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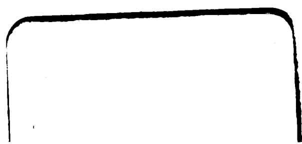

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LAW REPORTER.

VOLUME FOURTH.

MAY, 1841,—APRIL, 1842, INCLUSIVE.

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THE

LAW REPORTER.

EDITED BY

PELEG W. CHANDLER.

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VOLUME IV.

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THE LAW REPORTER.

MAY, 1841.

RHODE ISLAND AND MASSACHUSETTS.

The controversy between Rhode Island and Massachusetts, pending in the supreme court of the United States, assumes a character of so much novelty and importance in its principles and effect, that an account of the proceedings must be interesting not only to professional but general readers. It is, in all its parts, a case of the first impression. Two states of this Union are litigating, before the highest judicial tribunal of the nation, for territorial jurisdiction and the rights of sovereignty. The court has affirmed its own constitutional right to take cognizance of the case; has disposed of all preliminary questions, which the great interests involved, and the original character of the proceedings induced the defendant state to present; and now proposes to consider the rights of the litigant parties on a general answer, which it has ordered to be put on file by the first day of August next. Of these matters, then, we shall speak in their order, but it will first be convenient to give our readers an accurate idea of the subject in dispute.

It is to be understood, then, that the object of Rhode Island is to remove her present line of actual boundary running from the northwest corner of that state to the northeast corner thereof, directly north about five miles. The distance from east to west is about twenty-one miles and a half. The proposed new line is not exactly parallel with the old one. The area, however, comprises about seventy-five or eighty square miles. It is occupied by about six or seven thousand inhabitants, and contains, by estimation, a million of dollars of taxable property. It includes part of the townships of Douglass, Uxbridge, and Mendon, in Worcester county; and Bellingham and Wrentham, in Norfolk county, Massachusetts.

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As no such transfer of jurisdiction from one state to another, ever occurred in the United States, it is difficult to say what would be the civil and political effect of it on the inhabitants and their property, if this suit of Rhode Island should be successfully prosecuted. The disputed territory, that is now part of Massachusetts, would then be Rhode Island. The laws of Massachusetts, which now operate there, would thenceforth cease; and the laws of Rhode Island would be in force. Whether they would have a retrospective operation, and whether corporations, established by Massachusetts law, would continue in legal existence, and whether the past or future liabilities of the stockholders would remain as they now are, are questions not easily to be determined.

It is to be observed, however, that the present demand of Rhode Island, though now only made to the political jurisdiction and sovereignty, may, on the same principle, extend to the entire right in fee-simple to the soil; and that this right, if once the jurisdiction is settled in her favor, would depend for its practical operation on her own legislation and her state courts. The original grantees of the soil took under the title of Massachusetts; and the present possessors claim in direct succession from these original grantees. But the jurisdiction now claimed for Rhode Island belonged to her only because the soil was granted to her in her charter; and if it be so, the grants of soil by Massachusetts are as invalid as her claim to jurisdiction. If against the claim of a sovereign state, time is no bar to jurisdiction, neither is it to territory. To what extent the rights of Rhode Island would be pushed cannot be foreseen; but unquestionably there are deep interests at stake, as has been admitted by the supreme court of the United States; greater, probably, than they are aware of, who live on this disputed territory.

The bill of Rhode Island was filed in the year 1832, and a citation was served on the governor and attorney general of Massachusetts, commanding them to appear at the January term of the supreme court of the United States in 1833, to answer to the complaint. Governor Lincoln, then in the executive chair of Massachusetts, by virtue of a resolve of the legislature, passed in March preceding, authorizing him to take suitable measures for defending the rights of the state, appointed the Honorable Daniel Webster to appear as her counsel.

The bill is drawn with great labor, research, and professional skill. The third edition, now before us, printed by order of the supreme court, covers sixty-four closely-printed octavo pages. It sets forth the grant of King James I. to the council established at Plymouth, in the county of Devon, for the planting, ruling, ordering, and governing of New England, in America, of "all that part of America lying in breadth from 40° northerly latitude to 48° north, and in length of and within all the breadth aforesaid throughout the main lands from sea to sea," bearing date November 3, 1621. Then, the grant of the said council to sir Henry Roswell and others, on March 19, 1628, of all

that part of New England in America, which lies and extends between a great river, there commonly called Monomac or Merrimac, and a certain other river there, called Charles river, being in the bottom of a certain bay there, commonly called Massachusetts Bay, and "also all and singular those lands and hereditaments whatsoever lying within the space of three English miles on the south part of the said Charles river, or of any and every part thereof," &c.

The bill then sets forth the charter of Massachusetts, granted by Charles I., dated March 4, 1629, using the same words of boundary on the south, as are above recited.

Then, the surrender of their patent by the council of Plymouth, on June 7, 1635. Next, the settlement of the wilderness adjacent to the Massachusetts line by people from England and from Massachusetts. Then, the grant of a charter from Charles II., on July 8, 1663, to William Brenton and others, to be a body corporate and politic, by the name of The Governor and Company of the King's Colony of Rhode Island and Providence Plantations in New England, with the usual political privileges, and bounding the said Rhode Island Colony "on the north, or northerly, by the aforesaid south, or southerly line of the Massachusetts colony or plantation," &c., with an averment, that this charter was accepted by the freemen of said Rhode Island colony, who soon after organized and made laws in pursuance thereof.

The bill then avers, that in 1684, the first charter of Massachusetts was declared to be cancelled, vacated, and annihilated by the high court of chancery, and that in 1691, another charter was granted by William and Mary, which "did erect, incorporate, and unite the territories or colonies, commonly called or known by the names of the Colony of the Massachusetts Bay and Colony of New Plymouth, the Province of Maine, the territory called Acadia or Nova Scotia, and all that tract of land lying between the said territories of Nova Scotia and said Province of Maine, into one province, by the name of the Province of Massachusetts Bay," and granted certain powers of government, therein specially referred to.

The bill then avers the declaration of the independence of said colonies, on July 4, 1776, and comes to the conclusion, which is thus formally alleged: "That by virtue of the said letters patent, or charter to the said Governor and Company of the Colony of Rhode Island and Providence Plantations in New England, in America, and their successors, the dividing boundary line between Massachusetts on the north and Rhode Island and Providence Plantation on the south, became and was a line drawn east and west three English miles south of the river called Charles River, or any or every part thereof."

These averments in the bill state very clearly the title of the two states, so far as they depend on the British charters. Massachusetts claims title by other sources, but admits that the charter boundary is truly stated, and maintains that her present boundary conforms to it. The question is thus fairly presented, where on the earth's surface

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this line east and west three English miles south of the river called Charles river, or any and every part thereof, is to be drawn ?

To give our readers better means of understanding the matter, we leave, for a moment, the further details of the plaintiffs' bill, to state some historical facts, not disputed, we believe, by either party.

In the year 1642, which, it will be perceived, was thirteen years *after* the colonial charter of Massachusetts, and twenty-one years *before* the colonial charter of Rhode Island, certain persons, claiming to be skilful and approved artists, undertook to trace out and mark this line, make a map of the country, and delineate the line on the map ; and the map so made is now in the archives of Massachusetts, and has lately been lithographed by the order of Rhode Island. These persons erected a stake or monument in the town of Wrentham, in the latitude of 41° 55′, and drew a line, or directed it to be drawn, westerly therefrom, and protracting it beyond the coterminous boundary of Rhode Island, extended it by Connecticut until it should pass Connecticut River at Bissell's house. It has been since supposed, that a straight line could not be so drawn ; and so far as Connecticut is concerned, this supposition may be admitted ; but as relates to Rhode Island, it is not only possible but true ; and the line actually protracted from this station, marked upon the map and drawn upon the earth's surface, is the line of actual boundary, which then began to be considered, and ever since has been claimed and used by Massachusetts, as her boundary in conformity with her charter ; and is the line which Rhode Island now endeavors to remove about four miles further north.

The map, which accompanies this article, shows the position of Woodward and Saffrey's line. It also shows the line which Rhode Island claims to be the true line of the charter, and the space between these two lines, which is the disputed territory now in litigation.

It is proper to observe, that this map is copied from the official map made *ex parte* by the colony of Rhode Island in 1750, and is sufficiently correct for the purposes of explanation, but the delineation of the head-waters of Charles River is supposed by the agents of Massachusetts to be improperly represented by narrowing the representation of the stream. A very different picture is made of these waters in the map of the state now in progress of being made under the official trigonometrical survey, a transcript of which was made by her present chief surveyor, and exhibited before the supreme court. A copy of this map we regret not being able to present to our readers, because it would appear by it that there is another point of the river proper, from which a line may be drawn and a boundary traced, that more nearly coincides with the actual boundary, than the one now claimed by Rhode Island, and diminishes the disputable space to about a third part of the area represented in her map.

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MAP

of the Country adjacent to the Northern Boundary Line of the
COLONY OF RHODE ISLAND,
as the same was run by Commissioners appointed for that purpose by the said Colony, in the year 1750.
Copied from the Original, in the Secretary's Office, R. Island.

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Whether the line is drawn in the proper place, and whether, if now the court should direct commissioners to trace the boundary according to the charter, they would so mark a line, depends upon a very simple question, which yet has not been considered in the various judicial proceedings to which the case has given rise. The question is briefly this, Whether the head-waters of Charles river are any part of the river, within the terms of the Massachusetts colony charter?

The line is to be drawn from a point "three miles south of the river called Charles River, *or any or every part thereof.*" Woodward and Saffrey traced the river to its head-waters in a pond, called sometimes Whitney's Pond, sometimes Jack's Pasture Brook, and drew an offset of three miles directly south from the centre of that pond; from the southerly point of said line they drew their westerly line; and this Massachusetts claims to have considered to have been according to the true meaning and proper construction of her grant by charter. Rhode Island, on the other hand, maintains, that the point whence the line of three miles is to be drawn, is in the river proper; and she takes the most southerly bend of the main stream for this purpose, and drawing a line three miles in length south from such point, intersects it by a line due east and west, which last-named line she claims to have considered the true line of boundary between the states.

The space between the line actually drawn, and that which Rhode Island claims to have drawn is the disputed territory, and the claim of right, if this was an open question, free from all embarrassment by constant uninterrupted possession by Massachusetts, and from negotiation, compromise, agreement or treaty between the two colonies in ancient times, would depend on a solution of the simple proposition above stated. But it *is* embarrassed by both these circumstances, and as the plaintiff's bill refers to them and incorporates them with such answers as can be given to them in the bill itself, we now resume the analysis of her bill of complaint.

By the bill, then, it next appears, that in the year 1709, in consequence of disputes and controversies among the borderers, the two colonies appointed persons "to *ascertain and settle* the line of boundary" between them. Governor Dudley was appointed on the part of Massachusetts and Lieutenant Governor Jenckes for Rhode Island; they were attended by two or three friends of each party. The whole company met at Roxbury, on the 19th of January, 1710–11, and there, under the hands and seals of Dudley and Jenckes an agreement was made and reduced to writing, in which it is declared, that having fully debated and duly considered the challenges on both sides depending upon the several charters and letters patent, relating to the partition line between the said respective governments, and being desirous to remove and take away all occasions of dispute and controversy betwixt the two governments relating thereto, &c., they had mutually concluded and agreed:

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"That the stake set up by N. Woodward and S. Saffrey, skilful and approved artists, in the year of our Lord 1642, and since that often renewed in the latitude of 41° 55′ being three English miles distant southward from the southernmost part of the river called Charles river, agreeable to the letters patent for the Massachusetts province, be accompted and allowed on both sides the commencement of the line between the Massachusetts and the colony of Rhode Island, and to be continued betwixt them, in such manner that after it has proceeded between the two governments it may pass over Connecticut river at or near Bissell's house, as is deciphered in the plan and tract of that line by Nathaniel Woodward and Solomon Saffrey now shown forth to us, and is remaining upon record in the Massachusetts government. And whereas, upon presumption by mistake or ignorance of that line aforesaid, the inhabitants of the town of Providence, in the colony of Rhode Island and Providence plantation, have surveyed and laid out several lots and divisions of land to the northward of Woodward and Saffrey's line aforesaid, on the Massachusetts side; it is mutually and unanimously agreed, that there shall be and remain unto the said town of Providence and inhabitants of the government of Rhode Island and Providence plantation, a certain tract of land of one mile in breadth, to the northward of the said line of Woodward and Saffrey, as before described and platted, beginning from the great river of Pawtucket and so to proceed on the north side of the said patent line, of equal breadth, until it come to the place where Providence west line cuts the said patent line, supposed to contain five thousand acres, be the same more or less, the soil whereof shall be and remain to the town of Providence or others, according to the disposition thereof to be made by the government of Rhode Island aforesaid. Nevertheless, to continue and remain within the jurisdiction and government of Massachusetts Bay, any thing in this agreement to the contrary thereof or seemingly so notwithstanding, saving always likewise to any of the inhabitants of Massachusetts their improvements by building or fencing in of land within any part of the said mile of land before expressed to be and remain to them and their heirs according to their grants and improvements with this proviso, that so many acres as the occupiers or improvers shall be allowed upon the several challenges shall be added to the mile aforesaid in some proper and convenient place either at the side or end of said tract, so that the proprietors of the town of Providence or government of Rhode Island may not be losers thereby. And it is further agreed, that persons be nominated and appointed by the governor and council of each of the said governments respectively, to attend the first good season for that end within the space of six months from the date of these presents to show the ancient line of Woodward and Saffrey and to raise and renew marks, stakes, and other memorials for the reviving, preserving and continuing of certain knowledge and remembrance thereof *in perpetuam*, the gentlemen to be appointed to that service by the governor and council of the Massachusetts to give seasonable notice to the government of Rhode Island of the time and place for attending the same, that the gentlemen to be appointed on the part of that government may meet and join them accordingly, so that the mile of land herein granted to the inhabitants of Providence aforesaid may proceed in the settlement and improvement thereof for the benefit and advantage of both governments, and particularly to be a cover for the town of Providence against the insults of the Indian enemy."

The line not having been run as therein provided for, the colony of Rhode Island appointed other commissioners in 1717, with full power and authority "to agree and settle the aforesaid line between the said colonies in the best manner they can, as near agreeable to our royal charter as in honor they can compromise the same." The province of Massachusetts appointed their agents, with the same plenary powers. The parties met at Rehoboth, on the 22d of October, 1718, and there entered into another agreement under their hands and seals: "that the stake set up by Woodward and Saffrey in 1642, upon Wrentham plain, be the station or commencement to begin the line, which shall divide between the two governments aforesaid; from which said stake the dividing line shall run so as it may at Connecticut river be two miles and a half to the southward of a due west line, allowing the variation of the compass to be nine degrees, which said

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line shall forever be and remain to be the dividing line and boundary between the said governments."

In the May following, viz. May 12, 1719, certain persons, two being from Massachusetts and two from Rhode Island, met at Wrentham; ran a line according to the foregoing directions, or nearly so, and certified their proceedings under their hands and seals in the presence of three attendant witnesses.

To these proceedings, which on their face would seem to be final and conclusive, and which Massachusetts has always contended were had in fairness and good faith, the plaintiff objects by declaring in the bill, that they were the result of mistake, originating in the false representation of Gov. Dudley, who, the bill says, at the meeting in Roxbury, represented to the agents of Rhode Island that Woodward and Saffrey had ascertained the true point three miles from Charles river; that they were skilful and approved artists; that they had set up a stake there, and that the place where said stake was so set up *was three miles and no more*, from Charles river or any part thereof; and that the Rhode Island agents, relying on said representations, and verily believing the said point or place to have been rightly ascertained, without going to the place to see for themselves, signed the said agreement; whereas, as now appears — the bill says — this point or place is *more* than three miles, to wit, *seven miles* from any part of said river. The Rehoboth agreement is said to have been made under the like mistake; and the subsequent running of the line in 1719, which it is denied was so run by any competent authority, was vitiated by the like mistake.

The bill avers, that this mistake was not discovered or suspected by Rhode Island until 1749, and that in 1750, after vainly attempting to obtain a revision of the line by consent of Massachusetts, she caused the true line to be run and a map made of the premises; from which map the one annexed to this article is copied, and the difference between the line of 1710 '19 and the line of 1750 are thereby to be perceived.

The question of mistake by false representation as a matter of fact, and (if sustained by proof,) the effect of such mistake as matter of law, are thus opened, on the record, for the judgment of the court.

There is, however, another important fact disclosed by the bill. It declares, that, upon the territory between the two lines above described, which is declared to be twenty miles in length and four miles and fifty-six rods in breadth at the east end thereof, and more than five miles in breadth at the west end thereof, Massachusetts wrongfully possessed herself about the year 1719, and has continued to exercise jurisdiction over the same. Massachusetts would claim possession from a much earlier period, and it can hardly be doubted, that she held this possession from the earliest period of her charter, or at any rate, from 1642. Whether this possession for nearly two centuries gives her a title independent of any grant or charter and by force of

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the possession itself, is an important feature of the controversy. Rhode Island, while she admits that this possession has never been interrupted, maintains that on various occasions she has endeavored to obtain a revision of the question by importunity and remonstrance; and she certainly did invoke the concurrence of Massachusetts in 1750 and 1792 without effect.

If our readers have had the patience to follow us through this dry detail, they will have seen the subject matter of this controversy between sovereign and sister states, and the principal grounds upon which it is urged by the plaintiffs, and resisted by the defendants. Other subordinate questions, not without interest or perplexity, are involved, as commonly is the case in affairs of this ancient and complicated character. But after all, the subject resolves itself into these four questions:

1. Did the area of seventy or eighty square miles become part of the colony of Rhode Island by force of her charter? If it did not, there is an end of the matter. If it did; then,

2. Has Rhode Island lost her title to it by the agreements already recited?

3. Has she any present legal claim of title against an uninterrupted and adverse possession for nearly two centuries?

4. As this territory was never in possession of the state of Rhode Island, and as the declaration of independence is one of the charters of paramount authority under which by force of her previous occupancy Massachusetts claims title, what effect has that declaration on the rights of the parties under all the circumstances of the case?

It remains for us to speak very briefly of the proceedings in the supreme court of the United States on this novel subject of litigation. It is now nine years since the bill was filed in that court, and some surprise has been expressed, not always in the most candid manner, that the suit is not brought to a conclusion.

When it is considered, that the court sits but once a year, and that this is one of that class of high cases, which, by its rules, can be heard only by a full bench of judges; that, in the first place, the jurisdiction of this great tribunal was to be settled on a question among the most original and nice that had occurred in the chapter of constitutional law; and that, in the absence of all legislation by congress in regard to controversies between the states, the forms of proceeding had to be settled upon argument, its slow progress will not seem very strange. The state of Rhode Island took her own time for beginning this appeal to the great tribunal of supreme law. She may be supposed to have been well prepared for the contest, before she threw her glove into the arena. But in Massachusetts, the subject had slept in obscurity for forty years, and old as in fact it was, yet to the existing generation of statesmen and lawyers it was entirely new. A report made to the senate of Massachusetts in its session of 1832, shows a very limited acquaintance with the matter, and earlier reports unfor-

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tunately had rather compromitted than maintained her rights, from an imperfect acquaintance with facts. The case was spread, at long intervals, over two hundred years of her records, and when they were gathered together, a mass of documents was accumulated which would consume a year in the reading! But although the citation on filing the bill was returnable in 1833, there was no effort till the following year made by the plaintiffs to speed the cause. At the term of the court in 1835, a plea and answer were put in by the defendants, and in 1836, the plaintiffs, not having moved further in the case, a rule was obtained by the defendants to this effect, that the complainants file a replication within six months, or the cause be dismissed.

Accordingly, within the six months a replication was filed, accompanied by notice, that at the then ensuing term, a motion would be made for leave to withdraw this replication, and to set the defendants' plea down for a hearing. The motion was made as proposed, and not being objected to, was granted of course. But then it was suggested by the plaintiffs, that the bill needed amendment, and this amendment, readily acceded to by the defendants, was not made in form until 1839.

In the mean while, that no time might be lost, the defendants' counsel (to whom the governor, by a special commission dated in Dec. 1836, had added James T. Austin,) moved to dismiss the suit for want of jurisdiction. This motion was elaborately argued in 1838, upon principles which are reported in the 12 Peters's R. 657 *et seq.* The court by a bare majority of its members, sustained its jurisdiction. Other difficulties, of which the succeeding volumes of Peters give some account, prevented further proceedings until 1840, (14 Peters, 210) when the bill being amended and the same plea filed, an argument was had on its sufficiency, and the plea being overruled, a demurrer to the whole bill both for discovery and relief was filed, upon which argument was again had at the late term of the court, and the demurrer being also overruled an answer to the whole bill was ordered and must be put on file by the first day of August next.[1]

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[1] The progress of the cause has witnessed some change in the counsel. The plaintiffs' bill is signed by Albert C. Greene, attorney general of Rhode Island, and Asher Robbins, solicitor for the complainant. The latter gentlemen never attended the arguments in the supreme court, and the attorney general of Rhode Island withdrew after 1837. They were succeeded by the Honorable Benjamin Hazard and John Whipple, the former of whom being too infirm in health to take part in the discussion at the last term, his place was supplied by Richard K. Randolph. Since then Mr. Hazard has died. On the part of Massachusetts, although Mr. Webster still continues her counsel on the record, his present position will necessarily interrupt his connection with the bar. Mr. Austin has tendered to the governor his resignation of the special commission under which he was appointed to act in the cause, and probably the great work which the interests of both states demand, and the wide field for it which is opened by the recent decision of the court, and especially by intimations that fell from the bench as to the facts on which the case will turn, is to be traversed by new laborers. The truth is, that when the public is concerned in a lawsuit of this description, the honor of serving them is liable to a great many drawbacks, which are not submitted to in controversies of a more private character.

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The proceedings in court have not been without advantage. They open the new road upon which this novel cause is now to advance. They instruct the parties as to their rights, and the law, by which the court will administer them. There had been no precedent for such a suit. The suability of the states, allowed by the text of the constitution, was very early prevented from having any practical effect by the eleventh article of amendment. But this suit, and the liability of a state to the process of the court in such cases, is maintained by a provision of the constitution, (not touched by the amendment,) which extends the judicial power of the supreme court, "to controversies between two or more states."

In the argument on this jurisdiction, it was maintained by the defendant, that these controversies must be limited to those civil cases, of which judicial courts take cognizance; and could not extend to political controversies, of which this was an example, over which judicial tribunals do not ordinarily hold jurisdiction. Of this opinion was the chief justice. And again it was maintained, that although the judicial *power* might extend to such a case by the constitution, such power, could not be exercised until congress had provided a rule of decision and modes of proceeding suited to so novel a case. These positions were ably sustained by a minority of the court, but the decision was adverse to them. The court, it seems to us, has found itself embarrassed in carrying out its declared power. It has found, we think, that a claim for jurisdiction and sovereignty, as confessedly it is no right of private citizens and not one of those questions which can ever arise in the ordinary exercise of common law or equity jurisdiction, is too gigantic and weighty for the administration of any known forms of law.

Early in these proceedings it was announced, that in this, as in other cases, the court would be governed by the rules of practice of the high court of chancery in England; but it had got but a little way before it declared that it "would so mould these rules, as to bring the case to a final hearing on its merits; and that it was too important in its character, and the interests concerned too great, to be decided upon mere technical principles of chancery proceeding." 14 Peters, 210.

In the present position of the case, the whole merits of the controversy are to come into judgment; and although, we think the case might fairly have been decided, according to Mr. Justice McLean's most learned dissenting opinion, (14 Peters, 262) or even adversely to it, if the adverse doctrine had found better favor in the minds of the majority, and are certainly disappointed with the reasoning of the court on the demurrer; still we have entire confidence in the intelligence and fidelity of that dignified tribunal. There is, we are sorry to perceive, a disposition sometimes apparent, to undervalue its high and commanding character. Because its decisions, on some questions, are not in unison with our general opinions, and because some

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principles are adopted which are not in harmony with the doctrines of our schools; and possibly because a majority of its members are of a political party in opposition to the one to which we belong, we are in danger of losing our respect for its learning, its authority, and its power. But the members of this high court have, as a body, no superiors in all the great qualities of mind and heart, in honor, integrity, ability and learning, which are the ornaments of the bench and the security of the people. We should encourage this belief. We should cling to it as long and as closely as possible. The architect, said a distinguished advocate sneeringly, has placed the court-*room* in the basement of the capitol. But, if it may be supposed there was an allegory in his mind, here is the place for *the court*, for it is the basement and corner stone of public liberty, which can never be shaken while it rests on this immovable foundation.

RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, October Term, 1840, at Boston.

Jordan and others *v.* Warren Insurance Co.

Insurance on freight, on a voyage at and from New Orleans to Havre: The vessel was compelled to put back to New Orleans in consequence of an accident. The cargo, consisting principally of cotton, was so much damaged, that it would require several months to repack it in a condition to be reshipped, and it was sold by consent of the master and shippers; and the vessel proceeded on another voyage. *Held*, that the underwriters were not liable.

Underwriters cannot avail themselves of a freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage, which they have insured, and which has already terminated. Thus, where freight was insured at and from New Orleans to Havre, and the ship, meeting with an accident, put back, and another voyage to England was substituted, on which freight was earned; it was *held*, that the underwriters were not entitled to the freight of the substituted voyage, as in the nature of a salvage freight.

Where a cargo is so much injured (although capable of being carried to the port of destination, and there landed), that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell the cargo at the place, where the necessity arises.

The shipper has no right to demand the cargo at an intermediate port, without paying full freight.

Underwriters take upon themselves no risk whatever, as to the length or duration of the voyage insured.

Assumpsit on a policy of insurance. The policy was underwritten on the 30th of May, 1838, by the Warren Insurance Company, and thereby they caused Oliver Jordan, for whom it concerns, to be insured, lost or not lost, seven thousand dollars on the freight of the

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ship Franklin, at and from New Orleans to Havre, at a premium of 1 1-4 per cent. The declaration alleged, that the ship sailed on the voyage on the 6th of June, with a cargo on board, and was, during the voyage, driven by the violence of the waves and currents, upon a bank in the river Mississippi, where the vessel remained hard and fast in the mud; and while lying upon the said bank, was violently struck by a steamboat called the Tyger,—by which disasters the vessel was so injured and broken, that the cargo of the vessel was destroyed, and the vessel prevented from performing her voyage, and the freight was totally lost. Plea, the general issue.

The facts, as they were agreed by the parties or proved in the case, were, that the plaintiffs were the owners of the ship; that she took on board a cargo at New Orleans on freight for Havre, consisting of cotton, worth about $60,000, tobacco worth $10,500, and woods and wax about $500,—in the whole worth about $71,000. The freight bill was about $9916. While the ship was proceeding down the river Mississippi on the voyage, on the 7th of June, 1838, being in tow of the steamboat Tyger, towards the bar, the current of the river, running with great rapidity, caused the ship to sheer and surge so violently on the tow-line, that the steamboat lost her steerage-way, and, before she could recover her position, the ship took ground, and remained hard and fast. The eddy current then taking the steamboat, she swung round, and, driving stern foremost, struck the ship with great violence on the larboard side, and thereby did considerable damage to her. The ship was then found to have considerable water in her hold, increasing from six feet to thirteen feet. The cargo was thereupon taken out to lighten the ship and save the cargo, and it was carried back in steamboats, &c., to New Orleans. The ship being lightened by taking out her cargo, was also carried back to New Orleans, and was repaired and fitted again for sea before the 21st of July following. After the cargo arrived at New Orleans, it was surveyed by experts; and being found wet and damaged, a large portion of it was, by their advice, sold at public auction. The damaged part of the cargo sold for about $19,774 22; the residue, amounting in value to about $2210, being in a sound state, was shipped for Havre in another vessel.

It further appeared in the case, that the cotton, if shipped again in the ship in its wetted and damaged state, would have been very liable to spontaneous ignition; but it could, by a process of drying, sorting, and repacking, be put in a state for reshipment for commercial purposes, and that there were conveniences for the purpose. But the process was slow and would occupy a considerable length of time to be perfected; as long, as some of the witnesses thought, as six months. But it did not appear, that the cotton might not have been dried so as to be safe for transportation against ignition in a shorter period. After the Franklin was repaired, she took another cargo on board for England, the freight of which was worth $10,000, and

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sailed therewith on the 21st of July, and safely landed that cargo and earned the freight.

At the trial, one of the principal questions argued to the jury, (the questions of law arising in the case being reserved by consent for the consideration of the court,) was, whether the master acted according to his duty in allowing the cargo to be given up and sold on account of its damaged state. The jury, after finding a verdict for the plaintiff for $7000, further found; "That it was the absolute duty of the master to the owners of the cargo, not to undertake to carry forward the cargo; but that he acted properly in suffering it to be taken out of the ship and disposed of."

The cause was now argued upon the reserved questions under the agreement of the parties, by *Daniel Webster* and *J. P. Healy*, for the plaintiffs; and by *Theophilus Parsons* and *Theophilus P. Chandler*, for the defendants.

Story J. Two questions of law have been presented for the consideration of the court by the counsel for the defendants. (1.) That, under the circumstances of the present case, there has been no loss of the freight for the voyage, for which the underwriters are liable under the policy. (2.) Secondly, if there has been, then the underwriters are entitled to the freight of the substituted voyage to England as in the nature of a salvage of freight. The latter ground is maintained, upon the footing of the authority of the case of *Everth* v. *Smith*, (2 Maule & Selw. 278,) and that of *McCarthy* v. *Abel*, (5 East, R. 388.) There seems no reason to doubt the authority or correctness of either of these decisions. But they are founded altogether upon a consideration, which has no existence in the present case. There, the voyage on which freight was earned, was the very voyage insured, and which had not then terminated. Here, the voyage was entirely new, to a new port. The terminus of the old voyage was Havre,—of the new voyage, was England. The old voyage to Havre was terminated; and the new voyage had not the slightest connection with it. I know of no principle or authority, upon which the court can say, that the underwriters have a right to avail themselves of a freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage, which they have insured, and which has already terminated.

The real question, then, and the only one before the court, is that first stated. The question is not, whether the freight insured has been lost, (although the circumstances of the case are so imperfectly stated, that there is great obscurity as to the manner of settling the controversy between the owners and the freighters,) but whether it has been lost by any peril insured against, so as to make the underwriters liable therefor. The ship was clearly refitted for the voyage and capable of resuming it within a reasonable time, and if the con-

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dition of the cargo had been then such, that it could have been reshipped for the voyage, the master had a right to require it to be reshipped, and was bound to proceed with it on the voyage; or, if he did not, the freight, if lost, would be lost by his default, and not by any peril insured against. It has been suggested, that the time of the detention of the ship to refit was longer than the actual voyage to Havre; and, therefore, that the master might reasonably refuse to proceed on the voyage. But the underwriters take upon themselves no risk whatsoever, as to the length or duration of the voyage insured. What they undertake is, that notwithstanding any of the perils insured against, the ship shall be capable of performing the voyage, so as to earn the freight insured, not that the voyage shall be performed in a longer or a shorter period. The owner takes upon himself the chances of a short or of a protracted passage. This doctrine was fully recognized in *Anderson* v. *Wallis*, (2 Maule & Selw. R. 240,) and applied to the very case of an insurance on freight, in *Everth* v. *Smith*, (2 Maule & Selw. 278.) In the latter case, the court held, that the underwriter had nothing to do with the temporary retardation, or protraction, or interruption of the voyage, if it was ultimately resumed, or capable of being resumed and performed. And, upon that occasion, Lord Ellenborough alluded to the doctrine in the former case, and repeated the question; "What case has ever yet decided, that such a temporary retardation (not going, as he added afterwards, to a destruction of the contemplated adventure,) is a good cause of abandonment, so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law."

