and, as we before stated, much of real interest, we must say that some portions of it are written slovenly. For example, on page 225, the author thus expresses himself: "In the Convention of Virginia, of which he was a member, which ratified the Federal Constitution, Judge Marshall, upon grave consideration, informed the people of Virginia," &c. * * * Such defects are, however, of minor importance, and we take great pleasure in commending the work to the reading public.

WILLIAMS ON REAL PROPERTY. *Principles of the Law of Real Property.* Intended as a first book for the use of Students in Conveyancing. By JOSHUA WILLIAMS, ESQ., of Lincoln's Inn, one of Her Majesty's Counsel. Fifth American, frem the Twelfth English Edition, with the Notes and References to the previous American Editions, by Wm. Henry Rawlé, and the Hon. Jas. T. Mitchell, and additional Notes and References, by E. Coppee Mitchell. Philadelphia: T. & J. W. Johnson & Co., 1879. Through J. W. Randolph & English, Richmond, Va.

The simple statement of the fact, that this work has passed through twelve editions in England and five in America, attests its excellence and value more potently than any words that we can add of it. Indeed, the work is so well known, that it may now be almost regarded as *the established* work on the important subjects of which it treats. Whilst this edition is doubtless the best that is now attainable for the American lawyer, containing, as it does, many of the latest citations of authorities, the labors of the present editor seem not to have been very great, and there appear but few changes in it from the last American edition, published, we believe, in 1872. The work of the publishers is, of course, well done, and the book should be in the library of every lawyer, and the hands of every student of the law.

AMERICAN DECISIONS, Vol. XII. A. L. Bancroft & Co., Law Publishers, 1879. Through J. W. Randolph & English, Richmond, Va.

This volume contains cases from 1 Minor, 1 Delaware Chancery, 1 Breese, 1 Blackford, 1 Littell's Select Cases, 2 A. K. Marshall, 5, 6, 7 Martin, 1 Walker, 1 and 2 Mills, 1 D. Chipman.

We have, with great pleasure, recommended each volume of these useful reports as they were issued under the editorial charge of Mr. Proffatt. This is the first volume issued since Mr. Freeman, the successor of Mr. Proffat, whose sad death we announced sometime since, took charge of the work; and a cursory examination of the many notes, and the general selection of cases, has satisfied us that in the hands of the present editor, the work has not, and will not, depreciate.

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The editor says, in his preface, as a further guarantee of this, that "the assistants of Mr. Proffat have been retained, both because of their competency and their familiarity with his plans and his methods of work." We think the publishers have laid the profession under special obligations for this great enterprise, and we take pleasure in reiterating the opinion formerly expressed by us of it.

BENJAMIN'S STUDENT'S GUIDE TO ELEMENTARY LAW. *Student's Guide to Elementary Law*, consisting of Questions on Walker's American Law and Blackstone's Commentaries, with References to Illinois Statutes and Decisions, where the law of the State differs from that laid down in the text. By REUBEN M. BENJAMIN, Professor of Law in the Illinois Wesleyan University. Chicago: Chicago Legal News Company, 1879.

This little manual will be found to be very useful to the law students of Illinois. It has many well framed questions which will prove suggestive and useful to the student anywhere; but the fact that the references are to the statutes and decisions of Illinois, must, of course, restrict its usefulness to that State, to a considerable extent.

MUNGER'S APPLICATION OF PAYMENTS. *A Treatise on the Application of Payments by Debtor to Creditor;* being a Complete Compilation of the Law pertaining to the Rights of Debtor and Creditor respectively; and also giving the various Rules for the Guidance of the Courts when no appropriation has been made by the parties. By GEORGE G. MUNGER, late Judge of Monroe county, N. Y. New York: Baker, Voorhis & Co., 1879. Through J: W. Randolph & English, Richmond, Va.

We acknowledge, with pleasure, the receipt of this valuable addition to our library, which, as the publishers say, is a "new law book on a new subject." The author says, in the preface, that "having occasion a short time ago to make a pretty thorough examination of the principles regulating the application of payments by debtor and creditor, he found the learning upon the subject in a very fragmentary condition. He discovered that not only was there no separate treatise embodying the law in clear and concise form, but even that there was not any systematic and exhaustive collection of its doctrines and rules anywhere." He seems to have treated the subjects with system and thoroughness. Between four and five hundred cases are cited, among them the latest in Virginia and the other States of the Union, as far as we have been able to discover. The subjects of the chapters are as follows:

Preliminary Observations; The Civil Law; The Common Law; First Principa Rule; Limitations, Modifications and Exceptions to the First Principal Rule; Second Principal Rule; Limitations, Modifications and Exceptions to the Second Principal Rule; This Right of Appropriation Confined to the Parties Themselves; Third Principal Rule, First Minor Rule, Second Minor Rule, Third Minor Rule Fourth Minor Rule, Fifth Minor Rule; In Regard to Partnership Cases; On Official Bonds; Miscellaneous Subjects: 1. As to the Time when the Application Takes Effect; 2. As to Pawns and Mortgages.