The jury have, indeed, found, that the master, in delivering up the cargo and allowing the sale thereof at New Orleans, performed his absolute duty to the owners of the cargo, and ought not to have undertaken to carry it forward to its destination in its then damaged state. And I think, that the jury were well warranted in this finding; for when a cargo on freight is so much injured, although capable of being carried to the port of destination, and there landed, yet if, from its present state, it will endanger the safety as well of the ship as of the cargo, or it will become utterly worthless on arrival at the port of destination, it is the duty of the master, exercising a sound discretion, for the benefit of all concerned, and especially of the shippers of the cargo, to land and sell the same at the place, where the necessity arises, whether it be by putting back to the original port of the shipment, or at any intermediate port, at which the ship arrives in the course of the voyage. It would be contrary to common sense and common justice for him to sacrifice the cargo for the benefit of another party in interest; or to elect upon whom the ruin, caused by a common calamity, should fall. In a case of necessity, or unexpected and pressing calamity, emergent in the course of the voyage, the master is by law created an agent from necessity for the

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benefit of all concerned; and what he fairly and reasonably does under such circumstances in the exercise of a sound discretion, binds all the parties in interest in the voyage, whether owners, or shippers, or underwriters. But, then, the question still remains, upon whom is any given loss to fall; and it by no means follows, because a sale of the goods has taken place at a port short of the port of destination by reason of a damage sustained by the cargo, the cargo specifically remaining, capable of being carried to its destination, that there is no freight due thereon by the shippers; but that the whole loss is to be borne by the underwriters on freight. That is assuming the very point in controversy.

Let us see, then, how upon principle the case stands as between the shippers of the cargo and the owners of the ship. We must take it in the present case, that the sale was with the entire consent and approbation of the shippers as well as the master, and for the benefit of the former. Now, nothing is better founded in the law on this subject, than that the shippers are bound to pay the full freight for the voyage, if the cargo is carried to the port of destination and specifically remains, notwithstanding at its arrival it is, by reason of sea damage, utterly ruined and worthless. This doctrine, although formerly a matter of some doubt, is now firmly established, and indeed must be manifestly so upon principle.[1] It is as clear, that after the shipment of the cargo on the voyage the shippers have no right to demand it at any intermediate port short of the port of destination, without payment of the full freight for the voyage, whether the cargo be there in a damaged or in an undamaged state. The reason is obvious. The master has a right to carry on the cargo to the port of destination; and if his ship be capable, either then or within a reasonable time, of carrying the cargo to the port of destination, there is no ground to say, that he is not entitled to earn a full freight, and the shippers of the cargo cannot insist upon changing the original contract *in invitum*, and cut him off from all freight, or dismiss him with a *pro ratâ* freight. The contract of the ship-owner is to carry the cargo to the port of destination; but he by no means warrants the state, in which it shall arrive, as it may be affected by the perils of the seas or other perils, against which his contract does not bind him. It is no answer, to say, that, if the cargo is carried on in a damaged state, it will be ruined. The true reply is, that the ship-owner has nothing to do with that, and that the shippers have no right to throw the loss of freight upon him, because the cargo is in danger of ruin by a calamity, against which he did not warrant them.[2]

How, then, do these principles apply to the circumstances of the present case. The ship was repaired, and capable again of taking

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[1] See Abbott on Shipping, Part iii. chap. 7, § 7 to § 9, and notes to American edition of 1829. *Griswold* v. *New York Ins. Co.* (3 John. R. 321.)

[2] Stevens and Benecke on Average, by W. Phillips, p. 286, note (1); Id. p. 357 to p. 360, edit. 1833. 3 Kent Comm. Lect. 47, p. 225, 4th edit.

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on board the cargo at New Orleans, within a reasonable time. The master had a right to require, that it should be so taken on board and carried on the voyage, as soon as it should be in a condition to be safely reshipped. He had a right to wait until the cargo could be dried, sorted, repacked, and prepared for reshipment. The delay arising thereby would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter frustration or destruction of it. If, then, the freight has been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole evidence shews, that the cargo could have been dried, sorted, and repacked safely for the voyage and, at the farthest, within six months. Mere delay in the voyage, or disappointment as to the time of arrival, constitutes, as we have seen, no ground for an abandonment of the voyage. So that here the loss of freight has been by a voluntary abandonment of the voyage by the master; and not from necessity, superinduced by any perils insured against.

Then, how stands the case as to the shippers of the cargo? They could not require the cargo to be redelivered to them, without the payment of freight for the voyage; and if they did not choose to pay the freight, the master had a right to retain the cargo for the payment thereof, or to prepare it again for reshipment, as soon as it could be safely done, unless the owners refused to allow it to be again shipped on the voyage. If they did so refuse, then the contract for full freight would have been complete on the part of the ship-owner, from the default on the other side. But we must take the case here to be, what in reality it was, a mutual, voluntary agreement, on the part of the master and the shippers, that the damaged cargo should be sold. The sale must, therefore, be treated as a sale reserving all the rights of the respective parties. And, in my judgment, the ship-owner was, for the reasons already stated, upon principle, entitled, under all the circumstances. to a full freight for the voyage upon all the goods so sold, or relinquished. He has, therefore, not lost his freight for the voyage from any perils insured against; but it is a clear right now existing against the shippers of the cargo, or, if lost, it has been lost by the voluntary relinquishment of the master and owner by their own act or default. So far the principles of law would conduct us, in my judgment, upon general reasoning, independent of authority.

But let us see, how the case stands, upon the footing of authority. And in this case, in my judgment, there is not only no authority adverse to the doctrine already stated, but there are authorities positively in its favor; and which, in effect, if admitted to prevail, decide the very case before this court.

The case of *Herbert* v. *Hallett*, (3 John. Cas. 93,) very nearly approaches the present. There, the insurance was upon freight on a voyage from New York to Havanna. The ship was stranded in a gale of wind, at Sandy Hook, on the outward voyage; the cargo

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was unladen, being considerably damaged, and was brought back to New York and delivered back to the shippers. The ship was repaired in a fortnight, and was soon afterwards sent on a different voyage. The court held, that the underwriters on freight were not liable on the policy; that the ship-owner ought to have insisted in carrying on the cargo after the ship was repaired; and that he had, by his negligence or folly, and not by any peril insured against, lost the freight. The court said, that if the ship be injured by the perils of the sea, but is repaired within a reasonable time, and the goods are damaged, the owner will be entitled to his freight, if he offers to carry on the goods, although damaged, on the voyage, and the shippers refuse. Nothing but a physical destruction thereof will exempt the shipper from payment of freight in such a case. It did not appear in this case, that the cargo was incapable of being reshipped. The case of *Griswold* v. *The New York Insurance Company*, (1 John. R. 204,) was an insurance on freight at and from New York to Barcelona, with liberty to touch at Gibraltar. In proceeding on the voyage, the ship was stranded on Long Island, and the cargo (flour) was, with a small exception, damaged. The cargo was taken out, and the ship got off and repaired in six days. The cargo was received by the shippers, and sold at auction at a loss of 27 per cent. The ship-owner abandoned to the underwriters on freight, and brought an action on the policy for the loss. The court affirmed the doctrine of the former case, holding that the ship-owner ought to have insisted on carrying on the cargo to the port of destination, so as to entitle himself to a full freight; and that there was no ground for the abandonment. Here the cargo was perishable; and upon the new trial ordered by the court, it appeared, that if it had been carried to the port of destination, it would not have been worth the freight. But, notwithstanding this fact, the court adhered to their former opinion, that the ship-owner was not entitled to recover. *Griswold* v. *The New York Insurance Company*, (3 John. R. 321.) In *Saltus* v. *The Ocean Insurance Company*, (14 John. R. 138,) there was an insurance on ship and freight and cargo, (rye flour and corn); and the vessel, in the course of the voyage, was obliged to put into a port of necessity to repair, and there the cargo was found to be greatly deteriorated, and in a state not fit to be unshipped; and it was accordingly sold. The vessel was repaired so as to be able to resume the voyage. The court held, that the ship-owner could not recover on the policy on freight, as the cargo, though damaged, still remained in specie; and the authority of *Griswold* v. *The New York Insurance Company*, was fully recognized. The case of *Whitney* v. *The New York Insurance Company*, (18 John. R. 208,) is supposed to trench upon the principles of the former cases. It strikes me, that it is entirely consistent with those principles; and that the decision turned upon peculiar circumstances. It was a policy on freight. The cargo was hemp, which was wetted, and the master could neither

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dry the hemp, nor ship it on board another vessel for the voyage in the wet and perishing condition in which it was; there being great danger of ignition. His own ship was disabled, and could not be repaired for half her value; nor could the hemp be reshipped in another vessel to the port of destination for one half of the value of the freight as valued in the policy. The master, therefore, broke up the voyage. The court held, that the voyage was rightfully broken up, and the ship-owner, having abandoned on the policy, was entitled to recover for a total loss of the freight. The case of *McGaw* v. *The Ocean Insurance Company*, (2 Chandler's Law Reporter, 363,) manifestly proceeded upon similar principles. Thus far the American authorities have gone; and they uniformly sustain the same doctrine.

The question has also arisen in England; and has there received a similar determination. In *Moody* v. *Jones*, (4 Barn. & Cresw. R. 394,) there was a policy on freight of the ship at and from Kingston in Jamaica to Liverpool. The vessel sailed on the voyage with a cargo of cotton, coffee, sugar, hides, and other goods, belonging to various shippers. The ship having started a plank, was obliged to put back to Kingston to repair; and was there repaired. The cargo was landed, and was found so wetted by the sea water, that it could not be reshipped without danger from ignition to the rest of the ship and cargo, unless it underwent a process of drying, which would detain the ship six weeks, and this would have been attended with an expense equal to the freight. Under these circumstances, the shippers refusing to interfere, but approving of a sale by the master, the master sold the damaged goods, and sailed with the proceeds thereof to Liverpool; and safely arrived there. The master's proceedings at Kingston were found to be such as a prudent man uninsured would have adopted. The master, at Liverpool, paid over the proceeds of the goods to the parties interested, without any deduction of freight. The question was, whether under these circumstances there was such a loss of the freight of the goods so sold, as entitled the ship-owner to recover under the policy. The court held, that there was not. The reasoning of the court is certainly not very full or satisfactory. But it is plainly in coincidence with what has been already stated, as the just result of the principles of law on the subject of the earning of freight. It may be added, that the same doctrine may be fairly deducible (although the very case is not put) from the reasoning of Pothier on the point, when full freight is due;[1] and it is not unimportant to remark, that Mr. Stevens and Mr. Benecke, both of them gentlemen of great practical experience in this branch of the law, assert the same doctrine, as one well established.[2]

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[1] Pothier Traité de la Charte-Partie, n. 70 to n. 77. Id. n. 121.

[2] Stevens on Average, p. 81, n. 6, edit. 1817. Id. edit. by Phillips, p. 286, note (1), edit. 1833. Benecke on Insurance, p. 447 to p. 449, edit 1824. Id. by Phillips, p. 357 to 367, edit. 1833.

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Upon the whole, my opinion, upon a deliberate survey of the whole matter, is, that the plaintiffs are not entitled to recover in the present case for a total loss of the freight insured. But that their claim is limited to the general average, and the loss of the freight of such of the goods, as were physically lost and destroyed by the perils of the seas.

District Court of the United States, Massachusetts, March, 1841, *at Boston.*

DEXTER AND OTHERS *v.* BARK RICHMOND AND CARGO.

Libel for salvage by pilots: *Held*, that the services rendered in this case constituted no claim for salvage; but the libellants were permitted to amend their libel and file a supplemental bill for extra compensation as pilots, which, on a hearing, was allowed to them.

THIS was a case in which the libellants, pilots of Martha's Vineyard, claimed salvage of the owners of the bark Richmond, belonging to Providence, R. I., for services rendered in getting the bark into Holmes's Hole, on the 27th of November last, she being forty-two days from New Orleans, bound for Boston. It was in evidence that the value of the bark, with her cargo, consisting of cotton and lead, was more than $50,000. On the 19th of November, in a violent gale, as appeared by her log, her rudder was lost, and a temporary steering apparatus was arranged to supply its place. The evidence of the libellants tended to show, that the vessel being, as they maintained, then without a rudder and otherwise crippled, and short of provisions, was spoken and boarded by the libellants off Block Island, with two signals of distress flying. That on the morning of the 27th of November, they put a pilot aboard and stood by her, at the request of the master, all day, and towed her some hours; and that, without the assistance rendered by them and their boat, the bark could not have reached a harbor that evening. The claimants maintained, that the whole statement of the pilots was greatly exaggerated, and offered evidence tending to show, that the bark was in no danger on that day from wind and sea; that she was not out of provisions, and could have made Holmes's Hole on that day without other assistance than that of a pilot; — and they contended that the libellants had not gone beyond the ordinary line of their duty as pilots, and could not at law recover a salvage compensation. After the first hearing of the case, and after consideration and consulting the authorities cited on both sides; Davis J. intimated his opinion, that the libellants in the case, as pilots, could not recover a salvage compensation. The libellants then moved for leave to amend their

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libel, and file a supplemental bill for extra compensation as pilots, to which the claimants objected. At a subsequent day, amendment was allowed, and a further hearing had, and evidence introduced to show the fair value of such services, and how they are usually compensated. The claimants proved the payment of $128—being $40 for pilotage into Holmes's Hole; $28 for keeper's fees 14 days there, and $60 for pilotage thence to Boston. A large portion of which, they contended, was for extra pilotage services, and also a tender of $150 in addition; and thought this was all they should be called upon to pay. The libellants contended, that a liberal allowance should be made for services attended with danger, and brought some evidence tending to show, that $500 or $600 would be a fair compensation.

Dexter and *G. W. Phillips* for the libellants.

Pope and *C. H. Parker* for the claimants.

Davis J. in delivering his opinion, said there were three kinds of cases of this nature—one purely salvage, where property had been saved from imminent peril; one purely pilotage; one between the two, where extra services beyond pilotage had been rendered, and had become entitled to extra compensation. The present case was one of the latter class. The bark was here in no imminent peril. Her crew was full. There was no distress other than the loss of her rudder, which she had been without for ten days previous to the assistance rendered. The only pretence of danger was the possibility of a change of wind, which might prevent her weathering Gay Head. It was undoubtedly expedient to keep the pilot boat in attendance under the circumstances; but the services thus rendered constituted no claim for salvage, but were to be compensated for as extra pilotage. The libellants did no more than, as pilots, they should have done. It appeared, that, in addition to one hundred and twenty eight dollars pilotage paid by the respondents, which the learned Judge considered a very liberal payment upon their part, a tender of $150 had been made. Allowing that each of the libellants had met with the best possible success on the 27th of November, the extent of their earnings would not have exceeded $40. The tender of $150 would give to each of them about $90 apiece, which exceeded, in amount, the monthly pay of the whole ship's crew. This sum was ample and more than the libellants should expect to receive under the circumstances. Their mistake had been from the outset in expecting a salvage compensation, which had led them to exaggerate and inflame the amount of their claim. It was well in all cases to allow a liberal compensation, and though in his opinion, the amount here paid and tendered, had been very liberal, yet considering the expense here incurred, and the policy of encouraging the rendering of similar services by persons in the situation of the libellants hereafter, he should give them the amount tendered of $150, and one half of their costs.

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Nelson v. Ship Hercules.

Joinder of seamen in suits for wages.

Libel by a seaman for wages on board the ship Hercules. The act of congress of 1790, ch. 56, § 6, provides that in suits by seamen for wages, all the seamen (having cause of complaint of the like kind against the same vessel) shall be joined as complainants. In this case, the libellant was the only one of the crew in port, and brought his suit alone.

Bolles, for the respondents, moved the court to add the names of the rest of the crew to the libel, that they might be concluded by the decree, and offered evidence to show that they had the same cause of action, in all respects, with the libellant. This would answer the object of the statute, which was to save the expense and trouble of several suits.

R. H. Dana Jr., for the libellant, contended that the statute applied only to cases where suits were actually commenced, and that absent parties could not be prevented from showing that their cause of action was different, and should not be concluded as to their claims by a trial upon evidence different from that which they might be able to produce.

Davis J. The court has no power to make parties to the libel. The statute only requires the consolidating of several suits, when actually brought upon what is evidently the same cause of action.

Supreme Judicial Court, Massachusetts, March Term, 1841, *at Boston.*

Lee, Administratrix, v. Thorndike, Administrator.

An award of the commissioners under the treaty with France of July 4, 1831, *held*, not to be conclusive upon the rights of the claimants, as between themselves.

Assumpsit to recover a part of certain money, alleged to have been received by the defendant under an award of the commissioners, appointed pursuant to the act of congress, to carry into effect the treaty between the United States and France, of July 4, 1831. The plaintiff alleged, that the commissioners, in making their award in the case of the schooner Two Friends, Lee, master, had, by mistake, awarded the entire amount allowed for the said schooner and the freight thereof, to the defendant, as administrator of the estate of Henry Thorndike, whereas one third of the said amount should have been awarded to the plaintiff, as administratrix of Larkin T. Lee; and it was to re-

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cover this one third of the sum allowed for the said vessel and freight, that this action was brought. At the trial, before Putnam J., the defendant objected to the admission of any evidence to contradict the said award, or to show that a mistake was made in the same, on the ground, that the commissioners were a judicial tribunal, and their award a judicial act, and on matters within their jurisdiction; and that, being such judicial act, the award could not be impeached collaterally in any other tribunal, but that so long as it remained in force, it was conclusive upon all the world. But the judge overruled the objection. There were also some objections to certain depositions, which were overruled. The plaintiff had a verdict, the defendant taking exceptions to the rulings of the judge.

William Gray for the plaintiff.

Bradford Sumner for the defendant.

Putnam J. In *Law* v. *Thorndike*, (20 Pick. R. 317; S. C. 1 Law Reporter, 101,) it was decided, that the remedy in a case like this was at law, and not in equity. In the present case, the court are of opinion, that all the rulings of the judge at the trial were right. The proceedings of the commissioners are, in some respects, conclusive. It was their appropriate duty to decide upon the amount and validity of the claims presented to them; but it was not their province to decide upon the conflicting rights of parties, *as between themselves*, In the case of *Comegys* v. *Vasse*, (1 Peters, 212,) a similar point arose, and it was there decided, that the commissioners under the treaty with Spain had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests. The validity and amount of the claim being once ascertained by their award, the fund may well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others, who assert a title to the fund, be left to the ordinary course of judicial proceedings in the established courts. Judgment on the verdict.

Whitney *v.* Whitaker and another.

Where the holder of a promissory note became party to a general assignment, which stipulated for a release of the debtors, and subsequently a covenant was made by which the creditors were to receive fifty per cent. of their debt, or the release in the assignment was to be void, and they did not receive that amount; it was *held*, that the note was not merged in the covenant, and an action might be maintained on it.

Assumpsit on a promissory note, signed by the defendants. The defence was, that the note had been merged in a covenant under seal, and that the action should have been brought on the covenant. The defendants assigned their property in 1834, for the benefit of their creditors, and the plaintiff became a party to the assignment, which contained a release of the defendants. Subsequent to the assignment,

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a covenant was entered into, by which it was provided, that unless the plaintiff and other creditors should receive fifty per cent. of their demand, their release of the defendants should be void; and they were not to sue the defendants for eighteen months. The plaintiff did not receive that amount, and the present action was brought.

C. G. Loring and *Betton* for the plaintiffs.

Bartlett for the defendants.

Putnam J. The action was rightly brought on the note. The two instruments must be construed with reference to each other, as if they had been simultaneous. The covenant was not a substitution of the note. The release in the assignment was conditional, and the condition not having been fulfilled, was void.

Judgment for the plaintiff.

Raymond and another *v.* Crown and Eagle Mills.

Where goods were delivered to an agent and charged to him, and an action was subsequently brought against the principal, it was *held*, not to be a bar to the suit, that the vendor *had the means of knowing* the principal at the time of the sale. Nor was it conclusive evidence of an election to trust the agent alone, that the goods were sent by his request to the principal; or that, in an action commenced against the agent, the name of the principal was subsequently inserted before that of the agent was stricken out.

This was an action on an account for certain groceries, which were furnished to Robert Rogerson, and for which the plaintiffs sought to recover of the defendants, on the ground that Rogerson acted as the agent of the Crown and Eagle Mills, in making the purchases. This suit was originally brought against Rogerson alone, and the defendants were afterwards added, and after the action was entered in court, the plaintiffs asked and obtained leave to strike out the name of Rogerson. It appeared at the trial, that at the first purchase of goods, Rogerson said they were for the Crown and Eagle Mills, and he wished them so marked, and delivered to his truckman. There was no evidence, that the plaintiffs in fact knew that the Crown and Eagle Mills were a corporation, or that the name designated any thing more than an existing factory, or establishment, but evidence was offered on both sides as to their means of knowledge. The judge who presided at the trial, instructed the jury, that the defendants were liable if the goods were delivered on the credit of Rogerson, the plaintiffs not then knowing that the Crown and Eagle Mills were a corporation, or distinct person or party, provided they elected to charge them, on discovering that fact; and that it was not enough to discharge the defendants to show that the plaintiffs had the means of such knowledge, unless the jury were satisfied that they actually knew it. That Rogerson's mentioning the name of the Crown and Eagle Mills, for whom the goods were intended, was not of itself conclusive against the plaintiffs. The jury

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were also instructed, that inserting both names in the writ by the plaintiffs was not waiving their right of election between Rogerson and the defendants, because they might suppose they could charge both, or it might be a mistake of counsel; and when the plaintiffs found that the corporation existed, if they inserted the name of the corporation in the writ, it was not fatal to their case that they did not strike out the name of Rogerson. The plaintiffs had a verdict, and the defendants took exceptions.

Charles G. Loring for the plaintiffs.

Dexter and *Peabody* for the defendants.

Dewey J. There is no dispute here, as to the general doctrine, that in case of a sale of goods to an agent, if the principal is afterwards disclosed, recourse may be had to him, unless the vendor knew at the time of the sale, that the purchaser was an agent, and elected to give credit to him instead of his principal. But, it is contended, that if the vendor has the *means of knowing* that the goods are for the principal, and then credits the agent, he shall not resort to the former. There would be many practical difficulties in the application of this doctrine. We do not understand the rule to be attended with this strictness. The vendor must have *actual knowledge* of the principal, and thereupon must elect to trust the agent in order to bar his remedy against the principal. The instructions of the judge were correct, that the statement of Rogerson that the goods were for the Crown and Eagle Mills, was not conclusive evidence that the plaintiffs elected to trust Rogerson, knowing his principal. This was clearly a question for the jury. The instructions of the judge upon the last point were also correct. The fact that Rogerson's name was not stricken out, shows no more that the plaintiffs elected to charge him than the defendants. This was open to explanation to the jury, and there must be

Judgment on the verdict.

Meachum *v.* Corbett and another, and Trustee.

Where a policy of insurance was payable to a mortgagee of the property insured, and a loss happened; it was *held*, that he was not chargeable as the trustee of the persons insured, for the amount due on the policy above his claim, before the loss was actually adjusted and the money paid over to him.

From the answer of John K. Simpson, the trustee, it appeared, that the principal defendants caused to be insured, at the Neptune Insurance Office, three thousand dollars on furniture belonging to them, payable, in case of loss, to said Simpson, to secure him the amount of a claim for $917 99, which he held against the defendants, and which was secured by a mortgage of the property. The property was destroyed by fire, but the insurers refused payment until

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the matter had been referred, when, on the award of the referees, they paid over to Simpson the sum of $2410 11. He retained the amount due to himself, and paid over the balance on an order of the defendants, which they had previously drawn in favor of one Kidder. Previous to this, to wit, six hours after the fire, this trustee process was served on Simpson; and the question was, whether he was chargeable as the tiustee of the defendants.

Sparhawk for the plaintiff.

Fiske for the trustee.

SHAW C. J. The trustee had no goods, effects, or credits in his hands at the time of the service of the writ. He was merely the assignee of a right to recover this loss for the benefit of the principal defendants, after deducting the amount of his claim; and until he received the amount, it was not trusteeable in his hands; he might never recover it. Trustee discharged.

PROPRIETORS OF THE CHURCH IN BRATTLE SQUARE *v.* BULLARD.

Effect of a judgment upon one who was not a party thereto and had no notice of the controversy.

DEBT on a bond to save the plaintiffs harmless in case any person should establish a title to a certain pew in the church in Brattle Square, Boston, against the defendant. It appeared, that all the deeds of pews in this church are given directly by the parish officers, and when a transfer is made, upon proper evidence of the fact being produced, a deed is given directly to the grantee by the parish. In the present case, a pew had been set off to the defendant, upon an execution held by him against Samuel Spear. Before giving a deed to the defendant, it was deemed expedient by the parish, to require a bond from him to save them harmless from any loss upon their warranty by the establishment of a valid title, paramount to the defendant's. The bond recited, that "whereas the above-bounden Lewis Bullard has this day received from the proprietors of the church in Brattle Square, in Boston, a deed, conveying to him a pew in said church, numbered 102; now if the said Bullard, in case any person or persons should establish their title to said pew against the said Bullard, his heirs, assigns, &c., and the aforesaid Bullard, his heirs, &c., shall in that case save and keep harmless the said proprietors against any damages for breach of warranty, or otherwise, in executing or delivering said deed to said Lewis, then this obligation to be void," &c. Subsequently, in 1835, the defendant conveyed the pew to Robert Hooper, jr., by a transfer in the form prescribed by the parish, and printed on the back of the deeds, and Hooper returned to the plaintiffs the defendant's deed, with the transfer thereon, and received from them another deed of the same tenor and form, in his own name. In 1838, William H. Spear

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laid claim to this pew, and upon a reference to arbitrators, the award was in his favor, as was also the judgment of the court in an action upon the covenant to abide by the award. *Spear* v. *Hooper*, (2 Law Reporter, 45.) Hooper having been thus evicted, the parish paid over to him the value of the pew, and now sought to recover the amount of the defendant, in an action of debt upon his bond of indemnity. At the trial, the judgment recovered by William H. Spear was offered by the plaintiffs to show a breach of the bond. The defendant objected to the admission of this judgment, upon the ground that he was no party to, and had no notice of, either the submission, the award, or the suit upon it; but the judge ruled, that the same was admissible in evidence, as tending to prove that the title to the pew had been established in some other person than the defendant, or Hooper, his grantee. He also ruled, that the plaintiffs must prove, by evidence *aliunde*, that the title to the pew aforesaid was in Spear, as determined by the arbitrators in their award. Evidence was then offered, on both sides, upon this point, the details of which, and some other points, we are obliged to omit. The defendant had a verdict, and the case came before the whole court on exceptions to the ruling of the judge.

Ivers J. Austin for the plaintiffs.

George W. Phillips for the defendant.

Shaw C. J. The ruling of the judge as to the judgment recovered by Spear was correct. It was clearly admissible for certain purposes; but it was not conclusive upon the title of Spear in this controversy between other parties. Bullard cannot be bound by a judgment, which was the result of a controversy between other parties, of which he had no notice. The court are also of opinion, that the verdict was not against the evidence.

Judgment on the verdict.

Niles *v.* Field.

A writ of *scire facias* against bail cannot be sued out to the same term at which the execution against the principal is returnable.

Scire facias against bail, sued out to the same term of the court at which the execution was returnable. The officer had made a return of *non est inventus* on the execution.

Greenough for the plaintiff.

Bolles for the defendant.

Shaw C. J. The writ was sued out too soon. A return of *non est inventus* cannot be made before the return day, for the debtor may be delivered up at any time before that day.

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Guild *v.* Guild.

Costs, where a petitioning creditor comes in, pursuant to the Revised Statutes, chap. 90, § 83.

In this case a petition was filed by the Mechanics' Bank, as subsequent attaching creditors, in accordance with the provision in the Revised Statutes, ch. 90, § 83, to set aside the plaintiff's attachment. The petition not being sustained, there was a judgment for the plaintiff, who now asked for costs against the petitioner, claiming an allowance of the usual taxable costs, travel and attendance, counsel fees, and interest upon the amount of his debt against the defendant, from the time the petition was filed until judgment.

D. A. Simmons for the plaintiff.

Robins, *contra.*

Dewey J. Where an action is defaulted and a subsequent attaching creditor comes in and delays the suit, he must pay costs, if unsuccessful; but where, as in this case, the defendant himself keeps the action open, and the plaintiff thus has costs against him, he shall not recover the same costs of the petitioning creditor. In regard to the claim for counsel fees, we do not think they come within the intent of the statute in relation to costs in these cases, and they are not allowed. In regard to the question of interest, without assigning any general rule, applicable to other cases, we are of opinion, that, in the present case, this is a charge solely on the debtor, inasmuch as he appeared and caused the case to be brought up to this court by appeal. Nor is it any valid objection on the part of the plaintiff, that he cannot recover the interest of the defendant, because the *ad damnum* in his writ is too small. The petitioning creditor must not be prejudiced by this. But the plaintiff must be allowed the usual attorney fee and witnesses' fees.

Page and another *v.* Bent and another.

Where debtors made an assignment of their property, which stipulated for their release, and wrote a letter to be shown to certain creditors, which contained some errors in relation to the amount of property assigned, and said creditors became parties to the assignment; it was *held*, that the statements in the letter, although untrue, were not *conclusive* evidence of fraud, because one of them might have been an error of judgment, and the other was corrected in the assignment itself, which was referred to in the letter.

Assumpsit by the plaintiffs, of Haverhill, Mass., against the defendants, of Philadelphia, on a bill of exchange, and also an account for goods sold and delivered. At the trial before Wilde J., the defence was, that the defendants, in 1832, made an assignment of their property, which contained a release of debts by those who became parties to it; and that the plaintiffs became parties to the same. In

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answer to this, the plaintiffs contended that the release was procured by fraud, and was invalid. It appeared that a letter was written by the defendants to one Chase, with a request that he would show it to the plaintiffs, in which it was stated that they had made an assignment, a copy of which had been sent to Elias B. Thayer, of Boston, who would exhibit it to the plaintiffs, and requested them to become parties to it. The plaintiffs contended that they should never have come into the assignment but for this letter, and that it contained misrepresentations in two important particulars. (1.) In stating the amount of goods on hand to be $7518 06, when it appeared by the valuation of the officers appointed to appraise the same, under oath, to be only $4557 08, which appraisement was made before the writing of the letter, and was known to the defendants. (2.) In stating the amount of the preferred debts to be only $42,805 04, which did not include (as the plaintiffs alleged it ought) the debts secured by a pledge of a part of the defendants' assets. The effect of such pledge being in fact a preference of such debts, and diminishing so far the amount applicable to the debts not preferred. The defendants contended that no misrepresentation whatever was proved; that the difference in the statements of the goods on hand was clearly accounted for by the well known difference between the cost of a stock of goods and its actual value in cash when transferred to assignees. In relation to the alleged misrepresentation in regard to the amount of the preferred debts, the defendants argued that the assignment, which was examined by the plaintiffs, accompanied by explanations by Mr. Thayer, contained enough to supply any supposed deficiency in the letter to Chase. The defendants also contended, that supposing there was a misstatement of their affairs, still, unless it was designedly or fraudulently made, it would not in a court of law avoid the release. That if the misrepresentation was an innocent one and the plaintiffs had been damaged, they must seek relief in a court of equity. The jury were instructed, that the burden of avoiding the release was on the plaintiff; that if an intentional misrepresentation of their affairs had been made by the defendants, the release thereby procured would be void; but that, if such representation was not made designedly, it would not in an action at law have that effect. The defendants had a verdict, and the plaintiffs moved for a new trial.

Benjamin Rand for the plaintiffs.

Ellis Gray Loring for the defendants.

Shaw C. J. The general doctrine in relation to fraudulent representations was so fully examined by the court in the late case of *Hazard v. Irwin*, (18 Pick. 95,) that it is unnecessary to go into it now. The instructions to the jury in the present case were correct. The first representation, alleged to be fraudulent, in regard to the goods on hand, may have been a mere error of judgment; it is not conclusive evidence of fraud. In relation to the other point, there was

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strong evidence of fraud from the statements in the letter to Chase; but the letter referred to the assignment, and in that instrument the error was corrected.

Judgment on the verdict.

BROOKS AND ANOTHER *v.* WHITE.

Before the maturity of a promissory note, two notes amounting to a less sum, and signed by other persons than the promisors of the original note, were tendered by one of the promisors of the original note and a receipt was given to him in full satisfaction of all demands. *Held*, to be a valid discharge of the debt. *Held*, also, that the question whether the receipt was intended for one or all of the promisors was properly left to the jury.

ASSUMPSIT on a promissory note, against Keith White, William Downing, and M. W. Wright, composing the firm of K. White & Co. Wright was never served with process, and the plaintiffs discontinued as to Downing in the court below. At the trial, the plaintiffs gave the note in evidence and rested their case. The defence was on accord and satisfaction, before the maturity of the note, by the delivery by Downing to the plaintiffs and acceptance by them in full satisfaction of this and all demands against K. White & Co., of two notes held by Downing against other persons, amounting together to a less sum than the original note. It appeared, that the receipt, which had been given by the plaintiffs, was not under seal, and had been lost. Evidence was offered to prove that fact, and that the receipt was in full of all demands, and was not to Downing alone. Upon this evidence the plaintiffs contended that there was no sufficient consideration to support the receipt so as to make a discharge and satisfaction of this note. That as the receipt was to Downing alone, in law it was no discharge of this note as against White. But the jury were instructed, that there was a good and sufficient consideration, and the case was left with them to find, whether the receipt was intended as a discharge of Downing alone or of all the members of the firm. The defendant had a verdict, and the plaintiffs moved for a new trial.

Crowninshield for the plaintiffs.

B. R. Curtis for the defendant.

DEWEY J. There being no release under seal, the receipt can only avail as evidence of an accord and satisfaction. The plaintiffs deny that it is good for this, even. The general principle is, that payment of a less sum than the debt is no satisfaction of the plaintiff's claim where the payment is in money. The reason as given in *Pinnel's case*, (5 Coke, R. 115,) is, "that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." The rule is strictly technical and is not favored; cases are always taken out of it where a consideration can by possibility be raised. Thus, where any thing except money is received in full satisfaction, it is sufficient. In the

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case cited, it is said, "the gift of a horse, hawk, or robe, &c., in satisfaction is good. For it shall be intended that a horse, hawk, or robe, &c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction. But *when the whole sum is due*, by no intendment, acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar, it was resolved, that the payment and acceptance of parcel *before the day* in satisfaction of the whole, would be a good satisfaction, in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material." So in the case of *Boyd v. Hitchcock*, (20 John. R. 76,) it was held, that where a debtor gives his note indorsed by a third person as further security, for a part of the debt, which is accepted by the creditor, in full satisfaction of all demands, it is a valid discharge of the whole debt, and it may be pleaded in bar, as an accord and satisfaction. The court are clearly of opinion, that, upon this point, the instructions to the jury were right. The other point, as to whether the receipt was intended as a discharge of Downing only, or of all the members of the firm was properly left to the jury; and there must be,

Judgment on the verdict.

Johnson *v.* Jordan.

Where one sold adjacent lots to different persons at the same time, and no mention was made in the deeds of a right of drain; it was *held*, that one of the purchasers had a right to close up the drain of the other's lot, which passed over his premises.

Trespass *quare clausum* in entering the plaintiff's close and opening a certain drain, which the plaintiff had closed up. The defence was, that the defendant had a right to have a drain run from his house over the plaintiff's lot; that the plaintiff stopped it up, and the defendant entered upon the plaintiff's lot to open it again, which he did with as little injury to the plaintiff's lot as possible. It appeared, that both of these lots, which are situated on Temple street, in Boston, were owned by William Breed in 1804. He devised to his wife Rebecca, the use, income and improvement of the same during her life, and after her decease to Peter O. Thacher, to have and hold the same in fee simple for certain purposes. In 1825, Breed and wife being both deceased, Judge Thacher caused the land to be divided into several lots, and to be sold at public auction; and these two lots were sold to different individuals, under whom the present parties derived their titles. This drain existed at the time of the sale by Judge Thacher; but nothing was said about it in the deeds.

Blair for the plaintiff.

B. R. Curtis for the defendant.

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SHAW C. J. If a party convey an estate having certain easements appertaining thereto, they will pass to the purchaser, even although no mention is made of them in the deed. The difficulty exists where the owner of land divides it and sells to different persons without mentioning any thing in the deeds of any easements. In this case, as in all others of a like kind, the object is to ascertain the intention of the parties; and in order to this it is necessary to refer to the settled rules of construction. The well known rule of construction in reference to deeds is, that the language is to be taken most strongly against the grantor; which would have an important bearing here, if one of the lots had been sold before the other. But here they were both sold at the same time; and the court cannot so construe the deeds as to make a reservation in favor of one purchaser and against the other, in respect to an easement of which no mention is made in the deeds. The lots being both sold on the same day and no mention being made in the deeds of a right of drain, the plaintiff was justified in closing it up, and the defendant had no right to come upon the plaintiff's land to open it.

PERRY v. HARRINGTON AND OTHERS.

An acceptance to pay a certain amount of money out of the first money which might be received on a certain account, is a continuing undertaking; and the acceptors must pay the money as fast as collected, upon reasonable request.

THIS was an action against the defendants as acceptors of the following order: "Boston, April 8, 1837, Messrs. Harrington and Co. Gent. please pay Mrs. C. Perry two hundred dollars out of the first money belonging to me, which you may receive on account of the Eastern Star, and oblige your obedient servant, D. H. Creeig." There was an indorsement of three dollars. The Eastern Star was a newspaper, which the defendants, Harrington & Co., had purchased of Creeig, and the money was to be paid out of what they collected of subscribers and other debtors to the establishment. When they had collected $63 75, a demand was made on them in behalf of the plaintiff for the money they had collected. They refused to pay, and in June, 1837, an action was brought by the plaintiff against the defendants on this acceptance, alleging that they had collected $100 on account of the Eastern Star. A trial was had and the plaintiff recovered a verdict for $60 39. Since that action was brought the defendants collected from subscribers to the Star $136 25. After they had collected this, to wit, on April 1, 1838, the plaintiff demanded payment of this additional sum, which they refused to pay, and the present action was brought.

Sewall for the plaintiff.

Harrington for the defendants.

SHAW C. J. Is the first judgment a bar to the present action? We

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think not. It is now well settled, that a contract to do several things at several times is divisible in its nature, and an action of assumpsit lies upon every default. *Badger v. Titcomb*, (15 Pick. 409.) This acceptance is obviously a continuing undertaking. It was argued by the defendants, that the whole was to be void unless the sum received amounted to two hundred dollars, and all right of action was suspended until that amount was received; but the true construction is, that the acceptors were to pay the money as fast as collected till the sum reached two hundred dollars. If it never reached that amount, then their undertaking was to pay all that was received. No time being fixed for the payment of the amounts collected, it was to be done upon reasonable request; which obviates the defendants' other objection, that the acceptors would be liable to a multiplicity of suits. Such being the doctrine, the former judgment for a part of the sum received, is no bar to a suit for the balance, which the plaintiff may clearly maintain.

Court of Common Pleas, Massachusetts, March, 1841, *at Salem.*

Mansfield and others *v.* Jackson.

Where in suits against an alien a motion was made by the defendant to remove them to the circuit court of the United States in conformity with the act of 1789, ch. 20, a motion by the plaintiff to reduce the *ad damnum* in the writs below the sum which brought them within the operation of that statute, was denied. *Held,* also, that after such denial and before the filing of the bonds required by the statute, the plaintiffs could not become nonsuit.

This was the case of six actions, brought by seamen on board the brig Tigris against the defendant, a midshipman in the navy of her Britannic majesty, the queen of Great Britain, for an alleged false imprisonment. The Tigris, an American vessel, was seized on the coast of Africa by the British brig Waterwitch, on suspicion of being engaged in the transportation of slaves, and was placed in charge of the defendant, who brought her with her, officers and crew, to the United States. For this act the present actions were brought. [See the facts more fully set forth in the case of *The Brig Tigris* and the *Commonwealth* v. *Coburn,* [3 Law Reporter, 428–432.] The defendant's counsel, on entering his appearance, filed petitions for the removal of the actions to the circuit court of the United States, in conformity with the act of congress of 1789, ch. 20, which secures to aliens, when sued by citizens of the United States, the right to have the process against them removed, where the matter in dispute exceeds the sum of $500. The damages alleged in all of the present writs were $1000. It was now moved by the counsel for the plaintiffs to amend the *ad damnum* by reducing the damages claimed to $400, and, in

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this way to prevent the removal of the actions to the circuit court of the United States.

J. H. Ward, with whom was *Perkins*, for the plaintiffs. The court has a large power under the Revised Statutes, to allow amendments; and the supreme judicial court, in reducing the bond of the sureties, as they did, on the habeas corpus sued out by Mr. Jackson, to $300, have virtually determined the amount in dispute.

Charles Sumner for the defendant. The amount of the bail bond is not the criterion of the amount in dispute. The plaintiffs might recover the full sum now alleged as damages, if a jury saw fit to give them. The supreme court of the United States has regarded the sum alleged as damages, as determining the jurisdiction. This court, by allowing the amendment in the present case, will limit the rights intended to be secured to aliens; will deprive the defendant of the privilege of having these actions, involving delicate inquiries, tried by the higher court, and will virtually oust the circuit court of a jurisdiction, which had accrued, when the process was commenced with the *ad damnum* at $1000.

Warren J. Under the large powers given by the Revised Statutes to our courts with regard to amendments, it would be within the power of the court to allow the amendment in the present case. But the peculiar circumstances of the case will not justify the exercise of this discretion with which the court is invested. The actions must be removed agreeably to the petition of the defendant, on his entering into the bonds required by the statute.

At a subsequent day, between the order of the court and the filing of the bonds, the plaintiffs offered to become nonsuit. It was understood, that they proposed to commence *new* actions in behalf of the sailors, laying the damages at such a sum as would bring them within the jurisdiction of the court of common pleas. It was objected by the counsel for the defendant that, from the time of the filing of the petition for removal, and *a fortiori* from the time of the order of the court, all power in the court of common pleas over these actions ceased, except what was necessary to speed their removal. They were *in transitu* to the circuit court; and their final disposition must be determined there. On the other hand it was urged that a plaintiff might discontinue at any time.

Warren J. Considered the question as a delicate one, but decided against allowing the nonsuit, and the actions were accordingly removed.

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Circuit Court of the United States, New York, April, 1841.

WILLISON *v.* HOYT.

Necessity of stating in a protest at the customs every charge objected to.

THIS was an action against the defendant as ex-collector of New York, to recover an amount of duties alleged to have been improperly charged on goods imported by the plaintiff. The goods consisted of eight bales of silk striped Lama handkerchiefs, imported by the ship Liverpool, January 5th, 1841. The article was composed of silk, worsted, and cotton, and the collector charged it with the reduced woolen duty of 41 per cent., which the importer paid under protest. It was admitted, that the woolen duty was improperly charged.

Winthrop, for the claimant, contended, that the article was free, as silk was the most valuable component part of it, and therefore it was not subject to duty on the cotton, which formed another component part.

Butler, for the defendant, said, it might be a question whether, in order that an article should be free on account of the most valuable part of it being silk, the silk should not only be more valuable than any other component part of the article subject to duty, but also more valuable than each and all of the other component parts taken together. But in the present case he thought this question did not necessarily arise, as the claimant had entered the article as a manufacture of cotton, subject to a duty of 25 per cent. and in his protest made no objection to that duty, but simply protested against the article being charged the woolen duty of 41 per cent. He therefore contended that the claimant was bound to pay at least the duty of 25 per cent. on the article, as in manufactures of cotton.

THOMPSON J. said, that when making a protest, the party should clearly state in it what he objected to, and if he considered the article a different one from what the collector alleged it to be, he should so inform him, in order that the collector might be on his guard and know what it is that the merchant objects to. In the present case, the merchant did not protest against the duty of 25 per cent., and therefore the court thought a verdict should be rendered only for the difference between 25 per cent. and 41 per cent., which was all the merchant objected to at the time of the protest.

Verdict accordingly.

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District Court of the United States, Southern District of New York, March, 1841, *at New York.*

UNITED STATES *v.* CERTAIN CASKS OF GLASS WARE.

Printed statute books of the parliament of Great Britain, purchased of the queen's printer, are admissible as prima facie evidence of the laws contained therein.

ON the trial of this cause before Betts J. and a jury, *Hoffman*, district attorney, offered to read in evidence printed acts of parliament 5 and 6 Wm. 4, and 1 and 2 Victoria, in relation to the exportation and drawback duty on glass, and called a witness who testified that he was in London in 1838, and went to the parliament printing house, to procure the said acts of parliament, but was referred to the queen's printer as the only one who could furnish them; that he accordingly went to the store of the queen's printer, and there purchased the acts in question.

Patterson, for the claimants, objected to the admissibility of the statutes as evidence, contending that the district attorney must prove them by producing exemplifications under the great seal of England, authenticated by the secretary of state for foreign affairs or by a sworn copy compared with the rolls of parliament; and he cited several cases to that effect.

BETTS J. The ancient strictness of the rule respecting the proof of foreign laws has been much relaxed in England, and more so in the United States, of late years. The cases cited by the counsel show what the law has been on the subject, and also indicate some of the modifications of its former rigor, which have become incorporated in the modern practice; and it may be added, that in this state, until comparatively a recent period, not only was such strictness of proof exacted in respect to the laws of foreign nations, and of our sister states, as foreign laws, but even the statutes of our own legislature could not be read, of right, from the statute book. At this day, it is believed that in most of the states, and in the courts of the United States, the public laws are read from the printed statute books of the respective states, and such publications are accepted as at least *prima facie* evidence of the law. [See the next case, *Farmers and Mechanics Bank* v. *Ward.*] I am not aware of any higher authority than a like usage and general acquiescence in it, for reading the acts of congress in this court from the statute book, nor why, if the rule adverted to is to be administered as it was formerly laid down, the district attorney should not be driven to produce exemplifications of every statute of congress offered in evidence here. In whatever terms the rule may be sometimes expressed, it seems to me, such cannot be its spirit; and if executed according to the letter, clearly the highest or best evidence would not be an *exemplification* under a foreign seal, but the oath of the king himself, perhaps, who sanctioned the law, or of the public functionaries who were present when it was enacted or passed through all the forms

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rendering it completely a law. The cases speak of foreign laws as facts to be proved by the best evidence; but certainly the spirit of the cases, particularly in the courts of the United States, regard the promulgation or publication of the foreign laws as the fact to be proved, and not the formula of their enactment or registration. It is no less the law if the law-giver declares it by proclamation or insertion in a newspaper, than if inserted in the roll of the tower, and accordingly it would seem that the only essential matter to be proved, is, whether it has been published and promulged as the law of the country. The fact of publication may be proved by evidence competent to establish any other fact *in pais*. The act being that of a sovereign, does not necessarily demand a different order of proof, than if it was the declaration or ratification of a private person. In this point of view, I think the evidence is admissible. But in my opinion, foreign statutes in relation to the navigation, exports and imports of the country may be read in evidence as history of its policy, and upon the same principle that its annals are read to prove changes of succession, changes of dynasty, or other political events, and facts of a public and notorious character. If the offer of the proof rested upon the statutes only, I should receive it as sufficient *prima facie* evidence, because, if the rule in this behalf is yet unsettled and dubious, it is time that the highest tribunal of this land should declare and determine it. And I may add, I should regret to see the United States behind England in recognising and administering this rule of evidence, upon liberal and philosophical principles, and that whilst the public laws of this country are read there, in the first instance, without question, we should exclude from our courts like proof of the laws of England.

Circuit Court, City of New York, March, 1841.

Farmers and Mechanics Bank *v.* Ward.

Held, that the printed laws of Connecticut were not admissible in evidence, there being no proof that they were obtained of the state printer.

Where in an action upon bills of exchange, drawn in New York and payable there, but discounted in Connecticut, the defence set up was usury; it was *held*, that the transaction was to be governed by the laws of New York.

This was an action on two bills of exchange, drawn in New York and payable there, and discounted by the Farmers and Mechanics Bank, of Hartford, at six per cent. per annum. The proceeds were sent to the defendant in two checks, at sight, on the Union Bank of New York. The defence set up was usury, which was alleged to consist in the plaintiffs having charged one half per cent. for the checks, which, added to the six per cent. charged on the discount,

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made the interest on the bills more than seven per cent., being the legal interest of New York, and the defendant contended that the transaction was to be governed by the laws of New York only. The court however ruled that the contract was to be governed by the laws of Connecticut, being the place where the contract was effected. The defendant then alleged that the laws of Connecticut only allowed six per cent. interest, and that therefore whether the contract was to be governed by the laws of New York or Connecticut, it was in either case usurious and illegal. In proof of this allegation he offered to read in evidence the statutes of Connecticut, and for that purpose produced a volume of the laws of Connecticut. The plaintiffs objected to the laws of Connecticut being read in evidence, unless they were first duly authenticated, and the court held the objection to be valid. Mr. Lawrence, the librarian of the New York Law Institute, was then called to the stand and deposed that the volume of the Connecticut laws, now produced in court, had been received from the state library at Albany, and another copy of the same edition had been received of Gould & Banks of New York. But he did not know who was the state printer of Connecticut, or whether this volume of laws was published by the state printer. This evidence was deemed, by the court, insufficient. Counsellor Davies was then called, and stated that about two years back he was at the office of the secretary of state in Connecticut, and conversed with him as to the manner in which the laws of that state were published, and that he said—The court here interrupted Mr. Davies, and remarked, that whatever the secretary of state had said about it was but a matter of private conversation, and was therefore inadmissible, as evidence. The defendant then cited a decision made a few days back by Judge Betts, in the United States district court, in which he admitted an English act of parliament to be read in evidence, although not authenticated by the English secretary of state. [The preceding case of the *United States* v. *Certain Casks of Glass Ware.*]

Fessenden for the plaintiffs.

Hawkes for the defendant.

Gridley J. In the case referred to, the decision was correct. There the English act of parliament had been purchased from the queen's printer, and therefore Judge Betts rightly allowed it to be read. And if in the present case there was proof to show that the volume of laws now offered in evidence, had been procured from the state printer of Connecticut, I would receive it in evidence, but as there is no proof of that, I must exclude it. As there are other editions of the statutes published at a much lower rate than those published by the state printers, it may fairly give rise to a question of correctness, if no other. I therefore think the evidence offered inadmissible.

The plaintiffs had a verdict, the defendant taking exceptions.

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DIGEST OF AMERICAN CASES.

Selections from 16 Maine (4 Shepley's) Reports.

ACTION.

Where, by the terms of a contract, one party was to perform certain labor, and the other, in consideration thereof, was to pay a sum of money in a certain month, an action commenced on the last day of that month is prematurely brought, and cannot be maintained, although a demand of the money had been made by the plaintiff on the same day before suing out the writ. *Harris* v. *Blen*, 175.

ATTACHMENT.

1. Cloth purchased for a coat, carried to a tailor to be made into one, and cut out, is exempted from attachment. *Ordway* v. *Wilbur*, 263.

2. Where goods are attached by an officer on mene process, he is not liable to the suit of the debtor while the lien created by the attachment continues, although he does not keep the property safely. *Bailey* v. *Hall*, 408.

BAILMENT.

Where goods were left by the plaintiff with another for safe keeping merely, and the defendant came to the bailee of the goods, and saying that he had authority from the plaintiff to make sale thereof, took the goods and sold them, and paid a portion of the proceeds of the sale to the bailee, with the request to pay the same to the plaintiff; and where the plaintiff received this money without objection, and requested the bailee to call on the defendant for the remainder; it was *held*, that *trespass de bonis asportatis* could not be maintained, although the defendant did not show any authority from the plaintiff to make the sale. *Wellington* v. *Drew*, 51.

BASTARDY.

If the mother of a bastard child marry before a prosecution, and one be afterwards instituted, the husband should join in the complaint. *Keniston* v. *Rowe*, 38.

BILLS AND NOTES.

1. If the maker of a check, payable instantly, has no funds at the time in the bank upon which it is drawn, it is, when unexplained, deemed a fraud; and the holder can sustain an action upon it, without presentment for payment, or notice. *True* v. *Thomas*, 36.

2. Where a note is made payable at a particular bank, and before the day of payment arrives that bank has no place of business, and ceases to exist, and another bank does business in the same room; if it be necessary to make a presentment of the note for payment, it is sufficient if made at that room. *Central Bank* v. *Allen*, 41.

3. Where a note is made payable at a particular place, the reply which is there made on presentment for payment, is admissible in evidence. *Ib.*

4. Where the maker of a note has removed before it falls due, and his residence cannot be ascertained by reasonable diligence, if it be necessary to make a demand, it may be made at his former residence. *Ib.*

5. Where W. A., the payee of a negotiable note then payable, indorsed it thus, "W. A. holden, Aug. 11, 1836," he was held liable without demand or notice. *Bean* v. *Arnold*, 251.

6. If the name of a firm be affixed to a negotiable paper by one of the members of the firm for his individual accommodation, and the note is discounted at a bank in the usual manner, with-

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out knowledge of such fact, the other members of the firm are bound, although the note is made out of the course of the partnership business, and without the knowledge or consent of the other partners. *Waldo Bank* v. *Lumbert*, 416.

7. Each indorser of a promissory note, is entitled to one day for giving notice to the party next liable; but the time is to be calculated from the day on which the notice was in fact received, and is not enlarged, if he has received notice earlier than might in strictness have been required. *Farmer* v. *Rand*, 453.

8. If the indorser of a note in blank, prove that a waiver of demand and notice was afterwards written over his name, in the presence of the plaintiff, when the indorser was not present or assenting thereto, he is thereby discharged, unless the plaintiff bring proof to show his liability. *Ib.*

CONTRACT.

1. If no place be appointed in the contract for the delivery of specific articles, it is the duty of the debtor to ascertain from the creditor where he would receive them; and if this be not done, the mere fact that the debtor had the articles at his own dwelling-house at the time, furnishes no defence. *Bean* v. *Simpson*, 49.

2. A contract to make and execute "a good and sufficient deed to convey the title to said premises," is not performed, unless a good title to the land passes by the deed. *Hill* v. *Hobart*, 164.

3. A contract made by one of five members of a committee chosen by a parish to build a church, in the name of the whole, is not binding on the corporation. *Adams* v. *Hill*, 2.5.

CONVEYANCE.

1. The general rule is, that lands bounded upon rivers or streams of water extend to the thread of the stream, unless the description be such as to show a different intention. *Nickerson* v. *Crawford*, 245.

2. And if land be described in the grant as extending from a road northerly "to the margin of the cove, thence westerly along the margin of the cove about eleven rods," and thence southerly to the road; the land granted extends but to the edge of the water, and the flats are not included. *Ib.*

COUNSELLORS.

A counsellor or attorney at law, regularly admitted to practise, is not under the necessity of producing any special power of attorney to act for individuals or corporations in court; and his statement that he does represent a person or body corporate is sufficient. *Penobscot Boom Corporation* v. *Lamson*, 224.

DEMURRER TO EVIDENCE.

A demurrer to evidence is considered an antiquated, unusual, and inconvenient practice, and is allowed or denied by the court, where the cause or indictment is tried, in the exercise of a sound discretion, under all the circumstances of the case. *The State* v. *Soper*, 293.

DIVORCES.

The legislature have power to grant divorces, in cases where the supreme judicial court have no jurisdiction; but where the court have the jurisdiction, the constitution forbids the exercise of that power by the legislature. 479.

DOWER.

1. Where the husband took a conveyance of land, and at the same time gave a mortgage to the grantor to secure notes for the purchase-money, and the notes and mortgage were sold and delivered over by the mortgagee to a third person, who some years subsequently delivered the same notes with the mortgage, which had never been recorded or transferred in writing, to the mortgagor, and took a note and mortgage to himself for the balance then due, in which the wife did not join; the widow of the mortgagor was held entitled to dower. *Hobbs* v. *Harvey*, 80.

2. In the assignment of dower, any improvements made by the grantee or his assignee, after the alienation by the husband, are to be excluded. *Ib.*

EQUITY.

1. It is a matter of discretion in the court, whether or not to decree a specific performance, not dependent, however, upon the arbitrary pleasure of the court, but regulated by

general rules and principles. *Rogers* v. *Saunders*, 92.

2. When a contract is in writing, is certain, fair in all its parts, is for an adequate consideration, and is capable of being performed, it is a matter of course for a court of equity to decree performance. *Ib.*

EVIDENCE.

1. In an action to recover damages for the loss of a building by fire, occasioned by the negligence of the defendant, the testimony of witnesses offered on his part, "that he was very careful with fire, that they never discovered any carelessness in him about taking care of his fires during the time they were at his house, which was immediately before the fire," is inadmissible. *Scott* v. *Hale*, 326.

2. To exclude the communications of client to counsel from being given in evidence, it is not necessary that they should have been given under any injunction of secrecy. But the mere fact of the employment of counsel in a cause is admissible. *Wheeler* v. *Hill*, 329.

3. If the attesting witness to a promissory note be called, and does not prove the handwriting of the name to be his, it is competent to prove it by the testimony of other witnesses. *Quimby* v. *Buzzell*, 470.

4. Receipts are not in all cases conclusive; they afford *prima facie* evidence of what they declare, but are subject to be overthrown by counter proof from the other party, which may be by parol evidence. *Rollins* v. *Dyer*, 475.

INSURANCE.

1. Where a quantity of potatoes were insured against the perils of the sea, "and against all other losses and misfortunes which shall come to the damage of the said potatoes to which assurers are liable by the rules and customs of assurances in B., provided, that the assurers shall not be liable for any partial loss on sugar, flax-seed, bread, tobacco and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, flax, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding;" and where the potatoes were lost by perils of the sea, but not by stranding, it was *held*, that the assurers were liable. *Williams* v. *Cole*, 207.

2. Potatoes come within the class of articles denominated perishable in their nature. *Ib.*

3. Where by the uniform practice of an insurance company, a deviation from the risk assumed in the policy is waived by the president, for a compensation agreed upon by him and by the assured, and the waiver and assent, with the terms thereof, are written across the policy, without any new signature, and recorded by the secretary, a contract made in that manner is binding upon the corporation. *Warren* v. *Ocean Ins. Co.*, 439.

4. And after such contract has received the assent of the assured and of the president of the company, and has been written upon the policy, it is the act of the corporation, although the secretary may not record it upon the record book. *Ib.*

5. Where the custom of an insurance company is to dispense with the signature of the assured to the premium note until after the policy is recorded, the omission to sign the note when the risk is taken, does not render the contract void from want of consideration. *Ib.*

6. In an action on a policy of insurance, it is competent for a judge at the trial to permit an amendment of the declaration by adding a new count, varying from the original only in the date of the policy declared on. *Ib.*

MORTGAGE.

1. The mortgagor of an undivided portion of a tract of land cannot, without the consent of the mortgagee, by an after conveyance by metes and bounds of any part of the mortgaged premises, withdraw from the lien created by the mortgage the part so conveyed. *Webber* v. *Mallett*, 88.

2. Where one pays to the holder of a mortgage the amount due thereon, and takes a deed of quitclaim, if the intention to extinguish the mortgage appear at the time, it is decisive of the question; but if no such intention appear, equity presumes the mortgage to be outstanding, or extinguished, as the interest of the party paying may require.

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The courts of common law in Massachusetts and Maine have adopted this rule of chancery. *Hatch* v. *Kimball*, 146.

3. A merger is prevented, and the mortgage upheld, where there is a strong equity in favor of it, but never where it is not for an innocent purpose. *Ib.*

4. Where a mortgage has been cancelled and discharged, and a new security on the same land has been taken for the debt, the mortgage is to be considered as if it had never existed, and intervening incumbrances or attachments are let in. *Stearns* v. *Godfrey*, 158.

OFFICER.

1. When a deputy-sheriff attaches goods, he has the custody of them in his official character until the suit is determined, whether he continues in office or not, and is officially bound to deliver them to any officer who may seasonably demand them on the execution; and the sheriff is liable for his neglect or misdoings in relation thereto. *Morton* v. *White*, 53.

2. An officer who acts according to his precept in making an arrest, is not a trespasser, although the party arrested is privileged from arrest. *Chase* v. *Fish*, 132.

PARTNERSHIP.

1. Where, after the decease of one of three partners, the survivors published a notice, that "the business of the late firm will, for the present, be carried on in the same name, under the charge of J. H. (one of the partners), who will continue, who is duly authorized to adjust and settle all matters relative to the same;" it was *held*, that the surviving partners, by such notice, held out to the world, that they would continue to transact business under that name, and that a note given by J. H., under the name of that firm, would bind both. *Casco Bank* v. *Hills*, 155.

2. Where two persons so held themselves out to the world as partners, as to make a note, given by one in the partnership name, binding upon both, the indorser of a note, thus given, will not be permitted to testify, that it was given for a consideration not authorized by the terms of written articles of copartnership between them, in a suit by one, ignorant of the terms of such written articles. *Ib.*

3. General reputation is not admissible in evidence, in aid of other testimony, to prove a partnership. *Scott* v. *Blood*, 192.

4. To show that several persons carry on business as partners, it is sufficient to prove that they have severally admitted the fact, or have held themselves out as such; and this may be proved by parol evidence, although it appear on the trial, that there was a written agreement, and no notice to produce it was proved. *Bryer* v. *Weston*, 261.

POOR DEBTORS.

Where one who had been elected a member of the legislature, on his way to the place of meeting was arrested on an execution, having waived his privilege from arrest as a member, and was committed to prison, and there gave the poor debtor's bond to obtain his release, such bond is not void for duress. *Chase* v. *Fish*, 132.

PRACTICE.

1. If a judge do not himself decide a question of law, but leave it to the decision of the jury, and the verdict is right, it will not for that cause be set aside. *Emerson* v. *Coggswell*, 77.

2. Whether a trial shall be postponed on account of the absence of a witness, or shall proceed, rests in the discretion of the judge; and the refusal to postpone presents no cause for a new trial. *Campbell* v. *Thompson*, 117.

SHIPPING.

1. Where a vessel is let to be employed for the season in fishing, to one who is to be master, and is to victual and man her, and is to pay to the owners for her hire a certain proportion of her earnings, and is to take his outfits and supplies of them; the owners are not liable during the time for any outfits furnished by others at the request of the master. *Houston* v. *Darling*, 413.

2. If a creditor release one of several who are joint promisors to him, all are thereby discharged. Thus, if supplies are furnished to the owners and sharesmen of a vessel let on shares, on their joint responsibility, the release of one is a release of all. *Ib.*

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INTELLIGENCE AND MISCELLANY.

CHANCERY REFORM. In the house of commons, Sir John Campbell, the attorney general, recently moved to bring in a bill to facilitate the administration of justice in the court of chancery, and pointed out the present unsatisfactory state of the business in that court; amounting to an absolute denial of justice in all cases where the sums in dispute did not exceed one hundred pounds. Nobody who was not a madman thought of going into the court of chancery unless his demand exceeded that amount. With the enormous mass of property brought under the administration of the equity courts, it was impossible, with the present judicial establishment, to get through the business. There had been hardly any addition to the judicial establishment of those courts since the reign of Edward the first, though the property to be administered had gone on constantly and rapidly increasing. The funds in the court of chancery, in 1802, amounted to £19,000,000; in 1812, to £28,000,000; and in 1839, to £41,000,000. The acts of parliament, which had been passed of late years respecting railways, had very much contributed to increase the business of the equity courts; and the consequence was, that there were frequent and just complaints of the slow administration of justice in those courts. The arrears were very great, amounting at present to between twelve hundred and thirteen hundred causes. Between the time of a cause being set down for hearing and its being heard, a period of not less than three years elapsed; and upon an average it was five years from the date of the institution of a cause to its perfection. When a cause was heard, it might not be definitely disposed of, but would come on again for further directions; and this might happen repeatedly before the cause was finally disposed of. The consequence of this procrastination was great distress to individuals. Another evil, also resulting from such a state of things, was the encouragement of fraud. Persons having property intrusted to them frequently set the law at defiance, presuming upon the inability of individuals to brave the expenses and anxieties of a chancery suit. Compromises on equal terms were matters of daily occurrence. The enormous amount of extra costs arising from delays, constituted in itself a great grievance. Upon a moderate calculation, the term-fees and other expenses arising from delays, amount to not less than £40,000 per annum. The remedy proposed for this state of things was an increase in the judicial strength to enable the judges in equity to dispose of the business more speedily. The bill now introduced would abolish the equity jurisdiction of the court of exchequer, and provide for the appointment of the two vice chancellors.

Sir Edward Sugden deprecated so extensive an alteration as that proposed, without due consideration. He thought the attorney general had unintentionally overrated the amount of arrears in the court of chancery. One additional judge would, he conceived, be sufficient to clear off all the arrears in the course of one year. He admitted, however, that the great accumulation of business rendered it necessary that more judicial power should be applied. As an instance of the increase, he said it had been computed by a competent judge that the railway motions alone have been sufficient to occupy the attention of one court, during the times of sitting, for a whole year. He pointed out forcibly the faults of the present appellate jurisdiction. In the first place, he maintained that it was not fit to leave the lord chancellor to the decision of appeals in the house of lords without assistance—without constant, regular, authorized assist-

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ance. He said, further, that it was not fit that there should be an appeal from the lord chancellor in one court to the lord chancellor in another court; he maintained that this was a mere mockery of justice. He was not prepared to trench upon the jurisdiction of the house of lords. He would introduce two permanent judges, to whom he would give the name proposed by Lord Langdale in the bill introduced by that noble lord some years ago—the name of lords' assistants. These two judges should hold office during good behavior; should be paid a proper salary; should not necessarily be peers, though they might be peers; if not peers, should have no voice in the house; but upon all occasions and at all times, should sit with the lord chancellor to hear causes, and to deliver their opinion upon those causes openly as judges. Such assistance as this afforded to the lord chancellor, would at once sweep away all the anomalies to which he had referred, and of which the suitor in chancery had so much reason to complain. He proposed that the lord chancellor, with the lords' assistants, should have the power of calling to their assistance the other equity judges. Leave was then given to bring in the attorney general's bill; and subsequently Sir E. Sugden obtained leave to bring in a bill to facilitate the administration of justice in the house of lords and the privy council.