Our examination has satisfied us that the work is of general importance no only to lawyers, but to business men generally. The work of the publishers is well done.

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HUTCHINSON ON CARRIERS. *A Treatise on the Law of Carriers as Administered in the Courts of the United States and England.* By ROBERT HUTCHINSON, ESQ., late of the Memphis Bar. Chicago: Callaghan & Co., 1879.

The publishers, in a note to this work, tell us that they learned in 1875, that the author, who had given great attention to the subject of "carriers," had prepared considerable material for a treatise, and that they had then requested him to complete his work, which he was unable to do by reason of his pressing professional engagements. That in 1877, their proposition to him to do so was renewed, that he consented, and worked unceasingly until the text was completed, when he was stricken down with that terrible scourge yellow fever; that the superintendence of the passage of the work through the press, the making of the analysis of contents, table of cases, and index, were kindly undertaken, for the benefit of the author's children, by Hons. James O. Pierce and Irving Halsey, and that thus the work was fully completed. Although there have been comparatively recent works of value issued from the press on this growing and important subject, yet none will deny that the continued development and extension of railroads and carriers of all kinds in this country and in England, must call into requisition everything that will shed light on the principles governing the relations existing between them and those who contract with them. We have given the work before us the best examination that we could, within the limited space that we could spare from other pressing engagements, and we have no hesitation in pronouncing it to be one of real value on the subject of which it professes to treat. The principles stated by other writers, and those deducible from the latest cases from the several States of the Union and England are given, it seems to us, with method and clearness; and without being able to give a detailed criticism of the work as we would like to do, we unhesitatingly commend it, in general terms, to the profession.

From what we learn of the publishers, and what we have seen of their work, we would say that they are among the best and most enterprising in this country. Their work on this book is creditable in every way, and that portion of the preparation of the work performed by Judges Pierce and Halsey, attests no less their suitableness for the task undertaken by them, than the fidelity with which it has been performed.

EWELL'S EVANS ON AGENCY. *A Treatise upon the Law of Principal and Agent in Contract and Tort.* By WM. EVANS, B. A., OXON, and of the Inner Temple, Esq., Barrister at Law. Edited and Annotated by MARSHALL D. EWELL, LL. D., Professor in Union College of Law, Chicago; and Author of a "*Treatise on the Law of Fixtures*," *Leading Cases on Disabilities, &c.*" Callaghan & Co., Chicago, 1879.

We cannot better notice this work than to copy from the Editor's preface. He says, "The very favorable opinions which Mr. Evans' work has elicited from the legal press of this country would seem to render no apology necessary for the presentation of an American edition. * * * The aim of the Editor has been to present in the form of notes, a summary of the American law upon the topics discussed in the text, and to cite with considerable fullness the American cases on the subjects treated, and thus render the work useful to American students and practitioners investigating this branch of the law. Such errors of citation,

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and other errors as were discovered in the original edition, have been corrected, and nearly one hundred additional English cases, not cited in the original work, have been cited in this edition." Mr. Evans' is the latest work that we have seen on this subject; it was first issued from the English press in June, 1878, and was at once received so favorably by the profession in this country, that in February, 1879, a reprint of this English edition was issued by the Chicago Legal News Company. We have had occasion to examine the work frequently, and we concur in the judgment then, so far as we know, universally expressed of it. Professor Jewell's edition will render the work, originally so worthy of favor, the most valuable one that we know of on the subject, to the American student and lawyer.

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ANSWERS.

ARBITRATORS.

Where the merits in law and in fact are referred to an arbitrator of competent knowledge, and there is no question reserved by him, the court will not open the award, unless something can be alleged amounting to a perverse misconstruction of the law, or misconduct on the part of the arbitrator.

Where arbitrators mean to decide according to law, and they mistake the law in a palpable material point, the award will be set aside. But their decision, upon a doubtful point of law, or in a case where the question of law is designedly left to their judgment, will generally be held conclusive. It must appear they grossly mistook the law; and the court will not interfere merely because it would have given a different decision in the particular case.

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WITNESS.

R's executor brought an action of debt upon a bond against the executor of C. C. was one of four obligors on the bond—all of whom were dead but T., and T. was a discharged bankrupt. The only issue in the case was on the plea of payment. HELD:

1. That T. having been released from the payment by his discharge in bankruptcy, was a competent witness at common law for the defendant, to prove payment of the debt.

2. The statute, Code of 1873, sections 21, 22, was intended to remove incompetency in certain cases, and not to create it in any case; and T. being a competent witness at common law, is not rendered incompetent by the statute And this especially since the act of April 2, 1877, Sess. Acts of 1876–77, ch. 256, amending the former act, which, though passed after the suit was brought, was in force at the time of the trial, and, therefore, governs the case.

A husband is not a competent witness to prove his payments of a debt made out of the trust fund of his wife and children. And this though the objection to his competency was not made until four questions had been put to him on his examination in chief.

WOMEN.

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