The American Jurist. The April number of the Jurist contains but two original articles, one upon Kent's Commentaries; the other, a sketch of the professional life of John Adams. The other articles are selections of an interesting character from works of reputation. There is also a translation of three chapters on the influence of the Stoic philosophy on the Roman law, from Giraud's edition of the Elements of Heinneccius. We notice with pleasure that the editor intends to republish from the Law Magazine some of the biographical sketches of eminent lawyers and judges of England, which have appeared in that work. The present number contains the usual Digests, several miscellaneous cases from the Monthly Law Magazine, and critical notices of new books. There is also a short letter to the editor respecting an article in the January number of the Jurist on *Perjury in a deposition which is invalid as evidence in a civil suit*, in which the writer of the article is handled without gloves. The decision commented on in the article is that of the *Commonwealth* v. *Stone*, (3 Law Reporter, 105.) It is quite fashionable to find fault with the administration of criminal law in Boston; and there are some things, undoubtedly, which are open to severe criticism; but in general, we are convinced, from much close observation, this branch of jurisprudence is administered with as much humanity, certainty and strict regard to legal principles, in Boston, as in any part of the country. The Jurist takes the same ground in relation to the decision of the d'Hauteville case, that has been assumed by this journal, considering it a flagrant and unjustifiable departure from known and established principles. The first paragraph of a criticism of our review of that case is as follows: "A law journal may, with strict propriety, take notice of legal decisions, in their bearing upon the public morals; and it may, as we think, refrain from doing so, without a dereliction of duty. In our last number, we noticed the decision of the somewhat famous d'Hauteville case, with considerable severity, as a flagrant and unjustifiable departure from known and established principles; but we refrained from commenting upon the conduct of the parties, in its influence upon society and its bearing upon the public morals; a task, which we have now no occasion to take upon ourselves, even were we so inclined, since the able and elaborate review of our cotemporary of the Law Reporter. The editor of that work, who is the author of the review before us, has taken up the case and examined it in its connection with and bearing upon the morals of the domestic and social states, as well as in its character of a legal question; and, in both respects, has acquitted himself with great ability and success. If we felt inclined to criticise his performance, we should say something of the unnecessary fierceness with which he sets himself to attack the conduct of the respondents, and of the somewhat desultory manner in which the legal examination is conducted. But both these faults (if such they be) are attributable to the very great haste in which such a review, in order to possess any interest at all, must unavoidably be written. If our contemporary could have given himself

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more time, we are sure that the legal argument, without losing any of its fulness and completeness, would have been more condensed, and differently if not better arranged; and that the comments upon the conduct and motives of the respondents, without losing any thing of their truth or severity, would have manifested less of that feeling of personal hostility, which we are confident does not exist, in the slightest degree, in the breast of the writer."

THE ATTORNEY GENERAL'S ANNUAL REPORT. The last annual report of the attorney general of Massachusetts, made to the legislature at the late session thereof, consists of two parts—the first relating to the official duties of that officer, and the second, to statistics of crime. The report, although not so full as that of last year, contains many valuable suggestions and much interesting information. It appears that although there were, during the year, some cases of most atrocious crime, the general character of the criminal calendar is that of the more common and mitigated offences. There were five trials for capital offences during the year. Two of the parties were convicted of a mitigated offence—one was acquitted; in the other case, the jury being unable to agree after two venires, the defendant was discharged on her own recognizance. It would seem, that the costs of criminal proceedings have increased; but the criminal expenses of Massachusetts still compare most favorably with those of other states. The criminal department of this commonwealth is managed by six individuals, at the cost of seven thousand dollars per annum, unequally divided between them. In the state of New York, there are, in addition to an attorney general, fifty-six prosecuting officers, and their compensation is more than thirty-eight thousand dollars. Although in that large state the public service demands more time and labor than in ours, yet the difference bears a very unequal proportion, as may be seen in the official returns for the years 1835–6–7, in which the total number of convictions in New York was 4216, while in Massachusetts it was 2961. In Pennsylvania, it is believed, a system as extensive and costly is adopted. In each county in that state there is a prosecuting officer, and in some counties additional counsel, or additional fees to the same officer for civil business. The attorney general makes several suggestions in relation to the future economical administration of the criminal department, one of which is, that the criminal proceedings should be conducted by the same courts through all the counties of the commonwealth, by which he estimates that an annual diminution of ten thousand dollars would be made in the general expenses. This suggestion would lead to the abolition of the municipal court of Boston. In one of the statistical tables (No. 14,) in the second part of this report, a curious typographical error seems to have occurred. In this table there is a column headed "Indictments," by which it would seem, that, for burglary there had been eleven indictments at one term of the municipal court of Boston, and fifteen, for escapes from the house of correction! All this arises from the fact, that in the printing of the report the word *indictments* was printed by the compositor over the column intended to designate the day of the month. While this report was in the hands of the state printer the author of it was absent at Washington, or so gross an error would undoubtedly have been corrected.

MAINE REPORTS. We have received the sixteenth volume of the Maine Reports, being the fourth of Shepley's. It embraces the cases from the June term, 1839, in Kennebec, to the April term, 1840, in Cumberland. The reporter has in his hands cases enough for another volume, which will be published immediately. It will probably be the last of "Shepley's Reports," the party of which the present reporter is a member, having lost their ascendancy, for the present at least, in Maine. It is a matter of regret, that the office of reporter should be held in that state by the precarious tenure of party success; but that system of policy was introduced, in the case of Mr. Greenleaf, by the party to which Mr. Shepley belongs; and nothing will be lost, we are inclined to think, in carrying out the policy in the present instance. An independent criticism of the last volumes of the Maine Reports would be interesting on many accounts. We hope to be able to present one when Mr. Shepley's next volume is published. It is said, that John Appleton, Esq., of Bangor, is to be the future reporter.

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London Police. Lord George Loftus was, on March 26, brought before Mr. Dyer, on a charge of being found, about half past six o'clock, that morning, drunk and disorderly in the Haymarket, and collecting a mob by quarrelling with a cabman. The noble prisoner, by his conduct before the magistrate, showed that the fumes of what he had previously imbibed had not entirely evaporated. Police constable Matthews, 92 C, stated, that while on his beat in the Haymarket, about half past six that morning, his attention was attracted by hearing a violent altercation in the street, and on proceeding to the spot he found his lordship, surrounded by a mob of persons, quarrelling with a cabman. Witness understood that the origin of the dispute between his lordship and the cabman was, that his lordship had engaged the cabman to convey him to an hotel in Cavendish street, but insisted on driving himself. His lordship's violent conduct of course attracted a crowd, and on being remonstrated with, he threatened to punch both his (witness's) and the cabman's heads. Lord George: That's a —— lie. Witness continued. Finding persuasion of no avail, he was obliged to conduct his lordship to the station-house. Lord George: What —— liars the police are; I'll punch your head before the bench. His lordship continued for some time in a similar strain of invective; and Mr. Dyer, after in vain attempting to stop him by telling him he should fine him for every oath he uttered, threw himself back in his chair in evident disgust. Lord George continued: I don't care a —— for your fines. I was brought up to the bar myself, although I do not practise. I am as good a common lawyer as you are, Mr. Bench. That —— policeman's evidence is entirely *ex parte*, and his word ought not to be taken in contradiction to that of a nobleman. Mr. Dyer: If you go on in that manner, I must commit you. Lord George: Commit and be ——. If you do, my friend lord Normanby will liberate me. Mr. Dyer (to end the scene) told his lordship that he should fine him 5*s*. for being drunk, 40*s*. for eight oaths at 5*s*. each, 8*d*. for cab hire, and 2*s*. 6*d*. for the cabman's loss of time, making in all 2*l*. 8*s*. 2*d*. Lord George: You dare not fine me. I am a nobleman. If you do, it is at your peril. Mr. Dyer: If the fines are not paid, I will commit you. His lordship was then with some difficulty removed from the bar, and locked up. He soon afterwards paid the fines, and was released, threatening to take ulterior proceedings.

Appointments.—It is impossible for us, with the limited space we have for miscellaneous intelligence, to mention all the appointments which come to our notice. We shall, however, from time to time give those which are not likely to be generally published in the newspapers.—It is understood that the Hon. John Davis, the venerable and highly esteemed Judge of the United States District Court for the District of Massachusetts, is about to resign. Among those who are named as his successors, we have heard mentioned the names of Judge Warren, of the Common Pleas, and Messrs. Theophilus Parsons, John Pickering, and Benjamin Rand, of the Suffolk bar.—George S. Hillard, of Boston, has been appointed a master in chancery for Suffolk; an appointment which cannot fail to give great satisfaction to all who may be interested in the insolvent law of Massachusetts.—John E. Godfrey, of Bangor, Me., has been appointed a commissioner to administer oaths, take depositions and the acknowledgment of deeds to be used in Massachusetts.—Solomon Lincoln, of Hingham, has been appointed United States Marshal for Massachusetts.—Franklin Dexter, it is supposed, will be appointed U. S. District Attorney for Massachusetts.

Ancient Lectures on Jurisprudence. In the fourteenth century, lectures upon the science of jurisprudence were given in the university of Bologna, in Italy, by Giovanni Andria, a celebrated professor. His daughter, the accomplished Novella, was often prevailed upon by her father to take his chair; but in order that her consummate beauty might not distract the attention of the pupils, a veil was drawn before her, which concealed her from the public gaze, This interesting incident is thus related by Christina of Pisa: "In regard to his amiable and beautiful daughter, whom he so affectionately loves, she is so thoroughly skilled both in letters and law, that when he is himself engaged, she pronounces her lectures with a light curtain drawn before her."

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Brougham and Sugden. When Brougham was chancellor, it was remarked that he carried something of the vivacity of debate into the court, and that Sir Edward Sugden carried a considerable portion of the irritability of disappointment into it. The result was, some smart altercation with much petulance on the one hand, and a remorseless dry sarcasm on the other. When Brougham took leave of the bar, it was remarked that Sir E. Sugden alone neglected to rise and acknowledge his parting salutes, as though he would express, "I will not rise to you, whose rise has stopped my rising" The spleen did not confine itself to dumb show, it broke out in words, as spleen will do on a very slight occasion. While delivering a speech, Sir E. Sugden observed that the chancellor was writing, and he stopped. The lord chancellor desired Sir Edward to proceed. Sir E. Sugden replied, that he could not, unless he were in possession of the attention of the court. His lordship said, he was giving his full attention to every thing that was stated, and of that he alone was competent to judge; he was taking a note of something said by the learned counsel, and he should choose his own time for making his note; papers might be put before him for signature, but signing his name was merely mechanical, and did not at all withdraw his attention. If a judge were not at liberty to do any thing merely mechanical while counsel were addressing him, the business of the court must be suspended every time he blew his nose or took a pinch of snuff. If one of his predecessors had given such intense attention as was expected, he would not now appear with so smiling a countenance. Sir E. Sugden sat down. The lord chancellor inquired if he had any thing more to state in reply. Sir Edward Sugden declined to say anything further. The chancellor's illustrations of snuff-taking and nose-blowing were, perhaps, too farcical for his place, and for the respect which a judge should show for a member of the bar, even when he is in error; but the conduct of Sir Edward was considered at the time provokingly captious, and obviously proceeded from a settled purpose to take and make offence. It is notorious that Lord Eldon was in the habit of carrying on all the correspondence of state intrigue when presiding in the court of chancery, and purporting to be hearing the statements and arguments of counsel. After barristers had been addressing the court for hours, without making any impression on Lord Eldon's mind or ears, he would declare he must take home the papers to look into the case, without which proceeding, indeed, it was physically certain he could know nothing about it. The large full-bottomed wigs, worn by the English judges, would seem as if they had been devised for the protection of their organs of hearing on these occasions.

NEW PUBLICATIONS.

We understand, that Richard H. Dana, jr., the author of the agreeable and popular work entitled Two Years before the Mast, has in preparation a work to be entitled the Seamen's Friend. It is to be a practical treatise for the use of seamen, of young men looking toward a seafaring life, and of lawyers and others, who wish to inform themselves upon matters connected with the sea.

We have received a report of the trial of William P. Darnes on an indictment for manslaughter, for the death of Andrew J. Davis, in St. Louis, June 1, 1840. We can only say at present, that it appears to be a most admirable report of an interesting trial.

Commentaries on the Law of Partnership, is the title of a new work which Mr. Justice Story has in preparation for the press.

Second editions of Mr. Angell's treatises on the Law of private Corporations, and the Right of Property in Tide Waters, are in preparation.

A new stereotype edition of Mr. Sawyer's Merchants' and Shipmasters' Guide, is published.

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MONTHLY LIST OF INSOLVENTS.

Abington.
Stoddard, Richmond, Trader.
Thomson, Josiah, Laborer.
Amherst.
Dickinson, Edward W. Machinist.
Marsh, Eli C.
Boston.
Briggs, John C., } Traders.
Crafts, Francis D., }
Harriman, John., Painter.
Kenfield, Ebenezer, Victualler.
Orcutt, William A., Electrician.
Belchertown.
Cowles, Horatio, Yeoman.
Brewster.
Foster, Freeman, jr., Tanner and Currier.
Cambridge.
Boynton, Federal, Innholder.
Maxham, Leonard,
Danvers.
Tufts, Joseph, Tanner.
Falmouth.
Chadwick, David, Yeoman.
Gloucester.
Wood, Charles P. Trader.
Grafton.
Grant Henry T., Merchant.
Heywood, Charles L., Merchant.
Groton.
Richardson, George, Yeoman.
Hamilton.
Woodberry, William, Cordwainer.
Haverhill.
Caldwell, William, Merchant.
Hubbardston.
Parker, William J., Husbandman.
Lanesborough.
Harman, Henry B., Yeoman.
Lowell.
Burley, Joshua, Laborer.
Evans, Joseph, Carpenter.
Ford, Isaac N., Housewright.
Johnson, Joshua M., Butcher.
Philbrick, Moses E., Butcher.
Ludlow.
Dodge, Lewis,
Munson.
Howe, George,
Haynes, William A.,
Nantucket.
Macy, Gorham, } Copartners.
Macy, Charles, }
North Bridgewater.
Keith, Jason, Trader.
New Bedford
Curtis, Stephen, Trader.
Orleans.
Sherman, Freeman, Mariner.
Roxbury.
Nash, David R., Trader.
Salem.
Hall, Eliphalet, Housewright.
Howe, Willard, Yeoman.
Sandwich.
Bennett, Amos, Laborer.
Springfield.
Parks, Nathan, }
Jones, James, }
Lord, Horace, jr., Armorer.

TO READERS AND CORRESPONDENTS.

THE present number commences the fourth volume of the LAW REPORTER. It will be seen, by an advertisement on the cover, that the work has passed into the hands of new publishers, who promise to cause a decided improvement in the typographical execution of the publication, and to publish it with more punctuality than formerly. We request of our correspondents a continuance of their favors. Our limits are such, that we are often obliged to condense reports which are sent to us entire; and it is sometimes necessary for us to omit others altogether, or to delay their publication longer than may be agreeable to the writers. We trust the difficulties in this matter will be properly appreciated by all who think they have reason to complain; and a particular explanation in each case be rendered unnecessary.

Several reports, prepared for the present number, are omitted, in consequence of the space devoted to the controversy between Rhode Island and Massachusetts. This will scarcely be regretted, however, by those who read the article, as we believe it presents a fair account of this novel and interesting controversy between the two states.

Our next will contain decisions made at the last March term of the supreme judicial court of Massachusetts, and probably those made at the April term of the supreme judicial court of Maine; also the able opinion of Mr. Justice Story in the patent case of Wyeth *v.* Stone, and one or more opinions of Mr. Chief Justice Gibson.

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THE LAW REPORTER.

JUNE, 1841.

REMARKABLE TRIALS. — No. I.

CASE OF EDMUND KEAN AND MRS. ALDERMAN COX.

A LAW journal may, with entire propriety, take notice of all judicial investigations, in their bearing upon public morals, and upon personal and political history. It is accordingly our intention to give occasional reports of cases, which may involve no new or striking legal principles, but are simply interesting and important as matters of fact. Nor will they be confined to cases of a recent date, but we shall recur to those old trials, not generally accessible to the profession, which involve facts relating to the personal history of celebrated individuals, or which were attended by the marked exertions of distinguished members of the bar. Judicial proceedings are the true tests of character; they are among the best sources of history. They touch a man in his bed-chamber, and extract secrets which his right hand has not yet communicated to his left. Facts thus ascertained by tribunals erected for the express purpose of eliciting the truth, when carefully separated from the heavy legal forms by which they are incumbered, and presented in a style of simple narrative, may, we believe, be rendered highly interesting in themselves, and useful, as presenting the best accounts of individual peculiarities, or giving historical reminiscences of great value.

The trial of the celebrated case of *Cox* v. *Kean*, in the court of king's bench, Guildhall, before Lord Chief Justice Abbott and a special jury, on January 17, 1825, is probably within the memory of many of

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our readers, as the tragedian was at that time in the height of his fame in the old and new worlds. Others, however, only know of the case from general rumor; and we have taken pains to prepare a condensed report of the trial from the London edition now before us, published many years ago. It was an action brought to recover two thousand pounds damages of the defendant for a criminal conversation with the plaintiff's wife. The case was managed by Mr. Denman, (now Lord Chief Justice); Hon. Mr. Law, (now Recorder of London), and Mr. Chitty, for the plaintiff; and by Mr. Scarlett, (now Lord Abinger); Mr. Brougham, (now Lord Brougham), and Mr. Platt, for the defendant.

Robert Albion Cox, the plaintiff, was a London alderman. At the age of thirty-three, being a widower with one son, he married Miss Newman, aged twenty-one, the daughter of a respectable gentleman, an inhabitant of Dorchester, where the plaintiff then lived. At first, they resided on the plaintiff's estate at Dorchester, but subsequently removed to London, although they made frequent visits to the country. It was during one of these visits, in 1817, at Taunton, according to one account, that Mr. Kean first saw Mrs. Cox, while representing the character of Othello. The lady fainted in the stage box; there was for a few moments great confusion; the performances were suspended and the lady taken over the stage into Mr. Kean's dressing room. On Mr. Kean's return to London, he was invited to Mr. Cox's house, and was soon, with his wife, on most intimate terms with the family. Mr. Cox being a share-holder in Drury Lane, both he and his wife became frequent visiters at the theatre, especially on the nights when Mr. Kean performed. Mrs. Cox was a woman of cultivated intellect, well read in the works of the dramatic poets, especially Shakspeare; and felt a warm admiration for Mr. Kean's talents.

Under these circumstances a criminal intimacy sprung up between Mr. Kean and Mrs. Cox, which continued several years, during all which time the tragedian was received in the family of the alderman on the most intimate terms. There was a constant correspondence between the guilty parties, continuing while Kean was absent in the United States on a professional tour; the whole, however, being conducted in so cautious a manner as not to excite the suspicions of those most interested. Mrs. Kean at length had her suspicions aroused, and, in the presence of the plaintiff and his wife, desired the intercourse might cease, because she thought it might lead to an improper conclusion. Mrs. Kean accordingly broke off her connection with the family, but the easy alderman did not seem to have any fears, and nothing was done to interrupt Mr. Kean's visits. In 1823, however, the suspicions of the plaintiff were somewhat excited in relation to Kean's attentions to his wife, and a conversation ensued between them on the subject. Kean subsequently wrote the plaintiff a letter in which, after professing great friendship and disclaiming all evil intentions, he says: "I must be the worst of villains, if I could take that man by the hand,

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while meditating towards him an act of injustice. You do not know me, Cox: mine are follies, not vices. It has been my text to do all the good I could in the world, and when I am called to a superior bourne, my memory may be blamed, but not despised. Wishing you and your family every blessing the world can give you, believe me, nothing less than Your's, most sincerely, Edmund Kean,"

At the same time he wrote to the wife of the plaintiff as follows:

"My dear little imprudent girl, — Your incaution has been very near bringing our acquaintance to the most lamentable crisis. Of course, he will show you the letter I have written him; appear to countenance it, and let him think we are never to meet again, and in so doing he has lost a friend. Leave all further arrangement to me."

The criminal attachment between these parties was at length discovered in consequence of an appointment between them. The plaintiff was living at the time in Wellington street, London, and when he was from home, arrangements were made to admit the defendant. On one occasion the usual precautions were neglected; Mr. Cox unexpectedly returned and a full discovery was made. The wife was compelled to withdraw from her home, leaving a large number of letters in the hand writing of Mr. Kean, which were read at the trial. They had various superscriptions, although the favorite address which the lover used towards his mistress was "Little Breeches." Many of these letters were disgustingly obscene and others superlatively silly — more so even, than is usually the case in like circumstances. They give evidence of low and violent passions; a mean and cowardly spirit, and a destitution of the honorable feelings which might be expected from the "proud representative of Shakspeare's heroes." In two of them the tragedian breaks forth in the following manner, which is a fair specimen of the style of these epistles:

"Doubt that the stars are fire;
Doubt that the sun doth move;
Doubt truth to be a liar,
But never doubt I love."

It would appear, that the ardent lover was not uninterrupted in his amour at home, however easy Mr. Cox might be. Mrs. Kean and "Charles" were often most obstinately and inconveniently in the way, and the tragedian was held in pretty good subjection while they could keep sight of him, as the following notes attest:

"My dear, dear love, — I cannot write fully to you till I get to Cork. Half of your letter has been found, and created a most terrible explosion. She leaves me on Saturday, the 19th; I shall then write about my arrangements.
"Farewell, my darling little B***H.
"Little Breeches."

"Some evil spirit has got into our house. I cannot see what is the matter. I dare not go out alone. She says, 'she has as much right to pay visits as me,' and is determined that Charles or herself accompanies me wherever I go, till I leave London. Whatever it is, I hope it will dispel before to-morrow.
Bless you."

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"My beloved Charlotte, — She has taken it in her head to accompany me today wherever I go, and I cannot shake her off. You must guess my mortification,
Ever, ever, ever,
"Charlotte. Your's only your's."

"My darling Love, — You must be aware how very difficult it is to get one moment to myself: the eyes of Argus may be eluded, but those of a jealous wife impossible, even now I am on tenter-hooks. I expect the door forced open, 'and what are you writing?' the exclamation. Or, Susan, to see if every thing is comfortable, or Charles with a handful of endearments for his dear papa, all tending to the same thing, — what is he about? I shall therefore only say here, there, or any where, I love you, dearly love you, and so for ever, ever, ever."

In others he says: "I am guarded more closely than a felon. I cannot go into the most private closet, without a sentry at the door; the beautiful scenery by which we are surrounded, has no influence over jealous minds; the boy ["Charles" we suppose] shortly goes to school, and his aunt accompanies him" — "I have not heard from her lately, she may be on the way to me — they may follow me — we have one dreadful instance of that; my dear love, for Heaven's sake be guarded" — "I am watched more closely than Napoleon Bonaparte, independent of which, I have never been three days in a place." These letters also give some curious information respecting Mr. Kean's professional life. In one of them, dated "June 19, damned town," (post-marked Bath, June 20, 1822) he says:

"My little darling love, — I am in such a vortex of perplexities and mortifications, that I can scarcely collect my thoughts sufficiently to thank you for your letter, and to tell you how much I love you; it is now my dearest girl I wish for you, now that I am suffering under the most painful sensations of wounded pride, and the evident dupe of determined scoundrels, my mind boiling with rage and grief; wants now my own dear darling — my love to condole with; my fevered head wants rest in the bosom of my Charlotte. Indignation, resentment, and all the passions of the furies guides my hand while I tell you that in this infernal city, where I was a few years since the idol of the people, my endeavors are totally failing; I have not yet acted one night to the expenses; come to me darling, come to me, or I shall go mad. You must put off Tidswell; the carriage will not hold us all; if I should ever return to London, I will give her a jaunt to some of the environs, but if my provincial career is followed up by this terrible sample — Heaven or hell must open for me. I bore my elevation with philosophy, I feel I cannot long submit to the opposite."

In his letters from the United States, he also speaks of his professional success. "Every thing," he says, "both on and off the stage in this country, has exceeded my most sanguine expectations. I am getting a great deal of money, and all is going off well" — "I am living in the best style, travelling magnificently, and transmitting to England £1000 each month."

On the part of the defendant, several justifications were set up at the trial. *First*, it was said, that the plaintiff had connived at his own dishonor. But this was not much relied on; and the evidence was strongly opposed to it. *Secondly*, it was contended, that Mrs. Cox had herself committed adultery with other persons prior to her intimacy with Mr. Kean. There was not much proof of this, however, more

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than hearsay evidence that Sir Robert Kemyss was once discovered in a closet of the lady's bed-chamber; although it did appear, that the plaintiff, at the time he discovered his dishonor, suspected his wife's infidelity with other men, and actually commenced an action against one Watmore at the same time the suit was brought against Mr. Kean. *Thirdly*, it was urged, that the plaintiff had not exercised a reasonable caution in the control of his wife, but had exposed her needlessly rather to temptation. This point was better made out than the others. It appeared, that the access permitted Mr. Kean to the plaintiff's house had been of a nature unusually loose and familiar. He visited at all hours and seasons, coming sometimes when the family were in bed. Frequently he came to Mr. Cox's house in a state of intoxication; at other times Mr. and Mrs. Cox were found in his dressing room at the theatre; and on one occasion, it appeared, that both the lady and her husband had been present in that room while he dressed and undressed himself. The lady was often there without her husband. Mr. Cox several times brought Kean to his house to sup after the play was over; sometimes when he was very tipsy. He passed the night, under these circumstances, on the sofa. In the morning he went to bed in the bed-room next the drawing room, where he lay all day. There were also other circumstances tending to show the great confidence the plaintiff placed in his wife and Kean; all which the jury were instructed to take into consideration in mitigation of damages. The jury, after deliberating about ten minutes, returned a verdict for the plaintiff, with damages at eight hundred pounds.

The greatest anxiety on the part of Mr. Kean's counsel at this trial seemed to be, to place his conduct before the jury, and consequently the public, in such a light that he should not be compelled to leave the stage on account of the odium attached to his name by this affair. Accordingly, Mr. Scarlett made a most ingenious and eloquent attempt to represent the fallen woman as making the first advances and the husband making no objections, while the tragedian was at length compelled to yield! "Gentlemen," said the learned advocate, "no person is more backward than myself in offering an apology for a breach of duty; but I do say, on behalf of humanity, (for we are men and born to sin,) that the moment having arrived when this woman showed him that her object was his person, there is not one man in five thousand would have resisted." Much parade was also made about sundry letters from Mrs. Cox to the defendant, which from motives of honor towards her he refused to read, but which, it was said, if they were read, would inculpate others, and would, partially at least, exculpate the defendant.

The trial did, however, excite strong indignation against Mr. Kean. On Monday, January 24, 1825, a few days after it took place, he made his appearance as Richard III, and on the following Friday, in Othello. On each evening the doors of the theatre were besieged at an early hour, and the opposition to Mr. Kean was so strong, that not

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a single word was heard by the audience. On Friday evening the manager addressed the audience and offered to introduce Mr. Kean if they would hear him. After a considerable time had elapsed, in which the patience of the house broke forth more than once in murmurs, Mr. Kean appeared, led on the stage by Mr. Elliston. He had exchanged his tragic habiliments for a plain suit of black, and appeared in his own proper colors. The uproar was now at its highest pitch; and with very considerable difficulty Mr. Kean obtained a hearing. Having advanced to the front of the stage, he spoke as follows:

"LADIES AND GENTLEMEN,—If you expect from me a vindication of my own private conduct, I am certainly unable to satisfy you.—(*Applause and disapprobation.*)—I stand before you as the representative of Shakspeare's heroes.—(*Much contention between the parties favoring and disapproving Mr. Kean.*)—My private conduct has been investigated before a legal tribunal, where decency forbade my publishing letters and giving evidence that would have inculpated others, though such a course would, in a great degree, have exculpated me.—(*Applause and hisses.*)—If, Ladies and Gentlemen, I have withheld circumstances from motives of delicacy (*laughter*), it was from regard to the feeling of others, not of myself.—(*Clamors of applause mingled with hisses.*)—It appears at this moment that I am a professional victim—(*laughter.*)—If this is the work of a hostile press, I shall endeavor with firmness to withstand it; but if it proceeds from your verdict and decision, I will at once bow to it, and shall retire with deep regret, and with a grateful sense of all the favors which your patronage has hitherto conferred on me."

After the delivery of this speech, which was received by Mr. Kean's partisans with shouts of applause, Mr. Kean seemed greatly agitated, even to tears. He staggered to the back of the stage, and seemed in the act of falling, when Mr. Elliston came forward and led him off!

RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, October Term, 1840, at Boston.

WYETH AND TUDOR *v.* STONE AND OTHERS.

In a bill in equity for a perpetual injunction of the defendants, on account of an asserted violation of a patent right for an invention, it is a good defence, that prior to the granting of the patent, the inventor had allowed the invention to go into public use, without objection. But the public use ought to be clearly established by clear and full evidence, to produce this result. The mere user by the inventor of his invention, in trying experiments, or by his neighbors, with his consent, as an act of kindness for temporary and occasional purposes only, will not destroy his right to a patent therefor.

If the defendants use a substantial part of the invention patented, although with some modifications of form or apparatus, that is a violation of the patent right. So if the patent be of two machines, and each is a new invention, and the defendant use only one of the machines.

If the patentee, after obtaining his patent, dedicates or surrenders it to public use, or

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acquiesces for a long period in the public use thereof, without objection, he is not entitled to the aid of a court of equity to protect his patent; and such acquiescence may amount to complete proof of a dedication or surrender thereof to the public.

But to entitle the defendants to the benefit of such a defence, the facts must be explicitly relied on and put in issue by their answer; otherwise the court cannot notice it.

In the present case, the patent and specification claimed for the patentee, as his invention, the cutting of ice of a uniform size by means of an apparatus worked by any other power than human. It claimed, also, not only the invention of this art, but also the particular method of the application of the principle, stated in his specification, which was by two machines described therein, called the saw and the cutter. It was *held* by the court, that the specification, so far as it claimed the art of cutting ice by means of an apparatus worked by any other power, than human, was the claim of an abstract principle, and void; but so far as it claimed the two machines described in the specification, it might be good, if a disclaimer were made of the other parts, according to the patent act of 1837, ch. 45, § 7, and § 9, within a reasonable time, and before the suit were brought. But a disclaimer, after the suit brought, would not be sufficient to entitle the party to a perpetual injunction in equity, whatever might be his right to maintain a suit at law on the patent.

If the patentee has assigned his patent in part, and a joint suit is brought in equity for a perpetual injunction, a disclaimer by the patentee alone, without the assignee's uniting in it, will not entitle the parties to the benefit of the 7th and 9th sections of the act of 1837, ch. 45.

A single patent may be taken for several improvements on one and the same machine, or for two machines, which are invented by the patentee, and conduce to the same common purpose and object, although they are each capable of a distinct use and application, without being united together. But a single patent cannot be taken for two distinct machines, not conducing to the same common purpose or object, but designed for totally different and independent objects.

An inventor is bound to state in his specification, what he claims as his invention, and his summing of his claim therein is conclusive upon him. It will, however, be liberally construed in support of his right.

The assignee of a patent right, in part or in whole, cannot maintain any suit at law, or in equity, either as sole or as joint plaintiff thereon, at least as against third persons, until his patent has been recorded in the proper department, according to the requisitions of the patent acts.

Bill in equity for a perpetual injunction, and for other relief, founded upon allegations of the violation, by the defendants, of a patent right, granted originally to the plaintiff, Wyeth, as the inventor, by letters patent, dated the 18th of March, A. D., 1829, "for a new and useful improvement in the manner of cutting ice, together with the machinery and apparatus therefor," as set forth in the schedule to the letters patent; and afterwards with a small reservation assigned to the other plaintiff, Tudor, on the 9th of February, 1832, by a deed of assignment of that date, but which had never been recorded. The schedule set forth two different apparatus or machines for cutting the ice, the one called the saw, the other the cutter, which are capable of being used separately or in combination, and described their structure and the mode of applying them, as follows:

(1) Two bars of iron, or other material, secured to each other by cross bars: the two first mentioned to be of such distance apart as the dimension of the ice is required to be. (2) On each outside bar is bolted a plate of iron as long as the bar, and at right angles with the cross bars. These plates to be so bolted to the bars as to project three inches each on one side of the bars to which they are bolted, and one of them to project on the other side of the bar two inches; the other, one inch. These projections may be varied, according to the desired depth of the cut. (3) These plates, both on the upper side and on the under side of the bars, are to be cut at four equi-distant points each, at an angle of forty-five degrees, or thereabouts, to the bar, thereby forming a cutting point of forty-

five degrees, or thereabouts; to this point is welded a piece of steel, to form the chisel. The rear end of the plates to be of the before specified width from the bar, but to diminish toward the front end one fourth of an inch at each point, thereby giving each succeeding point a clear cut of one-fourth of an inch deeper than its precursor. (4) The mouths, by which the chips cut from the ice by the chisels are discharged, are made similar to that of a carpenter's plough. (5) To the middle of the front cross-bar is fixed a ring, for the purpose of attaching a draught chain, to which the horse that draws the cutter is to be harnessed. (6) This first part of the apparatus for cutting ice is called the cutter, and is used as follows: The cutter is laid on the ice, with the three-inch side of the plates downward, and drawn forward in a straight line as far as is required, thus making two grooves of an inch deep. The horse is then turned about, and the cutter turned over, so that the two-inch side of the plate shall be in one of the first grooves cut, and the one-inch side on the ice; and as the cutter is drawn forward, the two-inch side makes one of the first grooves an inch deeper, and the one-inch side forms a new groove of an inch deep. Proceed in this manner until as many grooves are cut as are wanted; then turn the cutter over upon the three-inch side, go over the whole again with this side, and they are finished. Repeat the same process at right angles with the first grooves, and the operation with this part of the apparatus is finished.

Part Second of Apparatus for Cutting Ice. (1) Two spur-wheels, about three feet six inches, more or less, in diameter, connected together by an axletree of iron, or other material, from the centre of each to the other, fixed immovable in each. (2) A pair of fills, proceeding from the axletree, and secured to it by a pair of composition boxes, admitting the axletree to turn in them. (3) A cog wheel, about three feet two inches in diameter, more or less, fixed to the centre of the axletree, so as to be incapable of turning, except with the axletree. (4) A pair of handles attached to the axletree, in the same manner as the fills, so as to admit of the motion of the axletree in them; these handles to be placed one on each side of the cog wheel in the centre of the axletree, and to be connected together by a permanent bar, at a suitable distance from the axletree. (5) Two cog wheels, about four inches diameter, more or less, one of which to work on the large cog wheel, and the other to work on the one so working, and both to be secured by pintles passing through the handles: the small cog wheel not working on the large cog wheel to have secured beside it a circular saw, about two and a half feet diameter, more or less. (6) The proportion between the large and small cog wheels is varied, to obtain greater or less velocity for the saw, as may be wanted. This part of the apparatus for cutting ice is called the saw, and is used as follows: Put the saw into one of the outside grooves made by the cutter; drive the horse forward, following the groove made by the cutter: at the same time a man who manages the handles presses them down as much as the strength of the horse will admit of. This operation is followed back and forth, until the ice is cut through. The same is done with the outer parallel groove on the opposite side of the work, and also on one of the end grooves, running at right angles with these. By this process the ice on the three sides of the plat, or work marked by the cutter, is cut through. When this is done, take an iron bar (one end of which is wide and fitted to the groove, and the other end of which is sharpened as a chisel,) and insert the end which is fitted to the groove into the groove next to and parallel with the end groove which is cut through; pry lightly in several places, then more strongly, until the ice is broken off; then strike lightly with the chisel end of the bar into the cross grooves of the piece split off, and it easily separates into square pieces. Thus proceed with the whole plat marked out by the cutter. It is claimed *as new*, to cut ice of a uniform size, by means of an apparatus worked by any other power than human. The invention of this art, as well as of the particular method of the application of the principle, are claimed by the subscriber.

The answer set up various grounds of defence. At the argument upon the hearing of the cause, the principal points insisted on by the

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defendants were: (1) That the invention was not new, and Wyeth was not the inventor; (2) that the machines used by the defendants were not an invasion of the patent of Wyeth, but were substantially different from his; (3) that Wyeth, if the invention was new, had suffered it to go into public use long before he took out his patent, and thereby his right to it was gone; (4) that Wyeth, after his patent, had abandoned his invention to the public; (5) that the specification was broader than the invention, and was too vague and indeterminate as to what was claimed as the invention to maintain the patent right; (6) that this defect was not cured by the disclaimer under the patent acts of 1836 and 1837, it not being within the provision of those acts, not being filed until after the present suit was brought.

The case was argued by *W. H. Gardiner* for the plaintiffs, and by *Simon Greenleaf* for the defendants. The arguments principally turned upon the grounds, which are stated in the opinion of the court, and therefore are not here repeated.

Story J. delivered the opinion of the court, as follows: I have considered this cause upon the various points, suggested at the argument by the counsel on both sides, with as much care as I could, in the short time, which I have been able to command, since it was argued; and I will now state the results, with as much brevity as the importance of the cause will permit.

The first point is, whether the invention claimed by the patentee is new, that is, substantially new. The patent is dated on the 18th of March, 1829, and is for "a new and useful improvement in the manner of cutting ice, together with the machinery and apparatus therefor." Assuming the patent to be for the machinery described in the specification, and the description of the invention in the specification to be, in point of law, certain and correctly summed up, (points, which will be hereafter considered,) I am of opinion, that the invention is substantially new. No such machinery is, in my judgment, established by the evidence to have been known or used before. The argument is, that the principal machine, described as the cutter, is well known, and has been often used before for other purposes, and that this is but an application of an old invention to a new purpose; and it is not, therefore, patentable. It is said, that it is in substance identical with the common carpenter's plough. I do not think so. In the common carpenter's plough there is no series of chisels fixed in one plane, and the guide is below the level, and the plough is a movable chisel. In the present machine, there are a series of chisels, and they are all fixed. The successive chisels are each below the other, and this is essential to their operation. Such a combination is not shown ever to have been known or used before. It is not, therefore, a new use or application of an old machine.

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This opinion does not rest upon my own skill and comparison of the machine with the carpenter's plough; but it is fortified and sustained by the testimony of witnesses of great skill, experience, and knowledge in this department of science, viz., by Mr. Treadwell, Mr. Darracott, and Mr. Borden, who all speak most positively and conclusively on the point. . . . .

The next point is, whether the ice machine used by the defendants is an infringement of the patent, or, in other words, does it incorporate in its structure and operation the substance of Wyeth's invention. I am of opinion, that it does include the substance of Wyeth's invention of the ice cutter. It is substantially, in its mode of operation, the same as Wyeth's machine; and it copies his entire cutter. The only important difference seems to be, that Wyeth's machine has a double series of cutters, on parallel planes; and the machine of the defendants has a single series of chisels in one plane. Both machines have a succession of chisels, each of which is progressively below the other, with a proper guide placed at such distance as the party may choose to regulate the movement; and in this succession of chisels, one below the other, on one plate or frame, consists the substance of Wyeth's invention. The guide in Wyeth's machine is the duplicate of his chisel plate or frame; the guide in the defendants' machine is simply a smooth iron, on a level with the cutting single chisel frame or plate. Each performs the same service substantially in the same way.

In the next place, as to the supposed public use of Wyeth's machine before his application for a patent. To defeat his right to a patent, under such circumstances, it is essential, that there should have been a public use of his machine, substantially as it was patented, with his consent. If it was merely used occasionally by himself in trying experiments, or if he allowed only a temporary use thereof by a few persons, as an act of personal accommodation or neighborly kindness, for a short and limited period, that would not take away his right to a patent. To produce such an effect, the public use must be either generally allowed or acquiesced in, or at least be unlimited in time, or extent, or objects. On the other hand, if the user were without Wyeth's consent, and adverse to his right, it was a clear violation of his rights, and could not deprive him of his patent.

Now, I gather from the evidence (which, however, is somewhat indeterminate on this point) that Wyeth's machine, as originally invented by him, was not exactly like that for which he afterwards procured the patent. On the contrary, he seems to have made alterations and improvements therein. Pratt (the witness) says, that he made the iron part of the *first* machine of Wyeth, which was partly of wood and partly of iron, in December, 1825, or in January, 1826; and that he afterwards made the machine, which was patented for Wyeth in December, 1837; and it was not patented until March,

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1829. So that the latter seems to have been more perfect than the former. But, at all events, I cannot but think, that the evidence of the user, as a public user, of the invention before the patent was granted, is far too loose and general to found any just conclusion, that Wyeth meant to dedicate it to the public, or had abandoned it to the public before the patent. It appears to me, that the circumstances ought to be very clear and cogent, before the court would be justified in adopting any conclusion so subversive of private rights, when the party had subsequently taken out a patent.

In the next place, as to Wyeth's supposed abandonment of his invention to the public since he obtained his patent. I agree, that it is quite competent for a patentee at any time, by overt acts or express dedication, to abandon or surrender to the public, for their use, all the rights secured by his patent, if such is his pleasure, clearly and deliberately expressed. So, if for a series of years the patentee acquiesces without objection in the known public use by others of his invention, or stands by and encourages such use, such conduct will afford a very strong presumption of such an actual abandonment or surrender. *A fortiori*, the doctrine will apply to a case, where the patentee has openly encouraged or silently acquiesced in such use by the very defendants, whom he afterwards seeks to prohibit by injunction from any further use; for in this way he may not only mislead them into expenses, or acts, or contracts, against which they might otherwise have guarded themselves; but his conduct operates as a surprise, if not as a fraud upon them. At all events, if such a defence were not a complete defence at law, in a suit for any infringement of the patent, it would certainly furnish a clear and satisfactory ground, why a court of equity should not interfere either to grant an injunction, or to protect the patentee, or to give any other relief. This doctrine is fully recognised in *Rundell* v. *Murray*, (Jacob's R. 311, 316,) and *Saunders* v. *Smith*, (3 Mylne & Craig, 711, 728, 730, 735.) But if there were no authority on the point, I should not have the slightest difficulty in asserting the doctrine, as found in the very nature and character of the jurisdiction exercised by courts of equity on this and other analogous subjects.

There is certainly very strong evidence in the present case affirmative of such an abandonment or surrender, or at least of a deliberate acquiescence by the patentee in the public use of his invention by some or all of the defendants, without objection, for several years. The patent was obtained in 1829; and no objection was made and no suit was brought against the defendants for any infringement until 1839, although their use of the invention was, during a very considerable portion of the intermediate period, notorious and constant, and brought home directly to the knowledge of the patentee. Upon this point, I need hardly do more than to refer to the testimony of Stedman and Barker, who assert this knowledge and acquiescence for a long period on the part of the patentee of the use of these ice cutters

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by different persons, (and among others by the defendants) on Fresh Pond, where the patentee himself cut his own ice. It is no just answer to the facts so stated, that until 1839 the business of Wyeth, or rather of his assignee, the plaintiff, Tudor, was altogether limited to shipments in the foreign ice trade, and that the defendants' business, being confined to the domestic ice trade, did not interfere practically with his interest under the patent. The violation of the patent was the same, and the acquiescence the same, when the ice was cut by Wyeth's invention, whether the ice was afterwards sold abroad or sold at home. Nor does it appear, that the defendants have as yet engaged at all in the foreign ice trade. It is the acquiescence in the known user by the public without objection or qualification, and not the extent of the actual user, which constitutes the ground, upon which courts of equity refuse an injunction in cases of this sort. The acquiescence in the public use, for the domestic trade, of the plaintiff's invention for cutting ice, admits that the plaintiff no longer claims or insists upon an exclusive right in the domestic trade under the patent; and then he has no right to ask a court of equity to restrain the public from extending the use to foreign trade, or for foreign purposes. If he means to surrender his exclusive right in a qualified manner, or for a qualified trade, he should at the very time give public notice of the nature and extent of his allowance of the public use, so that all persons may be put upon their guard, and not expose themselves to losses or perils, which they had no means of knowing or averting during his general silence and acquiescence.

The cases, which have been already cited fully establish the doctrine, that courts of equity constantly refuse injunctions, even where the legal right and title of the party are acknowledged, when his own conduct has led to the very act or application of the defendants of which he complains, and for which he seeks redress. And this doctrine is applied, not only to the case of the particular conduct of the party towards the persons, with whom the controversy now exists, but also to cases, where his conduct with others may influence the court in the exercise of its equitable jurisdiction.[1] Under such circumstances, the court will leave the party to assert his rights, and to get what redress he may at law, without giving him any extraordinary aid or assistance of its own.

But the difficulty in the present case applies not so much to the doctrine considered in itself, as in the utter impracticability of applying it on account of the state of the pleadings. The point is not raised, or even suggested in the answer, in any manner whatsoever, as a matter of defence; and of course it is not in issue between the parties; and the whole evidence taken on the point is irrelevant and

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[1] *Rundell* v. *Murray*, (Jacob's R. 311, 316.); *Saunders* v. *Smith*, (3 Mylne and Craig, 711, 728, 730, 735.)

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cannot be looked to as a matter in judgment. This defect in the pleadings, therefore, puts the question entirely beyond the reach of the court.

In the next place, as to the objections taken to the specification. The question here necessarily arises, for what is the patent granted? Is it for the combination of the two machines described in the specification (the cutter and the saw) to cut ice? Or for the two machines separately? Or for the two machines as well separately as in combination? Or for any mode whatsoever of cutting ice by means of an apparatus worked by power not human in the abstract, whatever it may be? If it be the latter, it is plain, that the patent is void, as it is for an abstract principle, and broader than the invention, which is only cutting ice by one particular mode, or by a particular apparatus or machinery. In order to ascertain the true construction of the specification in this respect, we must look to the summing up of the invention and the claim therefor asserted in the specification; for it is the duty of the patentee to sum up his invention in clear and determinate terms; and his summing up is conclusive upon his right and title. This was the doctrine maintained in *Moody* v. *Fiske*,[1] (2 Mason R. 112, 118, 119;) and I see no reason to doubt it, or to depart from it.

Now, what is the language, in which the patentee has summed up his claim and invention? The specification states: "It is claimed as new to cut ice of a uniform size, by means of an apparatus worked by any other power than human. The invention of this art, as well as the particular method of the application of the principle, are claimed by the subscriber," (Wyeth.) It is plain, then, that here the patentee claims an exclusive title to the art of cutting ice by means of any power, other than human power. Such a claim is utterly unmaintainable in point of law. It is a claim for an art or principle in the abstract, and not for any particular method or machinery, by which ice is to be cut. No man can have a right to cut ice by all means or methods, or by all or any sort of apparatus, although he is not the inventor of any or all of such means, methods, or apparatus. A claim broader than the actual invention of the patentee is for that very reason, upon the principles of the common law, utterly void, and the patent is a nullity.[2] Unless, then, the case is saved by the provisions of the patent act of 1836, ch. 357, or of the act of 1837, ch. 45, which will hereafter be considered, the present suit cannot be sustained.

But besides this general claim, there is another claim in the specification for the particular apparatus and machinery to cut ice, de-

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[1] See also *Hill* v. *Thompson*, (8 Taunt. R. 375.)

[2] *Moody* v. *Fiske*, (2 Mason R. 112.); *Brunton* v. *Hawkes*, (4 Barn. and Ald. 541.); *Hill* v. *Thompson*, (8 Taunt. R. 375, 399, 400.); *Evans* v. *Eaton*, (7 Wheat. R. 356.); Phillips on Patents, ch. 11, s. 7, p. 268 to p. 282.

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scribed in the specification. The language of the specification here is: "The invention of this art," (the general claim already considered) "as well as the particular method of the application of the principle," (omitting the words of reference, as above described,) "are claimed by the subscriber." Now, assuming the former objection, that the claim for a general or abstract principle is not a fatal objection in the present case, it has been argued, that the specification is too ambiguous to be maintainable in point of law; for it does not assert, what is claimed as the patentee's invention; whether it be the two machines separately and distinctly, as several inventions, or the combination of them, or both the one and the other.

It appears to me, that the language of the summary may be, and indeed ought to be construed, *ut res magis valeat, quam pereat*, to mean by the words "the particular method of the application," the particular apparatus and machinery described in the specification to effect the purpose of cutting ice. I agree, that the patentee is bound to describe, with reasonable certainty, in what his invention consists, and what his particular claim is. But it does not seem to me, that he is to be bound down to any precise form of words; and that it is sufficient, if the court can clearly ascertain, by fair interpretation, what he intends to claim, and his language truly imports, even though the expressions are inaccurately or imperfectly drawn.

Is the patent, then, a patent for the combination of the two machines, viz.: the saw and the cutter? If it be, then the defendants clearly have not violated the patent right; for they use the cutter only; and the saw-machine has been abandoned in practice by the patentee himself, as useless or unnecessary. It appears to me, that the patent is not for the combination of the machines, but for each machine separately and distinctly, as adapted to further and produce the same general result, and capable of a separate and independent use. In short, the one may be auxiliary, but is not indispensable to the use of the other. I deduce this conclusion from the descriptive words of the specification, which show, that each machine is independent of the other in its operations, and from the silence of the patentee as to any claim for a combination. This claim, then, for "the particular method of the application of the principle," although inartificial, may be reasonably interpreted as used distributively, and as expressive of a distinct claim of each particular method set forth in the specification. I deem the patent, then, to be a claim for each distinct machine, as a separate invention, but conducing to the same common end. Of course, if either machine is new, and is the invention of Wyeth, and it has been actually pirated by the defendants, the plaintiff is entitled to maintain a suit therefor under the acts of 1836 and 1837, although not at the common law. *A fortiori*, the same doctrine will apply, if both machines are new, upon the principles of the common law.

But it has been said, that if each of the machines patented is inde-

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pendent of the other, then separate patents should have been taken out for each; and they cannot both be joined in one and the same patent; and so there is a fatal defect in the plaintiff's title. And for this position the doctrine stated in *Barrett* v. *Hall*, (1 Mason R. 473,) and *Evans* v. *Eaton*, (3 Wheat. R. 454, 506,)[1] is relied on. I agree, that under the general patent acts, if two machines are patented, which are wholly independent of each other, and distinct inventions for unconnected objects, then the objection will lie in its full force and be fatal. The same rule would apply to a patent for several distinct improvements upon different machines, having no common object or connected operation. For, if different inventions might be joined in the same patent for entirely different purposes and objects, the patentee would be at liberty to join as many as he might choose, at his own mere pleasure, in one patent, which seems to be inconsistent with the language of the patent acts, which speak of the thing patented, and not of the things patented, and of a patent for an invention, and not of a patent for inventions; and they direct a specific sum to be paid for each patent. Besides; there would arise great difficulty in applying the doctrines of the common law to such cases. Suppose one or more of the supposed inventions was not new, would the patent at the common law be void in toto, or only as to that invention, and good for the rest? Take the case of a patent for ten different machines, each applicable to an entirely different object, one to saw wood, another to spin cotton, another to print goods, another to make paper, and so on; if any one of these machines were not the invention of the patentee, or were in public use, or were dedicated to the public, before the patent was granted, upon the doctrines of the common law the patent would be broader than the invention, and then the consideration therefor would fail, and the patent be void for the whole. But if such distinct inventions could be lawfully united in one patent, the doctrine would lead to consequences most perilous and injurious to the patentee; for if any one of them were known before, or the patent as to one was void, by innocent mistake or priority of invention, that would take away from him the title to all the others, which were unquestionably his own exclusive inventions. On the other hand, if the doctrine were relaxed, great inconvenience and even confusion might arise to the public, not only from the difficulty of distinguishing between the different inventions stated in the patent and specification, but in guarding themselves against fraud and imposition by the patentee, in including doubtful claims under cover of others, which were entirely well founded. In construing statutes upon such a subject, these considerations are entitled to no small weight. At least, they show, that there is no ground, founded in public policy or in private right, which calls for any expanded meaning of the very words of the

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[1] See also Phillips on Patents, p. 214, 215, 216.

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statute, and that to construe them literally is to construe them wisely. It is plain, also, that the act of 1837, ch. 45, in the ninth section, contemplated the rule of the common law as being then in full force, and, therefore, it seeks to mitigate it, and provides, "that whenever, by mistake, accident, or inadvertence, and without any intent to defraud or mislead the public, any patentee shall have, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing invented" (not of different things invented) "of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be good and valid for so much of the invention or discovery" (not inventions or discoveries) "as shall be truly and *bonâ fide* his own; provided it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right as aforesaid." This language manifestly points throughout to a definite and single invention as the "thing patented," and does not even suppose, that one patent could lawfully include divers distinct and independent inventions, having no common connection with each other, or any common purpose. It may therefore fairly be deemed a legislative recognition and adoption of the general rule of law in cases not within the exceptive provision of the act of 1837.

And this is what I understand to have been intended by the court in the language used in *Barrett* v. *Hall*, (1 Mason, 447, 475, 478). It was there said, (p. 475) that "a patent under the general patent act cannot embrace various distinct improvements and inventions; but in such case the party must take out separate patents. If the patentee has invented certain improved machines, which are capable of a distinct operation, and has also invented a combination of these machines to produce a connected result, the same patent cannot at once be for the combination and for each of the improved machines; for the inventions are as distinct, as if the subjects were entirely different." And again, (p. 478) "If the patent could be construed as a patent for each of the machines severally, as well as for the combination, then it would be void, because two separate inventions cannot be patented in one patent." It is obvious, construing this language with reference to the case actually before the court, that the court were treating of a case, where each of the patented machines might singly have a distinct and appropriate use and purpose, unconnected with any common purpose, and therefore each was a different invention. In *Moody* v. *Fiske*, (2 Mason, 112, 119), the Judge alluded still more closely to the distinction, and said: "I wish it to be understood, in this opinion, that though several distinct improvements in one machine may be united in one patent, [yet] it does not follow, that several improvements in two different machines, *having distinct* and independent operations, can be so included; much less that the same patent may be for a combination of different machines, and for

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distinct improvements in each." It is perhaps impossible to use any general language in cases of this sort, standing almost upon the metaphysics of the law, without some danger of its being found susceptible of an interpretation beyond that, which was then in the mind of the court. The case intended to be put in each of these cases was of two different machines, each applicable to a distinct object and purpose, and not connected together for any common object or purpose. And, understood in this way, it seems to me, that no reasonable objection lies against the doctrine.

Construing, then, the present patent to be a patent for each machine, as a distinct and independent invention, but for the same common purpose and auxiliary to the same common end, I do not perceive any just foundation for the objection made to it. If one patent may be taken for different and distinct improvements made in a single machine, which cannot well be doubted or denied,[1] how is that case distinguishable in principle from the present? Here there are two machines, each of which is or may be justly auxiliary to produce the same general result, and is applied to the same common purpose. Why then may not each be deemed a part or improvement of the same invention? Suppose the patentee had invented two distinct and different machines, each of which would accomplish the same end, why may he not unite both in one patent, and say, I deem each equally useful and equally new, but, under certain circumstances, the one may in a given case be preferable to the other? There is a clause in the patent acts, which requires that the inventor, in his specification or description of his invention, should "fully explain the principle and the several modes, in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions." Now, this would seem clearly to show, that he might lawfully unite in one patent all the modes, in which he contemplated the application of his invention, and all the different sorts of machinery, or modifications of machinery, by which or to which it might be applied; and if each were new, there would seem to be no just ground of objection to his patent reaching them all.[2] *A fortiori*, this rule would seem to be applicable, where each of the machines is but an improvement or invention conducing to the accomplishment of one and the same general end.

But let us take the case in another view, (of which it is certainly susceptible), and consider the patent as a patent, not for each machine separately, but for them conjointly, or in the aggregate, as conducing to the same common end; if each machine is new, why may they not both be united in one patent, as distinct improvements? I profess not to see any good reason to the contrary. If they may be so united, and were both new, then upon the principles established

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[1] See *Moody* v. *Fiske*, (2 Mason R. 112, 117, 118.)

[2] Act of 1793, ch. 55, s. 3. Act of 1836, ch. 357.

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in *Moody* v. *Fiske*, (2 Mason R. 112, 117, 118, 119), it is not necessary, in order to maintain a suit, that there should be a violation of the patent throughout. It is sufficient, if any one of the invented machines or improvements is wrongfully used; for that, *pro tanto*, violates the patent. In this view, therefore, the use of the cutter of the inventor, without any use of the saw, would be a sufficient ground to support the present bill, if it were not otherwise open to objection.

We come, then, to the remaining point, whether, although under the patent act of 1793, ch. 55, the patent is absolutely void, because the claim includes an abstract principle, and is broader than the invention; or whether that objection is cured by the disclaimer made by the patentee, (Wyeth) under the act of 1837, ch. 45. The seventh section of that act provides, "that whenever any patentee shall have, through inadvertence, accident, or mistake, made his specification too broad, claiming more than that, of which he was the original or first inventor, some material and substantial part of the thing patented being truly and justly his own, any such patentee, his administrators, executors, or assigns, whether of the whole or a sectional part thereof, may make disclaimer of such parts of the thing patented, as the disclaimant shall not claim to hold by virtue of the patent or assignment, &c., &c. And such disclaimer shall be thereafter taken and considered as part of the original specification, to the extent of the interest, which shall be possessed in the patent or right secured thereby by the disclaimant, &c." Then follows a proviso, that "no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same." The ninth section provides, "that whenever, by mistake, accident, or inadvertence, and without any wilful default or intent to defraud or mislead the public, any patentee shall have in his specification claimed to be the first and original inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be deemed good and valid for so much of the invention or discovery, as shall be truly and *bonâ fide his own;* provided it shall be a material and substantial part of the thing patented, and shall be definitely distinguishable from the other parts so claimed without right as aforesaid." Then follows a clause, that in every such case, if the plaintiff recovers in any suit, he shall not be entitled to costs, "unless he shall have entered at the patent office, prior to the commencement of the suit, a disclaimer of all that part of the thing patented, which was so claimed without right; with a proviso, "that no person bringing any such suit shall be entitled to the benefits of the provisions contained in this section, who shall have unreasonably neglected or delayed to enter at the patent office a disclaimer as aforesaid."

Now, it seems to me, that upon the true construction of this statute,

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the disclaimer mentioned in the seventh section must be interpreted to apply solely to suits pending, when the disclaimer is filed in the patent office; and the disclaimer mentioned in the ninth section to apply solely to suits brought after the disclaimer is so filed. In this way the provisions harmonize with each other; upon any other construction they would seem, to some extent, to clash with each other, so far as the legal effect and operation of the disclaimer is concerned.

In the present case, the suit was brought on the first of January, 1840, and the disclaimer was not filed until the twenty-fourth of October, of the same year. The proviso, then, of the seventh section would seem to prevent the disclaimer from affecting the present suit in any manner whatsoever. The disclaimer, for another reason, is also utterly without effect in the present case; for it is not a joint disclaimer by the patentee and his assignee, Tudor, who are both plaintiffs in this suit; but by Wyeth alone. The disclaimer cannot therefore operate in favor of Tudor, without his having joined in it, in any suit either at law or in equity. The case then must stand upon the other clauses of the ninth section, independent of the disclaimer.

This leads me to say, that I cannot but consider, that the claim made in the patent for the abstract principle or art of cutting ice by means of an apparatus worked by any other power than human, is a claim founded in inadvertence and mistake of the law, and without any wilful default or intent to defraud or mislead the public, within the proviso of the ninth section. That section, it appears to me, was intended to cover inadvertences and mistakes of the law, as well as inadvertences and mistakes of fact; and therefore, without any disclaimer, the plaintiffs might avail themselves of this part of the section to the extent of maintaining the present suit for the other parts of the invention claimed, that is, for the saw and for the cutter, and thereby protect themselves against any violation of their rights, unless there has been an unreasonable neglect or delay to file the disclaimer to each. Still, however, it does not seem to me, that a court of equity ought to interfere to grant a perpetual injunction in a case of this sort, whatever might be the right and remedy at law, unless a disclaimer has been in fact filed at the patent office before the suit is brought. The granting of such an injunction is a matter resting in the sound discretion of the court; and if the court should grant a perpetual injunction before any disclaimer is filed, it may be, that the patentee may never afterwards within a reasonable time file any disclaimer, although the act certainly contemplates the neglect or delay to do so to be a good defence both at law and in equity, in every suit brought upon the patent to secure the rights granted thereby. However, it is not indispensable in this case to dispose of this point, or of the question of unreasonable neglect or delay, as there is another objection, which in my judgment is fatal in every view to the maintenance of the suit in its present form.

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The objection, which I deem fatal, is, that the bill states and admits that the assignment to the plaintiff, Tudor, (made in February, 1832), has never yet been recorded in the state department, according to the provisions of the patent act of 1793, ch. 55, s. 4. That act provides, "that it shall be lawful for any inventor, his executor or administrator, to assign the title and interest in the said invention at any time; and the assignee, having recorded the said assignment in the office of the secretary of state, shall thereafter stand in the place of the original inventor, both as to right and responsibility. It seems a necessary, or, at least, a just inference from this language, that until the assignee has so recorded the assignment, he is not substituted to the right and responsibility of the patentee, so as to maintain any suit at law or in equity founded thereon. It is true, that no objection is taken in the pleadings on account of this defect; but it is spread upon the face of the bill, and therefore the court is bound to take notice of it. It is not the case of a title defectively set forth, but of a title defective in itself, and brought before the court with a fatal infirmity acknowledged to be attached to it. As between the plaintiffs and the defendants, standing upon adverse titles and rights, (whatever might be the case between privies in title and right), Tudor has shown no joint interest sufficient to maintain the present bill, and therefore it must be dismissed, with costs.

Supreme Court of Pennsylvania, March Term, 1841.

Alshouse *v.* Ramsey.

The validity of a verbal promise to pay the debt of another, made in New Jersey by an inhabitant of that state, to an inhabitant of Pennsylvania, is to be determined by the law of New Jersey; and being void by its statute of frauds, it will not support an action in Pennsylvania, though the statute of frauds in the latter state do not prohibit such a promise.

A promise to pay the debt of another, in consideration of forbearance, is a collateral undertaking.

This writ of error to the common pleas of Northampton, brought up a judgment on a case stated, which exhibited the following facts:— The plaintiff had obtained a judgment against one Vanatta, in Warren county, New Jersey, and was proceeding to sue out execution, when the present defendant, in whose employment Vanatta was, agreed with the plaintiff to pay the debt in consideration of three months' delay. The plaintiff urged him to execute a due bill for it, but he refused to do so. The agreement was made in New Jersey, where all the parties lived, except the plaintiff, who had shortly re-

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moved to Pennsylvania. The statute of frauds in New Jersey contains a provision that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant on any special promise to answer for the debt, default, or miscarriages of other persons, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." This clause, taken from the British statute of frauds, has not been retained in the statute of Pennsylvania.

The court below gave judgment for the plaintiff, on the ground, that the validity of the promise was to be determined by the law of Pennsylvania; and also on the ground that if that were otherwise, the promise was an original and not a collateral one. These points were argued here by *Maxwell* for the defendant below on the authority of Story's Conflict of Laws, § 260, 261, 317, 621; 1 Dall. 420; 8 John. 37; 2 T. R. 80; 1 Saund. 211, note 2; 7 T. R. 201; 2 Wils. 94; 1 Pothier, 370. And by *Brown* for the plaintiff, on the authority of Story's Confl. 280; 1 Wheat. R. 98; id. 121, and 3 Wash. 313.

Gibson C. J. There are discrepant texts of the civil law, touching the question whether a foreign contract is subject to the law of the place where it is made, or the law of the place where it is to be executed; and the commentators by no means agree in their attempts to reconcile them. The common law rule is, that the validity of a contract is to be determined by the law at the place of its origin; and those particular cases which have been made the basis of another rule, are to be viewed rather as exceptions. Such is the case of a contract which is to be executed in a foreign country, and which is presumed to be framed on the basis of the law at the place of its execution, (2 Kent, 459; Story's Confl. ch. 8, § 260.) But taking the *locus contractus* on all such cases to be the place of performance, a presumption arises, that the contract is to be performed at the place where it is made, if there be not an express or necessary understanding that it is to be performed elsewhere: and when such understanding is not apparent, the law of the contract is the law of the place where it was made, (3 Burg. Confl. 758; id. 2d vol. 851.) Such are the principles applicable to the subject as they have been stated by the best British and American jurists; and what is there in the case to indicate the existence of an understanding that the contract was to be performed in Pennsylvania? The promise was made in New Jersey, where all the parties but the plaintiff lived; and it was to pay at the end of three months without regard to place. But the creditor had shortly before removed to Pennsylvania; whence an argument, that, as every one must be taken to have intended the

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consequences of his acts, the parties must, in this instance, be taken to have intended that payment should be made at the place of his domicil. But an obligation thus to pay, is not now a legal consequence of the contract. Where the place of payment is not designated, the money must be tendered wherever the debtor is to be found within the realm; but the creditor is not bound to go out of it to seek him, (Co. Lit. 210, b.) The rule of the civil law is narrower still, it being said, that payment must be made where the contract was made, unless it appear by express provision or necessary inference that another place was intended, (3 Burg. Confl. 822.) As, then, there was no stipulation about place in this instance, the debtor was not bound to follow his creditor to Pennsylvania, which, as regards transactions of this nature, stands, in relation to the other states, as a foreign country—a principle decided in *Bucker* v. *Fenley*, (2 Peters, 578,) in which the states of the union were held to be foreign countries, as regards each other, in respect to bills of exchange. The contract, then, must be left to the operation of the particular clause in the New Jersey statute of frauds; and if it be such as that clause requires to be in writing, the plaintiff will derive no advantage from the omission of such a clause in the statute of Pennsylvania.

Decisions in the British statute of frauds are received, perhaps, in all the states as guides in the exposition of enactments on the same basis; and those of them which pertain to the interpretation of the second clause in the fourth section of that statute, are consequently applicable to the same clause in the statute of New Jersey. The rule extracted from them by Mr. Justice Buller, in *Matson* v. *Wharam*, (2 T. R. 80,) is "that if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay the debt, must be in writing, otherwise it is void by the statute of frauds;" and the existence of liability on the part of him who had the benefit of the original consideration, has been the criterion in the subsequent cases. In that case it was said that Lord Mansfield had taken a distinction in *Mawbray* v. *Cunningham*, which was overruled in *Jones* v. *Cooper*, (Cowp. 227,) between a promise before credit given and a promise after it, supposing the former necessarily to be an original undertaking in all cases, and the latter to be a collateral one; the accuracy of which is doubted in Roberts on Frauds, (210.) But in *Peckam* v. *Faria*, (3 Doug. 13; S. C. 12 Eng. C. L. R. 36,) Lord Mansfield himself confirmed the statement of Mr. Justice Buller, and at the same time receded from his original position. It is scarce necessary to say, the report of that case was not published when Mr. Roberts wrote. In no case, then, since *Jones* v. *Cooper*, has it been doubted, that if credit be given to a third person, either a subsequent or precedent promise is a collateral one. Such is the doctrine of *Anderson* v. *Hayman*, (1 H. B. 120,) and such it has continued to be down to *Darnall* v. *Tratt*, (2 Carrington & Payne, 82.) Had the

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courts of New Jersey adopted any other interpretation of their statute, we would be bound by it; but in *Dilts* v. *Parke*, (1 Southard, 219,) and *Hoppock* v. *Wilson*, (id. 149,) the principle of the British decisions seems to have been followed. What, then, are the circumstances of our case? The defendant promised to pay a judgment against another which is still in force. Had the promise been taken in satisfaction of it, he would have made the debt exclusively his own; but the consideration was only to forbear, and the promise was, in the words of the statute, to pay another's debt. The very case was put by the chief justice in *Buckmyr* v. *Darnall*, (2 Ld. Raym. 1085,) "Where a man is indebted," said he, "and I. S., in consideration that the creditor would forbear the man, promises to pay him the debt, such a promise is void unless it be in writing. It is clear, then, that the law of New Jersey rules the case before us, and that the debt is irrecoverable by it.

Rogers and Sergeant, justices, concurred; Huston and Kennedy, justices, were not at the argument.

Judgment of the court below reversed, and judgment rendered for the defendant on the case stated.

Supreme Judicial Court, Rhode Island, April Term, 1841, *at Providence.*

Chapin and others *v.* Providence Washington Insurance Co.

In an action on a policy of fire insurance; it was *held*, that proof of gross negligence on the part of the insured was inadmissible in the defence. *Held*, also, that parol evidence, varying the written application for insurance, was inadmissible.

Action on a policy of fire insurance. The loss happened at the Tiverton Print Works, on January 6, 1840, at midnight, and consisted in the burning of the singe house, and a quantity of cotton goods which it contained. At the trial in the court below, the defence set up was gross negligence on the part of the plaintiffs, in storing singed goods in the singe house over night; and the depositions of William R. Robeson and Jefferson Durfee, both managers of printing establishments at Fall River, were offered upon this point. They deposed, that at the establishments which they respectively managed, it was not usual, and it would be considered imprudent, if not unsafe, to permit singed goods to remain in the singe house over night, on account of the risk of fire. Their singe houses were constructed with reference to being fire proof; and this precautionary measure, owing to the

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liability of fire from the process of singing, was deemed by them highly desirable. Notwithstanding this evidence, the plaintiffs had a verdict, and the defendants appealed to this court. At the second trial, the defendants offered to prove, in addition to the evidence above mentioned, a uniform usage in all other printing establishments in New England, not to leave goods in singe houses over night, on account of the risk by fire. But the evidence was ruled out, as well as that of Robeson and Durfee. The defendants also proposed to prove, that at the time the written application for the policy declared on was made, the defendants objected to underwriting, having already paid several losses on these same print works; and the plaintiffs thereupon represented that the establishment had since been rebuilt and repaired, and was then as complete and safe as any print works in New England; and that it was upon this representation that this policy had been underwritten; that nevertheless there was no store house, either properly constructed or sufficient in size, wherein to store the goods connected with these print works. This evidence was also rejected; and the plaintiffs had a verdict. The defendants moved for a new trial.

Atwell and *Pratt* for the plaintiffs.

Carpenter and *Tillinghast* for the defendants.

THE COURT were of opinion, that the rulings of the judge at the trial were correct. Upon the first point they held, that an attempt to prove a usage at other printing establishments different from that at Tiverton, was but another mode of proving negligence in the plaintiffs. If it was an uniform usage, adopted from good precautionary reasons, not to leave or store goods, after singing, in the singe house over night, it must follow that a departure from this usage, by the plaintiffs, was gross negligence. But proof of negligence was not admissible; therefore proof of this usage differing from the practice of the plaintiffs, was not admissible. Upon the second point, the Court held, that the parol representations of the plaintiffs, though made at the time of the written application for the policy, could have no effect, either as adding to or as qualifying the description of the premises, set forth in the written application and accompanying plan. Evidence in proof of such representations would be inadmissible, and it was, therefore, properly rejected.

New trial denied.[1]

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[1] The Providence Daily Journal, in relation to this decision, says: "The principle decided in the above case, *that negligence in the insured* is not an available defence for the underwriter, may occasion some surprise among persons not conversant with such questions. It may not, therefore, be improper to observe, that the decision was not pronounced, until after a very full and patient investigation."

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Supreme Judicial Court, Massachusetts, March Term, 1841, *at Boston.*

Briggs, Assignee of Loring, *v.* Parkman.

An agreement between the mortgagor and mortgagee of personal property, that the former may remain in possession of the property, is not fraudulent *per se.*

Construction of the insolvent law of Massachusetts in reference to the possession of the property of the insolvent by the messenger, after the warrant has issued, and before the first publication of the notice of issuing it.

This was an appeal from the decree of a master in chancery, in a matter which came up under the insolvent law. The facts were, that the defendant on July 6, 1839, in consideration of a loan of $3500, made by him to Samuel H. Loring, (the insolvent) and the transfer of certain lease-hold estates made by Parkman to Loring, and being the same which the latter had previously assigned to Parkman, took from Loring his note for $5800, payable in 60 days, with interest, secured by a mortgage of the principal part of his stock in trade. During the negotiation and before the mortgage, Loring declined to account with Parkman for the proceeds of sales, stating that he should require them for his own use, but representing that he should not at that season make any large sales, and if he did, he would add to the amount of the mortgagee's security; that he intended to make a new arrangement with a person, who was to be his partner, and who was to advance money; that said person could not pay it then, but would shortly; and that he (Loring) would endeavor to pay one half of the note in thirty days. The nominal amount of the mortgaged property was, per schedule, $9115 42. The parties agreed that Loring might remain in possession and make sales as above, for which he need not account; and that the mortgagee should examine the amount of sales at the end of thirty days, for the purpose, if necessary, of obtaining further security. Loring was described in the mortgage as being of Boston, but in fact resided in Roxbury, and did business in Boston. The mortgage deed was, on 6th July, 1839, recorded by the clerk of the city of Boston, but was not recorded by the clerk of the town of Roxbury until the 15th of the same July. On the 13th of July, the mortgaged property was attached in six several suits by Loring's creditors. The officer, who served the writs, testified that the first writ was handed to him by the plaintiff, who at the time knew of the mortgage. On the 15th July, other attachments were made, and on the same day Loring applied to a master in chancery, as an insolvent debtor, and a warrant was issued forthwith, and possession of the property immediately taken by the messenger, an hour or two before the defendant's mortgage was recorded in Roxbury. After he took possession, the defendant, who was present, made and delivered to the messenger a notice of the mortgage. The first publication of notice by the messenger, pursuant to the second section of the insolvent act,

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was made in the newspapers published in Boston, on the morning of the 16th July. John C. Briggs, the plaintiff, was elected assignee. Upon these facts the assignee contended that the mortgage not having been left for record in Roxbury until after the attachments, and after possession of the property had, with the knowledge of the defendant, been taken by the messenger—the property passed to the assignee, discharged of the mortgage. The assignee further contended, that the agreement made as aforesaid between Loring and Parkman at the time the mortgage was given, that Loring might sell and dispose of the property and apply the proceeds to his own use, constituted in law a fraud, and rendered the mortgage null and void. But the master in chancery allowed the defendant's claim, and this appeal was taken.

Bartlett for the assignee.

Edward Blake for the mortgagee.

WILDE J. It is contended by the assignee, that the agreement as to sales made a secret trust in favor of Loring; and rendered the mortgage null and void. But we think the agreement of the parties, that Loring might sell and dispose of the property, was of the same character with an agreement that a vendor may remain in possession of personal property after a sale; which, in this state, has always been regarded as evidence of fraud only. In this case there is no reason why an explanation should not be made of the circumstances, under which the agreement to sell was made. It is not a necessary consequence of the agreement that the creditors would be defrauded. In fact no creditor is injured by it. It was a conveyance by way of security, and there is no reason for any inference of fraud. In the second place, it is contended by the assignee, that the notice of possession taken by the messenger, which was given to the defendant on July 15th, prevented his completing his title by a subsequent recording of his mortgage in Roxbury. The defendant's mortgage was not recorded in Roxbury, where the mortgagor lived, until thirty minutes past three o'clock P. M., on July 15th, being an hour or two after the messenger had taken possession of the property. The publication by the messenger was not till the next day; and the question is, whether the mortgagee could complete his title by recording his mortgage, after the warrant had been issued directing the messenger to take possession of the property. The true meaning of the statute is very plain, although there is an apparent discrepancy between some of its provisions in relation to the possession of the insolvent's property. We think the fifth section of the insolvent law, which declares, that the "assignment shall vest in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned or conveyed, or which might have been taken in execution on any judgment against him, *at the time of the first publication of the notice of issuing the above mentioned warrant*," must be regarded as limiting the general phraseology of the first and sixth

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sections; and that the mortgage having been duly recorded before the *first publication of the notice*, the property conveyed by it never vested in the assignee. Upon the whole, the court are of the opinion, that the decision of the master in chancery was correct.

Dixon et ux. v. Homer and others

Commissions on the inventory of personal property put in trust, disallowed.

Appeal from a decree of the judge of probate for Suffolk, allowing commissions of two and one half per cent. of the amount of the personal estate committed to the appellees, as trustees under the will of Benjamin P. Homer, and of five per cent. on the income collected.

Edward Blake for the appellants.

Franklin Dexter for the appellees.

Shaw C. J. The commissions of two and one half per cent. *on the inventory* of the personal property in trust, is entirely inadmissible. Commissions should be allowed for services rendered and not in anticipation of services. Nor does any clause in the will justify this allowance. The commissions of five per cent. on the income of the personal and real estate, although a liberal compensation, is not, upon the whole, too large. The case will, therefore, be remitted to the probate court with instructions to disallow the first and allow the second charge.

Ex Parte Washburn.

A writ of prohibition to restrain a court martial from taking cognizance of certain matters of charge against the petitioner, refused.

This was a petition for a writ of prohibition to be directed to the president and members of a court martial, to restrain them from taking any farther cognizance of certain matters of charge against the petitioner. The petition set forth, that the petitioner was the captain of a certain volunteer light infantry company of militia, called the Suffolk Light Guard. That certain charges had been preferred against him by a late private in said company. That the petitioner had been placed in arrest, and a court martial had been assembled for his trial. That the petitioner was charged, (1.) with neglect of duty, in not certifying, as captain of said volunteer company, to the city treasurer of Boston, a list of the persons entitled to the compensation provided in the Revised Statutes, ch. 12, s. 125, and statute 1840, ch. 92, s. 15, on or before the first day of November of each

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year. (2.) Falsely certifying. (3.) Neglect of duty. (4.) Doing an act contrary to the provisions of the Revised Statutes, ch. 12. Of each of which last three charges the specifications were substantially, that the petitioner certified a list of persons to the said city treasurer, as entitled to the compensation provided by law for members of volunteer companies having performed all the active duty required by law, and that said list contained the names of eighteen persons who had not done all such duty. That the petitioner had interposed a plea to the jurisdiction of the said court martial, in which he averred, that the offences whereof he was charged were not cognizable by the said court, but were solely cognizable by the civil tribunals of this commonwealth, and thereupon he prayed the said court martial to dismiss the same, as charging matters which they were not legally competent to investigate. That the said court decided, that they had jurisdiction of the aforesaid offences; and the petitioner was ordered to make his defence. Wherefore he prayed to be relieved, and that a writ of prohibition might be directed to said court martial.

Ivers J. Austin for the petitioner.

John Codman, judge advocate, *contra.*

Shaw C. J. This is a case of the first impression in this commonwealth. A writ of prohibition is a remedy in the last resort, to restrain excessive jurisdiction. It is a writ of great authority, and to be used with great caution. It must be a very clear case to induce the court to grant it. A case came before the court in Worcester a few years since, but the point we are here called upon to decide was not then discussed. It was to prevent the county commissioners of Worcester county from laying out a road, upon the ground that a writ of certiorari had been filed, but as the whole court sat in that county but once in a year, the object of the writ of prohibition was merely to stay proceedings, until the parties could be heard on the certiorari. The court then gave an opinion upon the main question, to which the parties conformed, and consequently no judgment was pronounced upon the prayer for a writ of prohibition. In the present case, the presumption is, that the court martial will not exceed its jurisdiction. We are called upon here to say, the court has no authority to act in the present instance. But we do not think a case has been made out by the petitioner to authorize the interference of this court in the manner prayed for.

The chief justice then went into an extended examination of the statutes in relation to the subject; the conclusion being, that the offences charged were military offences within the jurisdiction of the court martial; and the petition was dismissed.

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Little v. Rogers.

Costs in an action where the defence was usury.

This was a question of costs. The defence to the action was usury, upon ch. 25, § 2 of the Revised Statutes, which provides that whenever in an action on a contract, it shall appear that more than 6 per cent. has been taken, "the defendant shall recover his full costs, and the plaintiff shall forfeit threefold of the amount of the whole interest reserved or taken, and shall have judgment for the balance only, which shall remain due after deducting said threefold amount."

Brigham for the plaintiff.

E. G. Austin for the defendant.

Shaw C. J. delivered the opinion of the court to the effect: (1.) That the defendant was to have his costs taxed in the usual manner, and to have execution for them. (2.) That the plaintiff should have no costs, he not being in fact the prevailing party. (3.) That the counsel for the defendant having a lien on the defendant's execution for attorney's fee, &c. this was to be deducted. (4.) That the balance was to be deducted from the plaintiff's judgment and his execution to go for the remainder.

Supreme Judicial Court, Massachusetts, April Term, 1841, *at Springfield.*

Gorham and another v. Stearns.

A payment or assignment by a debtor, to one of his creditors, is not void as to his other creditors, under *St.* 1838, *c.* 163, § 10, unless it be made by the debtor in contemplation of becoming insolvent and obtaining a discharge under the provisions of that statute.

The stock in trade of a debtor, who was insolvent, was attached by several of his creditors, and he afterwards, on the same day, but not then intending to take advantage of *St.* 1838, *c.* 163, nor even knowing there was such a statute, assigned to another creditor choses in action to secure what he owed him, and also indemnify him against liabilities incurred on said debtor's behalf. On the next day, the debtor made application to a master in chancery for the benefit of said statute, and assignees of his property were afterwards duly appointed. *Held*, that the assignment to said creditor was not void as to the other creditors, within the terms of the tenth section of said statute.

In deciding a case stated by the parties, where the statement sets forth the testimony of witnesses, the court must take such testimony to be true.

This was an action by the assignees of Lester Belden, an insolvent debtor, to recover the avails of book debts and promissory notes transferred by him to the defendant to secure payment to the defendant of

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a debt due to him from said Belden, and also to secure the defendant against a liability which he had incurred by indorsing one of said Belden's notes.

The case was taken from a jury, and submitted to the court upon this statement of facts: "On the 11th of December, 1838, said Lester Belden made application to a master in chancery for the benefit of the act for the relief of insolvent debtors;" (*St.* 1838, *c.* 163,) "and after due proceedings upon this application, the plaintiffs were appointed assignees, at a meeting of his creditors held January 4th, 1839.

"Said Belden, until the spring of 1838, was in partnership with his brother, William Belden. William testified that, when they dissolved their partnership, Lester expressed doubts whether he should be able to pay his debts unless he should dispose of his stock to good advantage. On the 10th of December, 1838, his stock in trade was all attached, at the suit of several of his creditors, upon debts amounting to a large sum. On the same day, and immediately after the attachment of his property, he assigned his books of account and certain notes of hand to the defendant and William Belden. The defendant had a *bona fide* debt against him of about one hundred dollars, and had indorsed his note for five hundred dollars to the Chicopee Bank, some time previous, which note he has since been obliged to pay. Said assignment was on account of this debt and liability, so far as the defendant is concerned; and he has received under it the sum of $

"Said Belden was then (on the said 10th of December) in fact insolvent; but there is no other evidence, except as above stated, that he knew of his insolvency; and he testifies that he did not then intend to take advantage of the insolvent act, and that he did not in fact know of its existence. His insolvency was not known to the defendant."

The case was argued at the September term, 1840, by

R. A. Chapman for the plaintiffs, and by

Ashmun for the defendant.

Dewey J. The plaintiffs' claim arises under *St.* 1838, *c.* 163, § 10, wherein it is among other things provided, that any assignment, by any debtor, of any part of his estate, which he shall make with a view to give a preference to any creditor, &c., if made in contemplation of becoming insolvent and of obtaining a discharge under the provisions of said statute, shall, as to his other creditors, be void, in like manner and to the same effect as conveyances made by any debtor to the intent or whereby his creditors may be delayed, hindered or defrauded, are now by law void as to such creditors; and the assignees, in such case, may by an action in their own names recover from the creditor, so preferred, the property so assigned, or the value thereof, for the use of the other creditors.

It is for the plaintiffs to bring their case within the provisions of this statute, if they would avoid this assignment, and receive the avails of it from the defendant. The burden is on the plaintiffs to show that

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the transfer was made by Belden in contemplation of his becoming insolvent and of obtaining a discharge under the statute.

It is conceded by the defendant, that Belden was in fact insolvent and unable to pay all his debts, at the time of making the transfer to the defendant. But mere insolvency and inability to pay one's debts, do not render void a transfer of property to secure a particular creditor. It must have been made by the debtor in contemplation of his becoming an insolvent debtor, under *St.* 1838, *c.* 163, and of obtaining a discharge under the provisions of that statute. While the debtor, in the ordinary course of business, and without any purpose existing in his mind to avail himself of the statute just referred to, is paying debts due to any of his creditors, or giving them collateral security for the same, such transactions are valid between the parties, and not liable to be set aside as in violation of this statute, although it may eventually be made to appear that, at the time of making such payments, or transfer as collateral security for his debts, the debtor was in fact insolvent and unable to pay his debts. It is the intentional unjust preference of one creditor to the other, after the debtor has the purpose of availing himself of the benefits of the statute, that renders such preference void. The inquiry will therefore necessarily be, in cases like the present, was the transfer in contemplation of insolvency and the obtaining of a discharge under the act of 1838, *c.* 163. . .

Upon the case stated by the parties, we cannot say this fact is shown affirmatively. The fact of an actual insolvency, and the other circumstances under which this assignment was made, are certainly calculated to excite suspicion as to the purposes of the debtor; but the testimony of the debtor is direct and full to the point that he did not, at the time of making the transfer to the defendant, intend to become an insolvent and obtain a discharge under the insolvent act; and that in truth he had no knowledge of the existence of any such statute. If this testimony be true, it is quite certain that the assignment to the defendant was not made by the debtor in contemplation of obtaining a discharge under the provisions of the statute, and the case therefore does not fall within it.[1]

In deciding upon a case stated by the parties, as the present one is, the court must take the testimony of the witnesses to be true, and deal with it as such. If the plaintiffs would have the benefit of the other facts and circumstances disclosed in this case, to control the testimony of the debtor and discredit him, the case should have been submitted to the jury to weigh all the evidence and find the fact. But the case being presented to us upon this testimony, if we give it the full and proper effect which attaches to it, it negatives the unlawful intent to prefer one creditor under those circumstances which this statute prohibits and restrains. Such being the state of the case, the plaintiffs cannot maintain their action.

Plaintiffs nonsuit.

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[1] **New provisions on this subject have been made by *St.* 1841, *c.* 124, § 3.**

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Supreme Judicial Court, Massachusetts, September Term, 1841, at Lenox.

Housatonic Bank and Lee Bank *v.* Martin and another.

Where a mortgage of goods was made, subject to a prior mortgage thereof, and they were attached by the mortgagor's creditors, and replevied by the first mortgagee, and on the trial of the action of replevin, the first mortgage was decided to be void, and judgment was rendered for a return of the goods to the attaching officer; a demand on the officer, by the second mortgagee, ten days after the rendition of such judgment, accompanied with an account of the debt for which the goods were liable, conformably to the Rev. Sts. *c.* 90, § 79, was held to be within a reasonable time, although it was more than two years after the goods were attached.

When goods are attached, which have been conveyed by one mortgage to two persons, to secure a gross sum of money to each, a statement by them to the attaching officer, on their demanding payment of him, is sufficient, under the Rev. Sts. *c.* 90, § 79, if it set forth the gross sum due to each of them.

A debtor, on being called upon by A., one of his creditors, to give security, promised to do so by a mortgage of his personal property: He thereupon directed his attorney to prepare, 1st. a mortgage of his personal property to secure B., another of his creditors; 2d. a mortgage of the same property, subject to the first mortgage, to secure A.; 3d. a general assignment of all his property to B., under *St.* 1836, *c.* 238, subject to the two mortgages: The mortgages and assignment were all executed and delivered on the same evening, in the order in which they were directed to be prepared, A. not knowing of the mortgage to B. till he received the mortgage to himself, and having no knowledge of the assignment, until after it was executed and delivered, and never afterwards assenting thereto: The mortgage to B. having been adjudged void, because it was part of the assignment, and in contravention of said *St.* 1836, it was *held* that A.'s mortgage was not part of the assignment; that it was valid by the common law; and that he was entitled to hold the mortgaged property against the attaching creditors of the mortgagor, in the same manner, and to the same extent, as if the mortgage to B. had not been made.

Knowledge of facts, by a mere stockholder in an incorporated manufacturing company or bank, is not notice to the corporation of the existence of those facts.

Porter and *Byington* for the plaintiffs.
Wells, *D. N. Dewey* and *Robinson* for the defendants.

Sayles *v.* Briggs.

Where, in an action of slander, the declaration contains two counts alleging the utterance of similar words at different times, and a verdict is returned for the plaintiff, on one count, and for the defendant on the other, the counts are not on several and distinct causes of action, so as to entitle the defendant to costs, within the true meaning and intention of Rev. Sts. *c.* 121, § 16.

Wells and *Porter* for the defendant.
Bishop for the plaintiff.

White *v.* Judd.

Under the Rev. Sts. *c* 121, § 36, actual travel of a party to a suit, who resides without the state, can be taxed only from the line of the state, in the usual route from his residence to the place where the court is held.

Bishop for the plaintiff.
D. N. Dewey for the defendant.

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DIGEST OF AMERICAN CASES.

Selections from 3 Sumner's Reports.

ADMIRALTY.

1. Courts of admiralty do not recognise the rule in equity, requiring two witnesses, or one witness and strong corroborative circumstances, in order to overcome the denial in the answer. *Sherwood* v. *Hill*, 127.

2. The admiralty has no jurisdiction over preliminary contracts leading to maritime contracts. *The Shooner Tribune*, 144.

3. The jurisdiction of the admiralty does not depend upon the particular name or character of the instrument, but whether it imports to be a maritime contract. *Ib.*

ASSESSORS.

A memorandum on the books of the town clerk, that certain persons were "sworn to office" as assessors, signed by the clerk, as a justice of the peace, and not as town clerk, is a sufficient certificate of the official oath, according to the requirements of the Statutes of Maine. *Ware* v. *Bradbury*, 186.

CONSTRUCTION.

1. The courts of the United States are not bound, in the interpretation of deeds, by the local adjudications of a particular state. *Thomas* v. *Hatch*, 170.

2. Deeds are always construed according to the force of the language used by the grantor, and the apparent intentions of the parties deducible therefrom. *Ib.*

3. The following words followed the granting part of a deed; "a certain tract of land, of which only five-eighths, common and undivided, is the property of J. D. (the grantor,) and is hereby conveyed with the exceptions of about ten acres of land conveyed by deed to W. H., &c. &c., and also one acre conveyed by deed to R. &c., and also a strip of land, &c., containing one-eighth of an acre, &c., which exceptions are reserved out of the five-eighths as aforesaid;" *Held*, that the grantor conveyed nothing in the excepted parcels, but five undivided eighths in the remainder of the tract. *Ib.*

4. A boundary "on a stream," or "by a stream," or "to a stream, includes the flats, at least to low water-mark, and in many cases to the middle thread of the river. *Quære;* how it would be where the boundary was "on the bank" of a river. *Ib.*

5. A boundary on the bank of a river, referring to fixed monuments on the bank, limits the grant to the bank, and excludes the flats. *Ib.*

6. Where there was a deed from the state, conveying all the right, title and interest of the state unto a "lot of land numbered ten, as was surveyed by Park Holland, in the year 1801," which deed in the specific boundaries, bounded the lot on one side to a stake, and thence "to the bank of the river, thence by the bank of the river to the first mentioned bounds;" and in the plan the lot was laid down bounded on the river; *Quære*, whether taking the whole description together, it did not convey the lot to the stream, and include the flats. *Ib.*

7. If a plan is referred to in a deed, and the land, according to that plan, is bounded on a river, with no other specific boundaries than the river, *semble*, that the flats will pass, by operation of law, with the upland. *Ib.*

8. A plan of a tract of land, which is referred to in a deed, for purposes of description, is to be treated, as if it were annexed to, and made part of the deed. *Ib.*

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CONTRACT.

1. If a contract or order, under which goods are to be furnished, does not specify any time at which they are to be delivered, the law implies a contract, that they should be delivered within a reasonable time; and no evidence will be admissible to prove a specific time, at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument. *Cocker* v. *Franklin Hemp and Flax Manuf. Co.* 530.

2. The question of reasonable time is determined by a view of all the circumstances of the case; and parol evidence of the conversations of the parties may be admitted to show the circumstances under which the contract was made, and what the parties thought was a reasonable time for performing it. *Ib.*

EQUITY.

1. The answer of a defendant in another suit, though good evidence against him, is not admissible against a co-defendant. *Dexter* v. *Arnold*, 152.

2. The bill did not state, in what state the parol agreement for copartnership was actually made, though it might be taken from the allegations to have been made either in Massachusetts, Maine, or New Hampshire. *Semble*, that this would be a fatal omission, if properly presented to the court. *Smith* v. *Burnham*, 435.

3. A court of equity will not interfere to direct a specific performance of an agreement, where the terms of the contract are not definite and full, and its nature and extent are not made out by clear and unambiguous proofs. *Ib.*

4. A conveyance of certain premises, absolute in its form, but admitted, by the answer in chancery, to be a mortgage security merely for certain debts, was treated as a valid security to the extent of those debts, and the premises, subject to this charge, were held to be liable to judgment creditor of the original grantor. *Chickering* v. *Hatch*, 474.

5. The old cases with regard to maintenance and champerty go farther than would be now sustained in courts of equity. *Baker* v. *Whitney*, 476.

6. In matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments of answers. *Smith* v. *Babcock*, 583.

7. But they are slow to allow amendments in material facts, or to change essentially the grounds taken in the original answer. *Ib.*

8. Where the object is to let in new facts and defences, wholly dependent upon parol evidence, the reluctance of the court to allow amendments is greatly increased, since it would encourage carelessness and indifference in making answers, and open the door to the introduction of testimony manufactured for the occasion. *Ib.*

9. But where the facts sought to be introduced are written papers or documents, which have been omitted by accident or mistake, there the common reason does not apply in its full force; for such papers and documents cannot be made to speak a different language from that, which originally belonged to them. *Ib.*

10. The whole matter is in the discretion of the court; but, before the amendments to the answer are allowed, the court should be satisfied, that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to. *Ib.*

EVIDENCE.

1. The general rule at law is, that no evidence shall be admitted, but what is or might be under the examination of both parties. *Gass* v. *Stinson*, 98.

2. *Semble*, a deposition may be admitted in equity, where the direct interrogatories have been fully answered, and death or some inevitable accident occurs, which, without fault on either side, prevents a cross examination. *Quære*, how would this be law. *Ib.*

3. The direct examination of a witness was taken by a commissioner, with the consent of both parties. No cross interrogatories were ever filed; and the witness lived several months after the direct examination was begun; there was no proof, that, if the cross interrogatories had been filed, they might not have been answered. *Held*, that

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the omission to file the cross interrogatories was at the peril of the party, and that the deposition is admissible. *Ib.*

4. A witness, whose books are out of his reach, so that he cannot have access to them, may testify to their contents. *Ib.*

5. Papers from the probate records, showing that a person was treated by the probate court as the lawful guardian of a *non compos*, will be received as *primâ facie* evidence, after a long lapse of time, to supply the direct proof of a probate appointment. *Thomas* v. *Hatch*, 170.

FISHERIES.

1. By the Act of 1793, ch. 52, no registered ship or vessel can, while she remains registered, engage in the whale fisheries; but she must surrender her register, and be enrolled and licensed for the fisheries. *U. States* v. *Rogers*, 342.

2. The Act of 1835, ch. 40, provides, that "if any one or more of the crew of an American ship or vessel, on the high seas, &c., shall endeavor to make a revolt," &c., he and they shall, on conviction, be punished as provided in the Act. *Held*, that a ship, engaged in a whaling voyage, without having surrendered her register, or taken out an enrollment and license, pursuant to the Act of 1793, ch. 52, was not an American ship, within the purview of the Act of 1835, ch. 40, and that an indictment would not hold, under this Act, against the crew, for an endeavor to make a revolt. *Ib.*

INJUNCTION.

1. In common cases, it is of course to dissolve an injunction, if the answer denies the whole merits; and the plaintiff will not be permitted upon a motion to dissolve the injunction, to read affidavits in contradiction to the answer. It is otherwise in cases of special injunctions. *Poor* v. *Carleton*, 70.

2. The continuance or dissolution of a special injunction, after the coming in of the answer, depends upon the sound discretion of the court. *Ib.*

3. The answer must positively deny the material facts of the bill, and the denial must be grounded on personal knowledge, not merely on information and belief, in order to support an application to dissolve a special injunction. *Ib.*

4. In cases of irreparable mischief, the dissolution of an injunction rests in the sound discretion of the court, whether applied for before or after answer. Affidavits may, after answer, be read by the plaintiff to support the injunction, as well as by the defendant to repel it; and this, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer. *Semble*, the practice on this subject is more liberal in America than in England. *Ib.*

JURISDICTION.

1. In cases of concurrent jurisdiction in the state court and the circuit court of the United States, the latter has no discretionary authority to stay, or control the suit, or to refuse jurisdiction in order to prevent a collision between the two courts. *Wadleigh* v. *Veazie*, 164.

2. It is not sufficient to give jurisdiction to the courts of the United States, to allege, that a party is an alien. There must also be an allegation, that he is a subject or citizen of some one foreign state. *Wilson* v. *City Bank*, 422.

3. Nor is it sufficient to give jurisdiction, where a corporation is a party, to allege, that all the corporators are citizens of the United States. There must be an allegation, that the corporators are all citizens of some one or more state or states of the United States. *Ib.*

4. To entitle a corporation to sue in the circuit courts of the United States, all the members of that corporation must be citizens of some state of the United States, other than that state, of which the defendant is a citizen. And the averments must so be made in the declaration, in order to entitle the court to take jurisdiction of the case. *Bank of Cumberland* v. *Willis*, 472.

MORTGAGE.

1. Courts of equity follow the analogies of the law, as to the limitation of the right to redeem a mortgage. *Dexter* v. *Arnold*, 152.

2. The general rule in equity is, that twenty years exclusive possession by a mortgagee, is a bar to the equity of redemption. *Ib.*

3. Courts of equity will allow a re-

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demption of a mortgage, under peculiar circumstances, even after a lapse of more than twenty years. *Ib.*

4. The acts of mortgagee, within twenty years, admitting the title to be a mortgage, are sufficient to keep open the equity. So, also, are solemn recitals and acknowledgments of the mortgage, in deeds and other written transactions with third persons. *Ib.*

5. *Quære;* whether parol admissions, within twenty years, are sufficient to keep open the equity. *Ib.*

6. There is no instance of a decree being made upon parol evidence, in favor of the party seeking to redeem. *Ib.*

PARTNERSHIP.

1. *Quære*, if the payments and credits made by one partner after a dissolution of the partnership, and joint agency, and after a new individual agency in him, can be applied to the extinguishment of a debt of the partnership, unless circumstances justify the presumption, that the partnership debt has been adopted as his individual debt. *Gass* v. *Stinson*, 99.

2. The natural presumption is, that a partner paying a sum of money to his private creditor, who is also a creditor of the partnership, means to pay it on his private account, unless circumstances vary this presumption. *Ib.*

3. A promissory note on interest cannot be treated as a mere memorandum of an advance for a purchase upon a copartnership account. *Smith* v. *Burnham*, 435.

4. A parol agreement to become copartners in the business of purchasing and selling lands and lumber in the state of Maine, is a parol contract respecting an interest in lands, and void by the Statute of Frauds, so that it will not be enforced by a court of equity. *Ib.*

SHIPPING.

1. A master shipped a minor, who had run away from another vessel, under circumstances amounting to notice that the shipment was unauthorized by, and against the will of the father; *Held*, that this was a tort of the master for which the ship-owners were responsible in damages. *Sherwood* v. *Hall*, 127.

2. The measure of damages was held in this case to be the amount of the wages, which the minor was earning on board the other vessel at the time of the abduction, down to the termination of the voyage; and $50 besides to cover extra expenses and losses. *Ib.*

3. Where the voyage, commenced under this agreement, was broken up by the ship-owners before its completion; *Held*, that the measure of damages for which they were liable to the other party, was what would be a compensation for the actual loss and expense incurred about the voyage, the labor and services in procuring another vessel, and the reasonable disbursements in the present suit, beyond the taxed costs. *The Schooner Tribune*, 144.

4. A person, once master of a vessel, will be deemed to continue in that character, until displaced by some overt act or declaration of the owners. *Ib.*

5. The power of the master to make contracts about his vessel, in the home port of the owners, is limited. *Ib.*

6. Where goods are shipped under the common bill of lading, it is presumed, that they are shipped to be put under deck, as the ordinary mode of stowing cargo; unless there is a positive agreement to the contrary, or circumstances from which this may be inferred. *Vernard* v. *Hudson*, 405.

7. Where goods were shipped under the common bill of lading, at an under-deck freight, and finally delivered without damage; *Held*, that the ship-owner was entitled only to a deck freight. *Ib.*

VERDICT.

A verdict was set aside on the ground, that it could not have been found by the jury, without either disregarding the instructions of the court in point of law, or giving an effect to evidence, which, in a just and legal sense, was not proper. *Thomas* v. *Hatch*, 171.

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INTELLIGENCE AND MISCELLANY.

Bar-book of Suffolk County. Among the donations, at a late meeting of the Massachusetts Historical Society, was one from Mr. Attorney-General Austin, which is described in the following note from that gentleman to Rev. Dr. Harris, the librarian. "Dear Sir — The manuscript volume, which accompanies this note, purports to contain rules agreed to by the barristers and attorneys of the county of Essex, March term, 1768, which, with several other matters therein, are in the hand-writing of John Adams, second president of the United States. The book itself is the bar-book of Suffolk county, commencing on the 3d of January, 1770, and ending in March, 1805. It is the official record of the association of the lawyers of this county during that long period, and amply vindicates their most confidential proceedings from aspersions which have been frequently and publicly cast upon them. It does more. It demonstrates their very earnest solicitude to preserve the purity of justice, and to elevate the intellectual and moral worth of that whole class of men, lawyers as well as judges, who have any share in its administration. The association was continued till [1836], when its members, yielding to the force of public sentiment, saw fit voluntarily to dissolve it. Having at that time had the honor to be the president of the suffolk bar, this book, for some purpose connected with the association, came into my possession, and has so remained ever since. I know not that it has any owner, or that it is of value to any individual citizen. But the antiquary and the historian may perhaps feel disposed to consult its pages, and the descendants of the numerous professional men whose names are inscribed there, will find reason to be proud that their fathers were lawyers. Not knowing how better to dispose of this curious relic, I ask permission of the Massachusetts Historical Society to deposit it in their archives, as a place most suited to its careful preservation."

Removal of the English Law Courts. Upon a recent occasion in parliament, the solicitor-general moved for a committee to consider the expediency of a building in the neighborhood of Lincoln's-inn for the courts of law and equity which now sit in Westminster-hall. The convenience of the attorneys and solicitors, he said, was the convenience of the clients. If the courts were now first to be built, no one would think of building them on a site so remote from the seats of business as Westminster-hall. Originally there was little inconvenience in that site, because the business was then comparatively small, and the pleadings were oral; but at this day the business had become immense, and the pleadings being reduced to writing, must be prepared by the practitioners in their own chambers. A bill was now in progress for the creation of new courts, which would occasion a necessity for new buildings; so that this time was peculiarly fit for the consideration of the subject. At present, while the courts of chancery were at Westminster, where they always sit during term, all the business done out of court by the junior counsel was suspended; and their draughts of pleadings, and their attendance at the masters' offices, were thus confined to the vacations. Solicitors, in all courts, were taken away from their chambers, to the neglect of their in-door business, or obliged to delegate their court business to their clerks. The number of common law courts all sitting together at

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the same time was much increased; trials at *nisi prius* were going on before one of the judges of each court, while the rest were sitting in bank; and Westminster hall and its suburbs had become wholly inadequate to the accommodation of all these tribunals. The inconvenience occasioned by the proposed removal, to barristers attending the house of lords, would be confined to a very few individuals, and to a small number of days in the year; and the barristers attending committees of the house of commons and of the privy council were not numerous, nor was the business there of such a nature as would make it at all an object to practitioners to have facilities for repeatedly passing from one court to another in the course of the same day. The only argument against the proposed measure was old association, an argument not to be slighted, but yet not to be urged as a counterpoise to the great advantages he had before specified. Various places had been suggested where the new building might be erected. The attorneys had submitted a plan to Mr. Barry for the erection of new courts; and it was found that the centre of Lincoln's Inn Fields would afford every facility for that purpose. A splendid building could be erected in that space, which would afford, in addition to all the courts, a place for the preservation of the records, rooms for counsel, for witnesses, and for consultation on the ground-floor; so that the bar would never have occasion to leave the building in passing from one court to another; and, on another floor, would be a room for the masters in chancery, &c. There would remain an area of one hundred yards around the building, to be planted with shrubs and trees. It was proposed that the expense of executing this work should be defrayed from the suitors' fund of the court of chancery, and from the fee-fund of the common law courts, of which a surplus of £20,000 was annually paid into the consolidated fund. Thus the work would be executed without any addition to the public burdens. Sir Eardley Wilmot seconded the motion, which was supported by Mr. Hume, and agreed to without a division.

Speculators in Timber Lands. At the last session of the Maine legislature, certain resolutions were adopted, providing for an equitable settlement of any claims held by the state against individuals for timber lands sold since the first day of January, 1834. It is provided that the justices of the district courts be appointed commissioners, whose duty it shall be on application made within one year from the passage of these resolves, by any person indebted to the state for the purchase of lands sold since the first day of January, 1834, or who has become assignee to any such purchaser, and having an equitable claim against the state, praying to be relieved from the payment of notes due to the state, and from obligation to perform certain settling duties, either wholly or in part, and asking for a conveyance of the land originally contracted to be sold, either wholly or in part, to proceed and hear and examine, on oath or affirmation, every question and all facts relative to said applications. And the commissioners are empowered, after a full hearing and examination of such cases, to make a written report to the land agent, directing him to settle and adjust the claims in such way and manner and upon such terms, as to them shall seem equitable, just and expedient; and the commissioners may further direct such costs to be paid by said applicants, on account of expenses incurred by the state, as to them shall seem reasonable and proper, to be paid before the execution by the land agent of the award.

The land agent is authorized, upon the report made to him in writing by the commissioners or a majority of them, to cancel and surrender any notes, securities, or obligations in his hands and to discharge mortgages, give releases and make and execute conveyances, in such way and manner, and upon such conditions only, as shall be prescribed in the report of the commissioners. The justices of the district courts, who are thus made commissioners for these purposes, are Ezekiel Whitman, of Portland; Frederic H. Allen, of Bangor; Anson G. Chandler, of Calais, and Asa Reddington, of Augusta. They have given notice that they will meet at the court house in Bangor on the 12th of next July, for the purpose of performing the duties contemplated in the resolves of the legislature. It is necessary for each applicant to file with the land agent a brief statement of

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his case, and all the documents and written evidence in each case is to be deposited in the land office. It is made the duty of the attorney-general to act in behalf of the state in all these cases.

Obituary. Died in Pittsburgh, Penn., April 7th, Hon. Trevenion B. Dallas, one of the judges of the district court for Alleghany county. The Pittsburg Gazette says of the deceased: "He has left a widow and a large family of children to mourn his loss, and a large circle of acquaintances will feel his decease as that of a dear and cherished friend. Though we have differed with him widely in our political predilections, yet we consider, that in his death, society has lost a valuable member, the judicial bench an upright and improving incumbent, and his family a kind husband and an affectionate parent."

In Dover, N. H., April 25th, Hon. Daniel M. Durrell, aged 72. He was, apparently, in the enjoyment of good health, had ridden out on horseback during the day, and was seen walking the streets until late in the afternoon, with his usual vigor. About six o'clock he was found dead in the yard near his residence, having to all appearance died without a struggle. He was one of the most opulent and distinguished citizens of Dover, and had filled various offices of trust and importance. He was a graduate of Dartmouth college of the class of 1794, and commenced the practice of law, in Dover, in 1797. From 1807 to 1809 he was a member of congress from New Hampshire; he afterwards represented Dover in the state legislature, and in 1814 was appointed chief justice of the first district court of common pleas, which office he filled until the judiciary system was changed, and the court abolished. In 1830 he was appointed United States district attorney for New Hampshire, and held the office until 1834.

Supreme Judicial Court of Maine. We have received from an attentive correspondent at Portland, notes of the decisions at the April term of this court; too late, however, for their insertion in the present number. The court was in session two weeks. The whole number of cases set down for argument was 66. There were argued at the bar 33 cases, and 7 in writing. John Appleton, Esq., the new reporter, entered for the first time upon his duties at this term. We believe, that under the operation of the recent amendment of the constitution of Maine, limiting the judicial tenure to seven years, the Chief Justice and Mr. Justice Emery go out of office the present year. There are various speculations in regard to the new judges. It is supposed by many, that neither of the present incumbents will be reappointed

Lawyers in Maine. We learn from the Maine Register for this year, that the whole number of lawyers in that state is 437. Of these the county of York has 34; Cumberland, 66; Lincoln, 49; Hancock, 12; Washington, 29; Kennebec, 59; Oxford, 26; Somerset, 25; Penobscot, 74; Waldo, 29; Franklin, 20; Piscataquis, 10; Aroostook, 4. There are more lawyers in Bangor than any other town, namely, 48. Portland, which comes next, has 37. The population of Portland is 15,218; of Bangor, 8,634. The highest salary paid in Maine to county attorneys is 400 dollars. Those in Cumberland and Penobscot have this amount. Those in Franklin, Piscataquis and Aroostook, have 100 dollars each.

Severe Retort. When Fox's India Bill was under discussion in parliament, Lee, the attorney-general, a warm partisan of Fox, defending his invasion of "the chartered rights" of the East India Company, very imprudently and most unjustly asserted, that "a charter was only a scroll of parliament with a piece of wax dangling to it." Dundas, in reply, to expose the radical and shocking invasion of private rights, proposed by Fox and Lee, asked; "What was the great harm of hanging an attorney-general? An attorney-general was only a carcase dangling at the end of a rope."

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MONTHLY LIST OF INSOLVENTS.

Athol.
Richardson, John B. Carriage-painter.
Bedford.
Lane, Abner B.
Boston.
Clarke, John, Laborer.
Cleaves, Luther, Trader.
Coit, Gardner L. Clerk.
Freeman, Francis.
Hersey, Winthrop D. Grain-dealer.
Macomber, Stephen, Trader.
Nettleton, Charles L. Trader.
Titcomb, George, Teacher.
Cambridge.
Learned, Gilman P. Teamster.
Concord.
Alcott, Amos B. Gentleman.
Collier, Asa C. Jeweller.
Danvers.
Tufts, Joseph, Tanner.
Duxbury. [*On petition of Gideon Harlow.*]
White, Bailey, Yeoman.
Easton.
Dunbar, Braveo C.
Dunbar, Thomas J.
Essex.
Foster, Thomas, Shipwright.
Hooper, Thomas T.
Falmouth.
Herendeen, Sanford, Cooper.
Framingham.
Greenwood, Abel, Millwright.
Gloucester.
Knowlton, Barnett, Yeoman.
Nash, Lonson D. Trader.
Hamilton.
Adams, Samuel 3d, Cordwainer.
Lee.
LeBarnes, George G. Carpenter.
Sizer, Samuel,
Lowell.
Kent, James, Trader.
Lynn.
Brackett, Edwin, Trader.
Marblehead.
Avery, Samuel, Esquire.
Green, Joseph W. Merchant.
Milford.
Chapin, Adams, Cordwainer.
Nantucket.
Smith, Sepherous, Trader.
Northbridge.
Holbrook, Sylvanus, Manufacturer.
Salem.
Clark, John W. } Traders,
Dodge, Elizaphen, } Copartners.
Hunt, John D. Coach-maker.
Moulton, Josiah Jr., Yeoman.
Sturbridge.
Ellis, Gaius, Tavern-keeper.
Templeton.
Bennett, Hiram W. Jeweller.
Blakeley, Edwin D. Blacksmith.
Watertown.
Pierce, Otis, Teacher.
Worcester.
Brigham, Leonard, Merch't Tailor.
Henry, Patrick.
Rich, Peter Jr., Laborer.

NEW PUBLICATIONS.

The Maine Register and National Calendar, for the year 1841, has just been published in Augusta and Portland. It contains several errors, but as few, perhaps, as are usually to be found in such works. The effort to give "valuable information" is sufficiently amusing in some instances; and the editor exhibits a laudable desire to improve all the spare room for this purpose. Thus, after giving the civil government of Maine, a small space being unoccupied, the reader is informed, that "the valley of the Mississippi is said to be the greatest *coal field* in the world, covering a space of 900,000 square miles;" also, that the present population of London is about 2,000,000, with various other statistical items in regard to the waste lands in Ireland; the number of Frenchmen in London, &c.

The table of contents of the English Law Magazine, for May, is as follows: 1. Copyright in Tenures; 2. The Law of Compromise or Family Arrangement; 3. Life of Sir Samuel Shepperd; 4. Law of Guarantee; 5. On the Forms of Mortgages; 6. Tenant, Right in the North of England; 7. The New Local Courts Bill; 8. Hints for the Conduct of Causes and the Examination of Witnesses; 9. Burge on Supreme Courts of Appeal; 10. Digest of Cases in all the Reports; 11. Events of the Quarter, List of New Publications, &c.

The Rights, Duties, and Obligations of the owners, masters, officers, and mariners of ships in the merchant service, by George T. Curtis, is the title of a new work [illegible] is nearly ready for publication in Boston.

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THE LAW REPORTER.

JULY, 1841.

REMARKABLE TRIALS. — No. II.

CASE OF THOMAS OLIVER SELFRIDGE.

On the fourth day of August, 1806, Charles Austin, a student in Harvard University, was shot dead on the public exchange in Boston, by Thomas O. Selfridge, Esq., a member of the Suffolk bar. Mr. Selfridge was arrested on the same day, and committed to prison to take his trial for murder before the supreme judicial court. In December following, the grand jury, of which Thomas H. Perkins was foreman, having been very carefully charged by Mr. Chief Justice Parsons on the law of homicide, returned into court an indictment for manslaughter, to which, on his arraignment, the prisoner pleaded not guilty. He was then admitted to bail in the sum of two thousand dollars for his appearance from day to day; and the trial commenced on December 23, 1806, before Mr. Justice (afterwards Mr. Chief Justice) Parker. The cause was conducted for the Commonwealth by James Sullivan, attorney general, and Daniel Davis, solicitor general; and for the defendant by Christopher Gore and Samuel Dexter.

The unfortunate occurrence which was the occasion of this trial, arose out of excited political feeling, and a jealousy on the part of the accused, of his professional reputation, which, he thought, had been impugned by the father of the deceased. The original causes of the difficulty were these: One Eben Eager had been employed by a committee, of which Benjamin Austin was chairman, to provide a dinner on Copp's Hill for a democratic celebration on the 4th of July. There being some difficulty in the settlement of the bill, Mr.

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Selfridge, at the request of Mr. Eager, commenced a suit. The matter was subsequently settled, but Mr. Selfridge understanding that Mr. Austin had made some reflections upon his professional character, sent to him a note by a friend in which he said:—

You have to various persons, and at various times and places, alleged, "that I sought Mr. Eager, and solicited him to institute a suit against the committee (of which you were chairman) who provided the public dinner on Copp's Hill, on the fourth of July," or language of similar import. As the allegation is utterly false, and if believed, highly derogatory to any gentleman in his professional pursuits, who conducts with fidelity to his clients, integrity to the courts, and with honor to the bar; you will have the goodness to do me the justice, forthwith, to enter your protest against the falsehood, and furnish me with the means of giving the same degree of publicity to its retraction, that you have probably given to its propagation. I had hoped the mention of this subject to you yesterday, would have spared me the trouble of this demand; that twenty-four hours would have enabled you, without difficulty, to have obtained correct information, as to the fact; and that a just sense of propriety would have led you to make voluntary reparation, where you had been the instrument of injustice:—The contrary, however, impresses me with the idea, that you intended a wanton injury from the beginning, which I never will receive from any man with impunity.

The result of this communication not being satisfactory to Mr. Selfridge, he sent another note to Mr. Austin by the same friend, as follows:—

Sir,—The declarations you have made to Mr. Welsh are jesuitically false, and your concession wholly unsatisfactory.

You acknowledge to have spread a base falsehood, against my professional reputation. Two alternatives, therefore, present themselves to you; either give me the author's name; or assume it yourself. You call the author a gentleman, and probably a friend. He is in grain a liar and a scoundrel. If you assume the falsehood yourself to screen your friend, you must acknowledge it under your own hand, and give me the means of vindicating myself against the effect of your aspersion. A man, who has been guilty of so gross a violation of truth and honor, as to fabricate the story you have propagated, I will not trust; he must give me some better pledge than his word, for present indemnity, and future security. The positions I have taken, are too obviously just to admit of any illustration, and there is no ingenuous mind would revolt from a compliance with my requisitions.

This communication, like the other, being attended with no satisfactory result, Mr. Selfridge caused the following advertisement to be inserted in the Boston Gazette:—

"Austin Posted."

Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct, in a certain cause, and having refused to give the satisfaction due to a gentleman in similar cases— I hereby publish said Austin as a coward, a liar, and a scoundrel; and if said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proof. Thomas O. Selfridge.

Boston, 4th August.

P. S. The various Editors in the United States are requested to insert the above notice in their journals, and their bills shall be paid to their respective agents in this town.

Mr. Austin obtained knowledge that he was to be posted, and published in the Independent Chronicle of the same morning, the following note:—

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Considering it derogatory to enter into a newspaper controversy with one T. O. Selfridge, in reply to his insolent and false publication in the Gazette of this day; if any gentleman is desirous to know the facts, on which his impertinence is founded, any information will be given by me on the subject.

Boston, August 4. BENJAMIN AUSTIN.

☞ *Those who publish Selfridge's statement, are requested to insert the above, and they shall be paid on presenting their bills.*

On the morning that these advertisements appeared, there was a great deal of excitement in the city, and a general expectation that there would be a personal collision between the parties. Mr. Selfridge himself was informed by a friend, on that morning, that he would be attacked by some one, and he gave the witness to understand that he had been previously notified, or was ready; and when another friend asked him how he and Austin came on, he smiled and said he understood Austin had hired or procured some one or some bully (the witness did not recollect which expression was used) to attack him. This was a few moments before the encounter took place.

At about one o'clock in the afternoon, Mr. Selfridge left his office on the north side of the old state house, and proceeded leisurly down State street towards Suffolk buildings, on the corner of Congress street. When he had arrived about opposite to what was then called Half Court square, now Congress square, and was nearly in the middle of the street, Mr. Charles Austin, who was standing on the sidewalk, before Townsend's shop, between Congress street and Half Court square, advanced towards him with a walking stick in his hand, with which he gave Mr. Selfridge several blows upon the head. As the first or second blow was descending, the latter fired a pistol, and Mr. Austin expired in a few moments, although he struck several blows after he was shot. The ball entered his body a little below the left pap; its course was oblique and diagonal with the trunk of the body, inclining upwards towards the left side; it passed through the lungs, but not the heart, for it lodged above it.

There was some discrepancy between the witnesses at the trial as to whether a blow was struck before the pistol was fired. John M. Lane testified, that he was standing at the door of his shop on the north side of State street, between Wilson's lane and Exchange lane, (now Exchange street,) looking across the street, and there saw the defendant standing on the brick pavement. His face was towards the witness; young Mr. Austin was standing in front of the defendant. The defendant stood with his arms folded, or rather crossed horizontally, the right arm being uppermost, and in that position he fired the pistol. The deceased turned round instantly and gave the defendant several strokes before he fell.[1] Edward Howe testified, that in passing

[1] This witness was evidently mistaken in several statements, and was directly contradicted by Dudley Pickman, who testified, that he was in Lane's shop at the time, and Lane was sitting within the shop. *After the pistol shot was heard* Lane got up and went to the door and the witness followed him. Two other witnesses, however, testified that Lane was standing at the street door when the pistol was fired.

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from Townsend's shop to the east end of the old state house he met Mr. Selfridge about two rods from Townsend's shop. He had on a frock coat and his hands were behind him. After passing on six or eight steps the witness heard a loud talking behind him. He immediately turned and the first thing he saw was Mr. Selfridge's hand with a pistol in it, the pistol was immediately discharged. The instant *afterwards* he saw the person shot at *step from the side walk* and strike Mr. Selfridge several very heavy blows on the head. Ichabod Frost testified, that he was standing opposite Mr. Townsend's shop, and hearing the report of a pistol, turned his eyes and saw a smoke; at that instant the deceased was *stepping from the side walk* with his stick up.

These were witnesses called by the government. The witnesses called by the defendant gave a different statement. John Bailey was at work in Mr. Townsend's shop. He saw Charles Austin pass down the street, and afterwards saw him pass up; he returned and took his stand directly in front of the shop. He had a stick in his hand of an unusual size. Witness soon afterwards saw the defendant passing down the street; he had his right hand in his pocket, his left hanging down. When Mr. Selfridge first came in sight the deceased was standing on the side pavement in front of the shop in conversation with Fales, a college friend, and playing with his cane. The moment the defendant caught his eye, he left Fales, and stepped off the brick pavement into the street. He moved with a quick pace, and while going shifted his cane from his left to his right hand. After he had got off the pavement, he turned and went towards the defendant with his cane raised up. They met about seventeen paces from the place the deceased had left. The deceased held the cane by the upper or largest end. The cane was uplifted and actually descending to give a blow at the time the pistol was discharged. The blow was not struck till after the pistol was fired. Zadock French was near Townsend's shop. He saw Mr. Selfridge going from the north-east corner of the old state house towards the Branch Bank (situated between Congress and Kilby streets, a little beyond Suffolk buildings.) He walked very deliberately with his hands behind him or under his coat. When opposite the witness, he was a little south of the middle of the street. All at once, he turned or wheeled towards the witness. At the same instant, Charles Austin stept off from the brick pavement and walked with a very quick step towards him, having his cane raised. Mr. Selfridge, as he turned towards the witness, presented a pistol as if to defend himself. It appeared to the witness that Austin's breast went against the muzzle of the pistol. Austin struck the defendant a blow on the head and the pistol was fired at *the same instant.* Richard Edwards was standing with Mr. French. He saw Mr. Selfridge passing slowly in the direction of the Branch Bank. Immediately young Austin passed from behind witness towards the middle of the street. By the time witness had turned, Mr.

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Austin had got nearly to the middle of the street, and he saw Mr. Selfridge immediately before him, with his arm extended and a pistol in his hand. Mr. Austin had a cane in his hand, and at the instant the pistol was discharged, witness saw the cane elevated, but he was not able to say whether it was descending to strike a blow, or recovering from striking one. After the pistol was discharged, the deceased struck several blows with the cane. John Erving saw young Austin with his cane raised moving at a quick pace towards Mr. Selfridge, who had his left arm lifted as if to parry a blow; he took a pistol from his right hand pocket and fired under his arm. The first blow and the firing of the pistol seemed to be at the same instant. Lewis Glover testified, that when the deceased came up to Mr. Selfridge he struck him on his hat; while he was aiming the *second* blow, Mr. Selfridge took his hands from behind him, presented a pistol and fired it. The witness said he stood within fifteen feet of the parties and kept his eye steadily upon them. He was confident there was one blow before the pistol was discharged and that it was a violent one, sufficient, he should believe, to knock a man down who had no hat on. Joseph Wiggin saw Mr. Selfridge coming down the street and turned round to see if Austin had moved from his place and found he had. At that moment the witness heard a sound as of the stroke of a stick on a coat. Casting his eye round, he then saw Mr. Selfridge present his pistol, stepping back one step and fire.

It appeared, that young Austin was about eighteen years old, and very much superior to Mr. Selfridge in personal strength. He usually carried a rattan, but on the morning of his death, he purchased a heavy hickory cane; asked if it was a strong one and "would stand a good lick." A witness, who sold him the cane, said he had sold him canes for six months, about once a week, and he had always purchased small bamboos. Mr. Austin, senior, testified however, that his son had a cane at home twice as large as the one he struck Mr. Selfridge with, although he usually carried a small one.

It was in evidence, that Mr. Selfridge was of a very slender and delicate constitution, which his appearance indicated, and he had been noted for it when in college, never being able to engage in the athletic exercises or amusements peculiar to collegians. It was also testified, that Mr. Austin, senior, said a short time before the affray on the same day, that "he should not meddle with Selfridge himself, but some person upon a footing should take him in hand," and one of Mr. Selfridge's friends informed him, as we have before stated, that he was to be attacked by a bully hired for the purpose. Mr. Austin, however, denied on oath explicitly, that he ever had any intention of inflicting personal injury on Mr. Selfridge, or of hiring any one to do it. "I appeal to God," said he, when questioned upon this point, "he would have passed me as safely as he stands at your bar." The evidence of Lemuel Shaw, now chief justice of Massachusetts, who occupied the same office with Mr. Selfridge, was offered to show

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that Mr. Selfridge went on 'change that day on business. It appeared that Mr. Selfridge received a dangerous wound from Mr. Charles Austin at the time of the affray. Dr. Warren was called to him in the evening and found a large contusion on his forehead about the middle of it; it was three inches in length and one in depth. The blow must have been given, the witness thought, when the hat was on. The hat was produced in court and found very much bruised.

Such were the prominent facts as they appeared in the evidence at the trial. The principal ground taken in the defence was, that the killing was necessary in self defence; that the defendant was in such imminent danger of being killed, or suffering other enormous bodily harm, that he had no reasonable prospect of escaping, but by killing the assailant. The counsel for the defendant, in commenting on the evidence, contended, that Mr. Selfridge went on the exchange about his lawful business, and without any design of engaging in an affray; that he was in the practice of carrying pistols, and that it was uncertain whether he took the weapon in his pocket in consequence of expecting an attack; that if he did, he had a right so to do, provided he made no unlawful use of it; that the attack was so violent and with so dangerous a weapon, that he was in imminent danger; that it was so sudden, and himself so feeble, that retreat would have been attended with extreme hazard; that the pistol was not discharged until it was certain that none would interfere for his relief, and that blows, which perhaps might kill him, and probably would fracture his skull, were inevitable in any other way, and that the previous quarrel with the father of the deceased, if it could be considered as affecting the cause, arose from the misbehaviour of old Mr. Austin, and that the defendant had been greatly injured in that affair.

Mr. Justice Parker, in charging the jury, laid down the general proposition, that when a man in the lawful pursuit of his business, is attacked by another, and, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. The jury were also instructed, that unless the defendant had proved to them that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power—he had been guilty of manslaughter, notwithstanding they might believe with the grand jury who found the bill, that the case did not present the least evidence of malice or premeditated design in the defendant to kill the deceased or any other person.

The court adjourned at 2 o'clock P. M., and came in at 4 P. M., when the jury returned a verdict of not guilty. It was said that they agreed in fifteen minutes.

Thus terminated a trial which was probably attended with greater

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excitement than any other which ever occurred in this country. It is almost impossible for the present generation to comprehend the deep political feeling of that day, or to fully appreciate the bitterness and acrimony which existed between the two great political parties. The circumstance of such a death of one of the family of a leading politician was well calculated to excite this feeling to an intense degree. Accordingly, the newspaper press in all parts of the country was filled with comments upon the matter, and little regard was often paid to truth or decency in these ebullitions of political partisans.[1]

The case was conducted with uncommon ability by all engaged in it; and notwithstanding the great excitement against the defendant, he had the benefit of a most impartial trial. His able counsel managed the defence with prudence as well as ability. The closing argument of Mr. Dexter, in particular, was characterized by all the clearness, eloquence and brilliancy of that great lawyer; it was also remarkable for its propriety and fitness for the occasion. Evidently aware of the excited state of political feeling, which might be supposed to affect the jury as well as the bystanders, he proceeded in the defence with great caution and kept steadily in view the object which the lawyer ought always to consider paramount to all other considerations of mere feeling — the welfare of his client. In no instance did he forget that he was to restrain all political feeling, if any he had; unless, indeed, he may be supposed to have done so, when, in commenting upon the first publication in the Boston Gazette by Mr. Selfridge, he made a most cutting and terribly severe description, which no one failed to apply to Mr. Benjamin Austin, although Mr. Dexter disclaimed the intention of making any personal application of it.[2] "Suppose," said he, "a man should have established his

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[1] Mr. Selfridge being a federalist, some of the democratic newspapers made the most of this affair. Mr. Benjamin Austin, commonly called at that time *Honestus*, was the reputed editor of, or a principal writer for, the Independent Chronicle. That paper entered into this matter with great zeal and animation, and allusions to it were found in its columns long after the public excitement had died away. Before the trial took place, it contained most bitter and inflammatory appeals to the popular mind; and after the acquittal of the accused, the court, jury and counsel came in for a share of abuse. The charge of Chief Justice Parsons to the grand jury, which consisted principally of extracts from the old writers on criminal law, was much and bitterly complained of. The course of this paper, although not surprizing under the circumstances, was consistent neither with justice, propriety or a just regard for the laws and institutions of the country.

[2] This argument was reported in the Columbian Centinel soon after the trial, and the reporter thus speaks of it: "When the English language shall be numbered with the dead, and our orators, and illustrious literary characters become classics to posterity, this speech will rank, for both reason and rhetoric, among the first forensic efforts of New England." *Per contra*, the next Chronicle says: "The speech is a poor, feeble attempt at the sublime, arrayed in the ridiculous garb of bombastic *bathos!* It is the feather of a goose, absurdly intended to be inserted in the pinion of an eagle."

The trial was taken in short-hand by T. Lloyd, Esq., reporter of the debates in congress, and George Caines, Esq., formerly reporter of New York; and was sanctioned by the court and the reporter of the State. Mr. Dexter, however, had the advantage of reporting his own speech. The Chronicle of February 5, 1807, says: "The trial

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reputation as a common slanderer and calumniator, by libelling the most virtuous and eminent characters of his country, from Washington and Adams, down through the whole list of American patriots; suppose such a one to have stood for twenty years in the kennel, and thrown mud at every well dressed passenger; suppose him to have published libels, 'till his style of defamation has become as notorious as his face, would not every one say, that such conduct was some excuse for bespattering him in turn?"

After his trial Mr. Selfridge published a statement[1] of the circumstances attending the case, including a defence of his conduct; in which he considers the controversy between himself and Mr. Austin as entirely personal, and complains that it had been converted into a political affair. He then examines the charges, which, he contends, Mr. Austin had made against him, and which, if true, would forever disgrace him as a lawyer. In relation to the catastrophe in State street, he says he expected an attack on that day, which induced him, through the day, to keep his pistols in his pockets. While passing down State street, his hands being behind him, on the outside of his coat, his attention was arrested, by the rapid and furious approach of the deceased, with a large cane uplifted. He instantly half wheeled, and faced him; and with a mere glance, observed, that his whole visage denoted the most desperate intentions. Instantly he seized with his right hand, the pistol in his right side pocket, which was guarded and upon half-cock, but before he had time to present it, he was struck a heavy blow, which fell upon his forehead. In the mean time he prepared his pistol, stepped back one or two paces, presented and discharged it while the deceased was in the act of giving the second blow. In regard to his conduct on this occasion he says:—

Are the destinies of the weak to be suspended upon the volition of the strong? Does gigantic force authorize its possessor to doom to irreverable infamy, whomsoever it pleases? Most assuredly not. Under personal aggression, then, what measures are justifiable *to avoid disgrace?* What are permissible, *for the preservation of* HONOR? When the awful crisis arrives, which renders it necessary to

as printed, is a gross imposition on the public: the friends of Selfridge having had almost the sole conducting of it. Mr. Dexter's plea is not as delivered in court."

Mr. Dexter's argument was made on Christmas day; and it may be here remarked as a curious coincidence, that on the *same day*, thirty-four years afterwards, his son, Franklin Dexter, made the closing argument in the defence of Mrs. Kinney, before the same court, charged with murder — a trial which excited little less interest than that of Mr. Selfridge. The argument of Mr. Franklin Dexter was scarcely inferior, in any respect, to that of his father. It may not be improper to mention, also, that at the last mentioned trial, Mr. Attorney General Austin, a cousin of Benjamin Austin, was opposed to Mr. Dexter, and a grave misunderstanding between those gentlemen took place, which we formerly noticed. (See 3 Law Reporter, 409.)

[1] A correct statement of the whole preliminary controversy between Thomas O. Selfridge and Benjamin Austin; also a brief account of the catastrophe in State street, Boston, on the 4th August, 1806: With some remarks, by Thomas O. Selfridge.

——————— "He takes my life,
When he doth take the means whereby I live."

Charlestown: Printed by Samuel Etheridge, for the author, 1807.

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resist, or to succumb with dishonor, is it not a solemn duty, which every man owes to his friends, his country, and his God, to summon all his energies, and employ all his faculties, to avoid the *former*, and preserve the *latter?* And when, with a weapon, he supplies the deficiency of corporal strength, does he do any thing more than use such means as Providence has placed within his reach for defence? . . . . . . How far one man may ruin the peace, destroy the character, and degrade the standing of another, is a question of the most serious import. Were a gentleman quietly to submit to a beating, he would be instantly shunned by the friends of his youth, and the companions of his age. When the blasting reproaches and ireful contempt of his former associates had exiled him from his accustomed scenes of business, and of pleasure, whither could he repair? What occupation could he pursue? Should he fly to the army, the last refuge of the desperate, what government would invest him with a command? What soldier would follow him in the day of battle? Philosophy may surmount the ordinary evils of life, death may be met with magnanimity, but "*a wounded spirit, who can bear?*" . . . . . . The honor of a gentleman, should be as sacred as the virtue of a woman; but the female is authorized to take his life, who would violate her honor. Why is a man not bound to maintain his honor at the same hazard? The loss of virtue to a woman, is irretrievable ruin; so is the loss of honor to a man; and for the same reason in both cases, because they both lose their rank in society, and their estimation in the world.

Mr. Selfridge resumed the active duties of his profession in Boston. He was a man of the world, and had not that application to study, which is indispensable to the thorough lawyer. Possessed, however, of considerable natural abilities, he took a high rank as an advocate at the bar; and was in an extensive practice till his death which we believe took place about ten years after his trial.[1]

Many years have now elapsed since this exciting trial took place, and the feelings of bitterness with which it was attended are forgotten. The acquittal of Mr. Selfridge is generally regarded as correct by those who examine all the evidence in the case. Of the moral character of the transaction it is not for us to pronounce judgment. It was regretted by all, and by none more than by Mr. Selfridge and his political and personal friends. It must be placed in that class of deeds which are not amenable to the law, but upon the necessity or propriety of which, men will always entertain different opinions. Few will deny, that in such an affair the lot of the survivor is most to be regretted; and

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[1] We are informed by an old member of the bar that Mr. Selfridge's business increased after his trial. The docket of the Supreme Court at that period would seem to indicate a different result, although in a city, the court docket does not give a very accurate idea of the extent or value of one's business. It appears that at the March term 1806, before the catastrophe in State street, there were on the docket (old and new entries) 667 actions, in 72 of which Mr. Selfridge appeared for plaintiffs. At the March term, 1807, after the trial, there were 355 old actions, in 41 of which Mr. Selfridge was for plaintiffs. He made no new entries at that term. At the November term, 1807, of 317 old actions he was for plaintiffs in 19. He made three new entries at that term; the docket contained 254. At the November term, 1809, he was for plaintiffs in 22 actions out of a docket of 345. He made 19 new entries; the docket contained 386. At the March term, 1812, he was for plaintiffs in 28 actions out of a docket of 487. There were 156 new entries, of which he made three. At the November term, 1814, he appeared to be doing considerable business; he made eleven new entries, out of a docket of 158. At the March term, 1817, his name appears in two cases for plaintiffs; he made no new entries this year. It is probable he died before this time.

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many will agree with Mr. Dexter, that it is a most serious calamity, for a man of high qualifications for usefulness, and delicate sense of honor, to be driven to such a crisis, yet should it become inevitable, he is bound to meet it like a man, to summon all the energies of the soul, rise above ordinary maxims, poise himself on his own magnanimity, and hold himself responsible only to his God. Whatever may be the consequences, he is bound to bear them, and stand like mount Atlas,

> "When storms and tempests thunder on his brow,
> And oceans break their billows at his feet."

RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, October Term, 1840, at Boston.

Palmer v. Warren Insurance Company.

Words of exception in any instrument are to be construed most strongly against the party for whose benefit they are intended, and this rule is applied to words of exception in policies of insurance; but this rule of interpretation is subservient to another — *verba intentione non è contra, debent inservire.*

Policies of insurance are always construed liberally, and rarely, if it is possible, subjected to any critical strictness, or any technical interpretation.

Where a policy of insurance on time contained the following clause: "excluding during the term all ports and places in Mexico and Texas, also the West Indies, from July 15th to October 15th, 1839, each at noon," and the vessel did sail from New York for, and arrived at, St. Jago de Cuba, within the excluded period, and on her return, she was lost in December following; it was *held*, that the underwriters were liable — the clause in the policy being an exception or exclusion of *time*, and not of *voyages*, and the loss not happening within the excepted period.

Assumpsit on a policy of insurance. The case came before the court upon an agreed statement of facts, to the following effect: The plaintiff, on the first day of May, 1839, procured a policy of insurance to be underwritten by the defendants, in "two thousand dollars, on one half of the brig Spry, for the term of one year from this first day of May, 1839, at noon, excluding during the term all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon; the brig valued at $45,000, at a premium of $11 per cent., to add one half per cent. each passage; her cargo is coal, stone or lime; or that she proceeds to or from a port in North Carolina, within Ocracock bar. The policy contained the usual risks and clauses in the Boston policies. The declaration was for a loss by the perils of the seas. It was agreed

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by the parties, that the question as to the liability of the defendants should be decided by the court before the case was submitted to a jury on the merits.

The cause was argued by *Rufus Choate* for the plaintiff, and by *Theophilus Parsons* for the defendants.

Story J. The questions involved in the argument of the present case are of considerable novelty, and certainly are not unattended with difficulty. The policy is upon the brig Spry for a year, "excluding during the term all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon." During the year 1839 the vessel performed a voyage from Boston to St. Joseph's, (Florida,) and from thence to the Havana, and thence to New York. On the 12th of September, 1839, she sailed on a voyage from New York to St. Jago de Cuba, arrived there about the first of October, and sailed from thence on her return voyage to New York on the 25th of October, and was wrecked on the 15th of December following on a beach in Eaton's bay, in Long Island sound. The loss, for which the suit is brought, is that occasioned by this shipwreck.

Now, upon this posture of the case, the question is, whether the Insurance Company are liable for the loss; and this depends upon the interpretation, which is to be put upon the terms of the policy. The loss occurred in the progress of the return voyage from the West Indies, within the year for which the insurance was made, and without the limitation of the time excluded by the policy (between July 15th and October 15th, 1839.) The terms of the policy are susceptible of various interpretations. The clause of exclusion may be construed, first, to be a condition or warranty on the part of the insured, that the brig, during the year, shall not be employed in any voyages to or from any port or places in Mexico, Texas, or to or from the West Indies between July 15th and October 15th; upon which construction it is clear, that the underwriters would not be liable for the loss, which has occurred. And this would be equally true, whether we should treat it as a case of non-compliance with the condition or warranty, or as a deviation from voyages insured. Or, secondly, the clause may be construed as allowing such voyages to and from Mexico, Texas, and the West Indies, during the excluded period, but exonerating the underwriters from all risks and liabilities for losses in in the course thereof; which in the events, which have happened, would be equally fatal to the recovery in this suit, since the loss was in the course of the voyage from the West Indies, which was begun, although not completed, within the excepted period. Or, thirdly and lastly, the clause may be construed, as merely excepting from the operation of the policy certain risks and losses, viz. all in ports and places in Mexico and Texas, and in the West Indies between July

15th and October 15th, 1839. In this last view, the policy would be completely operative, and cover the present loss, since it would not fall within the excepted risks. The defendants, in effect, contend, that the true import of the terms of the policy requires and justifies one or the other of the two first interpretations. The plaintiff, on the other hand, insists, that the third and last is the only true and sound interpretation. It has become the duty of the court, therefore, in a case, in which it is admitted on all hands, that there is no authority directly in point, to endeavor to ascertain, as far as it may, the real intentions of the parties in the language used, and to give such an interpretation as seems most consonant to that intention, and the general principles of law.

In the argument, it has been thought of some importance, in the construction of the clause, to ascertain, if there is any ambiguity in the language used, what is the rule of law, as applicable to this case, by which instruments of all sorts, and particularly policies of insurance, are to be construed. I take the rule to be clearly established, as a general rule, that words of exception in any instrument are to be construed most strongly against the party, for whose benefit they are introduced; and this rule has been expressly applied to words of exception in policies of insurance, as well in England as in this court.[1] *Verba fortius accipiuntur contra proferentem.* Now, for whose benefit are these words introduced? Clearly for the benefit of the underwriters, as they are to relieve them from risks, for which they would otherwise be liable under the general words of the policy. They are not, in form or in substance, the words of the insured; but words of exception, used by the underwriters, to exempt them from a liability from the general rule, which would otherwise attach upon them during the term of time, for which the policy was to endure. The language of the Supreme Court of the United States, in construing an exception in the policy of insurance in *Yeaton* v. *Fry*, (5 Cranch's R. 335,) is strongly in point as to the proper construction of the present policy. The court there treated the words of the exception as the words of the underwriters, and not of the insured, because they took a particular risk out of the policy, which but for the exception would be comprehended in the contract. So far, then, as the rule is to prevail upon the present occasion, it is unfavorable to the defendants. But it by no means follows, that it supersedes all other rules of construction; for there is another rule to be observed; *Verba intentioni, non è contra, debent inservire.*[2]

Another suggestion has been made, founded upon the grammatical sense of the words. It is said by the counsel on behalf of the plain-

[1] *Blackett* v. *Royal Exchange Insur. Comp.* (2 Cromp. & Jer. 244); *Donnell* v. *Columbian Insur. Comp.* (2 Sumner's R. 380, 381); see also *The Earl of Cardigan* v. *Armitage*, (2 Barn. & Cresw. 197, 206); *Bullen* v. *Denning*, (5 Barn. & Cresw. 847, 850, 851.)

[2] Co. Litt. 36.

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tiff, that the clause in question is to be construed as an exception, and, therefore, equivalent to "excepted risks." This is met on the other side by the remark, that the word used is "excluding," and not "excepting," and that, in a grammatical sense, to exclude means to shut out, and not to except; and, therefore, excluding is rather prohibiting. It is certainly true, that in lexicographies the word "exclude" has not ordinarily given to it, as one of its meanings, to "except." But nevertheless we shall find, that one of the senses given to the word "except" is to "exclude." And in common parlance, the words are often used as equivalents. Policies of insurance are generally drawn up in loose and inartificial language, and, indeed, in the language of common life, and therefore are always construed liberally, and rarely, if it is possible, subjected to any nice, or narrow, or critical strictness, or any technical interpretation. We look rather to the intent, than to grammatical accuracy in the use of language. If a policy of insurance were underwritten for a year on a ship, excluding the month of October, we should say, that it was but an exception of that month. If a policy was on all the cargo on board a ship, excluding the fruit on board, we should deem it a mere exception of the fruit. On the other hand, if the words were, excepting the fruit on board, we should as readily say, that the fruit was excluded from the risks stated by the policy. But in neither case should we say, that fruit was prohibited from being taken on board in the voyage. It does not appear to me, therefore, that any difficulty in the interpretation of the clause arises from any grammatical inaccuracy in the use of language. It will make no difference, in my judgment, in the present case, whether the word "excluding," in this policy, is interpreted in its more common sense of shutting out, or in the sense of "excepting," although I have no doubt, that the latter is the true and appropriate sense in the clause of the policy under consideration.

I confess, that I have felt some difficulty in arriving at a satisfactory conclusion as to the true and proper interpretation of this clause. I have no doubt, that the word "excluding" is not here used in any sense, which makes the clause amount to a warranty, or to a condition, or to a prohibition. The language does not, in my judgment, justify such a construction. It is not the fair import of the terms, and to arrive at it, we must force them out of their natural signification by an artificial straining. In *Yeaton* v. *Fry*, (5 Cranch R. 335, 341,) a similar attempt was made to construe an exception in the policy to be a warranty; but it was rejected by the Supreme Court of the United States. My difficulty is of another sort. It is, whether the clause amounts to an exception of *voyages*, or an exception of *risks*. Construe it, as an exception of voyages, and it will read, as if written thus; "Excepting during the term all voyages to and from all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon." On the other hand construe it, as an exception of risks, and it will read as if writ-

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ten thus; "Excepting all risks in all ports and places in Mexico and Texas, also in the West Indies from July 15th to October 15th, each at noon." After some hesitation, I have come to the conclusion, that the latter is the true and natural and easiest interpretation of the clause; and that it will satisfy the intention of the parties, so far as we can gather it from the words or apparent objects of the policy.

My reasons for this conclusion I will now proceed shortly to state. In the first place, it is a well known fact, that greater risks occur ordinarily in ports and places in Mexico and Texas, either from the character of the harbours, or that of the government, than in other ports. The same remark applies to the West Indies, during what are commonly called the hurricane months, which are between the middle of July and the middle of October. It is not unnatural, therefore, to expect, under such circumstances, either that such risks should be excluded, or that a higher premium should be paid. I entirely, therefore, accede to the argument, so strongly pressed in the present case, that the exception did cause a diminution of the premium, and without it the company would not have underwritten at all, or not without a higher premium.

The words, then, in effect, in my view, are words of exception or exclusion of what would otherwise be comprehended in the general terms of the policy. The policy is for the term of a year. The natural construction, then, of the exception is, that it excepts something already included. It is, then, an exception or exclusion of time, and not an exclusion of voyages; for no voyages are mentioned. The words are "excluding during the term." If the intention had been, in the first part of the clause, to exclude all voyages to or from ports and places in Mexico and Texas, we should naturally have expected the word "voyages" to be inserted in this very connection. But if it was intended only to exclude time, then the words stand well enough without any additional words, and their import is to exclude during the term the time in ports and places in Mexico and Texas. But even if this part of the clause should be construed to exclude voyages to and from Mexico and Texas during the year insured, it would not follow, that the other part of the clause is to receive the same interpretation. In the case of *Yeaton* v. *Fry*, (5 Cranch R. 335, 341,) the Supreme Court of the United States, upon a policy containing a clause, "all risks, blockaded ports and Hispaniola excepted," held the clause to be divisible, and applied the construction of it thus; that a voyage to Hispaniola was not insured; but a voyage to a blockaded port was, unless known to be blockaded, although it was in fact blockaded. The risk of loss from a known blockade was excepted, and not the voyage to the port itself. The same exposition might be applied here.

But as the brig did not, in fact, go on any voyage to Mexico or Texas, it is unnecessary to insist on that. We may read the clause, then, as if it were, "excluding during the term the West Indies from July 15th and October 15th, each at noon." Now, here it is clear,

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that voyages to and from the West Indies are not excepted generally; but the West Indies for a specified time only. The natural interpretation, then, of this clause is, that it excepts from the protection of the policy the time passed in the West Indies from July 15th to October 15th. I say, this is the natural interpretation; for the insurance is for a year, the exception carved out of it is for three months, and these three months not universally, but only when the vessel is in the West Indies. If the vessel is not in the West Indies, the policy covers the whole term; so that West India ports or places or West India risks only seem within the construction of the clause of the policy. Suppose, the brig had sailed on a voyage to the West Indies on the first of July, and had been lost on the tenth of the same month; what words are there in the policy (supposing there to be no warranty, condition, or prohibition, which I have already said there is not,) which would prevent the owner from a recovery of the loss under this policy? I confess I can perceive none. The loss would be without the excepted period, and not within it. Besides; it seems to me, that policies on time are properly to have the same construction throughout, unless there be an irresistible presumption the other way. The very object of a policy on time is to avoid any designation of voyages, or chances of deviation; and to leave the party at liberty to proceed on any voyages or adventures he may choose. Exceptions, therefore, in the policy, if they admit of any other reasonable interpretation, ought not to be construed as cutting down the policy to particular voyages, excluding all others; but to be deemed exceptions of time and risks in particular ports or parts of voyages. Now, every word in the present policy is perfectly satisfied by the interpretation, which I have given to it, without any straining of the words from their ordinary meaning, as words of exception or exclusion. But if we construe the clause the other way, as excluding all voyages to and from the excepted ports in Mexico and Texas, and all voyages to and from the West Indies, begun before, or continued after the excepted period, we are necessarily obliged to interpolate many words into the clause, and to deflect the words from their common signification. In short, we are to construe a policy, purporting to be a policy on time, to be also a policy on voyages, and the exceptions to be, not of time and risks, but of voyages to and from the excepted ports and places, as well as an exception of the time passed in them. It appears to me, that this is not a reasonable or justifiable construction.

But, suppose the meaning of the excepted clause is ambiguous, and admits of either construction, which is then to be adopted? The rule already adverted to decides this. The exception is to be construed most strongly against the underwriters, and most favorably to the insured.

Upon the whole, therefore, notwithstanding I have had some difficulty, my mind on the whole reposes on the construction, which I have stated, as the true, the natural, and the appropriate meaning of the policy.

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Supreme Court of Pennsylvania, December Term, 1840.

Parker *v.* Wells.

A parol contract for the purchase of land, is not taken out of the statute of frauds by mere payment of the purchase money.

This was an appeal from a decree of the common pleas of Delaware county, in the matter of the distribution of the proceeds of a sheriff's sale of a certain messuage and tract of land situate in that county, and sold by virtue of a writ of *venditiori exponas* in an action brought by Samuel Parker *v.* John Wells. The sheriff paid into court the sum of seven hundred dollars, which was claimed by two judgment creditors of the defendant; by Susannah Patterson, executrix of William Patterson, under a judgment against the defendant, entered on the 23d day of January, 1837; and by Charles Wells, under a judgment against the defendant, entered on the 19th of June, 1837.

The property from the sale of which the money arose, was conveyed to the defendant by Paschall Morres, the first of April, 1837. There had been a parol agreement for the purchase and sale of it between the parties on the previous autumn, by the terms of which, part of the purchase money was to be paid before the ensuing winter; it was not paid, however, and in December the defendant gave his note in lieu of it, which the purchaser had discounted in bank. The residue was paid on the first of April, 1837, when the conveyance was made. The defendant was in possession of the property previous to the agreement, under a lease which expired on the day of the conveyance.

On the ground that the defendant had, by payment of the purchase money, acquired an equitable title which might be bound by a judgment at law, the court below decreed in favor of the elder judgment creditor, though his judgment was obtained before the date of the conveyance, and though by the law of this state, after-acquired property cannot be so bound.

The cause was argued on an appeal to this court by *Dillingham* for the appellant; and by *Edwards* for the appellee; and the opinion of the court was delivered by

Gibson C. J. It is not pretended, that possession was delivered on execution of the contract; but it is argued that the security given for the purchase money was equivalent to payment of it, and consequently enough to take the case out of the statute. Though there had been several dicta that nothing but delivery of possession is to be taken for part performance, it had not been directly decided in Pennsylvania before *McKee* v. *Phillips*, (9 Watts, 85,) that payment of purchase money is not so. Yet, notwithstanding several English de-

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crees to the contrary, the opinion of the profession, drawn perhaps from some of the best text writers, had marshalled us the way to that conclusion. The English authorities are undoubtedly discrepant; but they justify what Mr. Justice Story seems, in his Equity Jurisprudence, ch. 18, § 760, to have feared would be considered a too positive assertion, that even in England the old doctrine had been overthrown. It is not a little singular that Mr. Roberts, when he wrote his treatise on the Statute of Frauds, which was published so late as 1805, considered this old doctrine to be firmly established; and it is not less so, that he mentioned *Pengall* v. *Ross*, (2 Eq. Ca. Abr. 46,) as the only case which militated against it; for many of the cases relied on by Mr. Justice Story and Sir Edward Sugden as establishing the contrary, were before that time; and they are corroborated by a multitude of dicta in later decrees. On the other hand, no American decision that I have discovered, contradicts them. Though Mr. Justice Thompson, while delivering the opinion in *Wetmore* v. *Morton*, (2 N. Y. Ca. in Error, 109,) repeats with seeming approbation, Lord Hardwicke's dictum in *Lacon* v. *Morton*, (3 Atk. 4,) that payment of purchase money has always been deemed part performance, it is evident from the fact of payment having in that case, been followed by possession and improvements, that he had not the question before us particularly in his view; indeed it belonged not to the case. Though the English statute of frauds has been adopted in practice or reënacted with modifications in almost every state of the union, it is wonderful how little is to be gleaned from the American decisions on this branch of it. On the facts of the case in *Davenport* v. *Mason*, (15 Mass. 93,) it is difficult to perceive how a question about part performance could be raised in it, as the money paid could certainly be recovered back without regard to the validity of the original contract, but there is no dictum in it in support of what I have called the old doctrine. *Bell* v. *Andrews*, (4 Dall. 152,) was an action to recover damages for a breach of the contract, which is not forbidden by our statute; and no more was determined in it than that payment of the consideration might be proved by parol. In the *Lessee of Billington* v. *Welsh*, (5 Binney, 130,) it was barely ruled that delivery of possession and payment of purchase money together, were enough to take the contract out of the statute without a word having been said about the supposed effect of payment alone. In *Jones* v. *Peterman*, (3 Serg. & R. 543,) which was the case of a lease and not a case of payment at all, the question had regard exclusively to possession at the time of the contract. It is true the chief justice, as he had done in *Smith* v. *Patton's Lessee*, (1 Serg. & R. 84,) mentioned the old distinction between purchase money and earnest, but in a way to leave it doubtful whether he considered either of them to be available. He glanced at the doctrine as it appeared to lie at the surface of the subject; but without a view to the present question, for it was not his habit to decide more than was in the case. The

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judge who was associated with him, proceeded less cautiously, and maintained delivery of possession to be the criterion. It may be said, then, that before the decision in *McKee* v. *Phillips*, the question, in Pennsylvania, was an open one, but swayed towards the conclusions of the puisne judge in *Jones* v. *Peterman*, by a preponderating weight of authority, and by the opinions of such men as Mr. Justice Story, Chancellor Kent, Sir Edward Sugden, and Mr. Newland. But independently of authority, there is much reason to distinguish betwixt evidence of payment and evidence of the more notorious and solemn act of investiture which is less susceptible of perjury, the mischief against which the statute was intended to guard. And there is even more reason for a strict construction of the statute of Pennsylvania, which denies not the injured party an action for damages, than there is for such a construction of the British statute which declares the contract to be void and allows him no remedy whatever. But, in the case before us the purchase money was not even paid: for though the giving of a negotiable security be equivalent to actual payment in order to found an action for money paid or received, it is not so to found an equity; as may be seen in its insufficiency to constitute a purchaser for valuable consideration. The purchaser, here, might perhaps have recovered his money back; but on no ground could actual payment, and much less could a security for it, give him an equitable estate in the soil. The judgment recovered of him before the land was conveyed to him, was consequently not a lien on it; and the fund in court must be decreed to the next oldest judgment creditor; who is the opposing claimant.

Decreed accordingly.

District Court of the United States, Maine District, at Portland, February Term, 1841.

The Dawn.

The libellant shipped for a voyage from Boston to Turk's island. The ship soon after leaving port, was so much damaged by the fortune of the seas, that the master, for the safety of the lives of the crew, put into Bermuda, where a survey was called, and she was condemned and sold as a wreck, and her crew discharged. Wages were paid to the libellant until he arrived at Bermuda. By his libel he claimed either the two months wages allowed to seamen on the sale of a vessel in a foreign port, and the discharge of the crew, by the act of congress of February, 1803, chap. 63; or a sum in addition to his wages, to pay his expenses home.

Held, that the act of congress applies only to the case of a voluntary sale of a vessel, and not to a sale rendered necessary by misfortune, and that the libellant was not entitled to the statute allowance, but was entitled to a sum in addition to his wages to defray the expenses of his return home, to be paid from the proceeds of the sale of the vessel.

In case of shipwreck, the seamen are by the maritime law bound to remain by the vessel, and exert themselves to save all that is possible of the ship and cargo.

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When they do this they are entitled to their full wages, without deduction, against the materials which they save of the ship, if enough is saved to pay them.
And they are entitled to a further reward, in the nature of salvage, against the whole mass of property saved.
Their claim is not as general or volunteer salvors, nor are they entitled to an equally large salvage; but they are entitled to a reasonable allowance, *pro opera et labore*, according to the circumstances of the case and the merits of their services.
When the disaster happens in foreign parts this ought not to be less than the expenses of their return home.

This case was before the court several terms ago, and is reported in Ware's Reports, 425. After the opinion was then delivered, the counsel for the respondent moved the court to suspend the decree, to enable the party to offer further evidence to show the actual condition of the vessel, when she arrived at Bermuda. Under the circumstances of the case, the court allowed the motion. The case was now presented on the new evidence. The material facts upon the whole case were as follows. The libellant shipped on board the brig Dawn, at Boston, November 26, 1836, as mate, for a voyage to Turk's island, for wages at twenty-five dollars a month. Soon after the brig left port she encountered violent gales, by which she was so much damaged in her hull and rigging, as to be incapable of continuing the voyage, and the master, for the safety of the lives of the crew, bore away for Bermuda, where she arrived on the 28th of December. The master then made his protest, and applied for a survey. Commissioners were appointed for that purpose by the governor, who after an examination reported, that from the great damage which the brig had received in her spars and rigging, and especially from the disabled state of her hull, connected with her great age, she was unfit for sea, and unworthy of repair; and she was subsequently sold as a wreck. The additional evidence, now introduced, went to confirm the report of the surveyors, and to prove the ruinous condition of the vessel, and to show further the great expenses of the repairs, which would be required to fit her for sea.

The crew were discharged, and paid their wages up to the time of the discharge. The libellant claimed in addition two months wages allowed by the act of congress of February, 1803, sect. 3, upon the sale of a ship and the discharge of her crew in a foreign port, or upon the discharge of a seaman in a foreign country, with his own consent; and if, under the circumstances of this case, he was not entitled to claim under the statute, an alternative claim was set forth in the libel for a reasonable compensation, in addition to his wages, in the nature of salvage for his extra labor and services in saving the vessel, and to pay his expenses home.

The case was argued by *C. S. Daveis* for the libellant, and by *T. A. Deblois* for the respondent.

Ware J. I do not think it necessary on this occasion to say much upon the claim for the statute allowance of two months additional wages, which are directed to be paid to the consul for the seamen's

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use on the sale of a vessel in a foreign port, or when a seaman is discharged in a foreign country with his own consent. When this case was before the court at a former term, that question was fully considered, and the conclusion to which my judgment was brought, by that examination, was, that the statute applied only to the case of a voluntary sale of the vessel, and to a strictly voluntary discharge of a mariner, and not to a sale or discharge rendered unavoidable by an imperious and overruling necessity. But when a vessel is sold in a foreign port, the case is within the words of the statute, and if the owners would exempt themselves from its operation it belongs to them to show that the sale was involuntary on their part. As the evidence then stood, it did not appear to me that the necessity of the sale was sufficiently established by the proof; but, under the peculiar circumstances of the case, it seemed to be reasonable to suspend the decree, and allow the owner to offer further evidence to that point. The evidence now produced does in my opinion satisfactorily show that the sale was, in the reasonable meaning of the word, a sale of necessity. Not that it was physically impossible to repair the vessel and proceed on the voyage; for it is always possible to repair or rebuild a vessel, while any part of the hull remains. But the damages were so extensive, and the expense of the repairs would have been so considerable, that it was beyond question greatly for the interest of those, on whom the loss must ultimately fall, to abandon the voyage and sell the materials preserved for the most they would bring. A sale is within the mercantile and reasonable sense of the word necessary, when the vessel cannot be repaired, but at a great sacrifice of the interests of the owners. And when a voyage is broken up for such cause, the seamen are not properly discharged, but the whole enterprise is brought to a premature conclusion by a fortuitous event, for which neither party is responsible.

The other question raised by the pleadings in this case is, whether upon a shipwreck and loss of the vessel in a foreign country, the seamen, who have remained by the ship and faithfully performed their duty to the last, can, upon the principles of the maritime law claim, a compensation, out of the property which they save, beyond their stipulated wages up to the time, when their connexion with the ship is finally dissolved, sufficient to pay their expenses home. This question has been very ably and elaborately argued on both sides; and the authorities bearing upon it have been widely examined. But with all the researches of counsel no adjudged case has been found, in which the question has been directly and formally decided.

It is contended by the counsel for the libellant that this claim is founded on an ancient principle of the maritime law of Europe, incorporated into the earliest digests of the law, and recommended as well by the dictates of justice and humanity, as by an enlarged and enlightened public policy; that if it is not directly sanctioned by any judicial precedents, neither are there any by which it is directly negatived; but that there are cases in which a compensation in the nature of salvage may be allowed beyond the amount of wages due, is fairly infer-

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rible from the doctrines of many of the adjudged cases; and it is in fact but a just application of the general principle of the maritime law, which studiously connects the interest of the crew with the safety of the vessel and cargo. On the other side it is argued that the claim cannot be supported as one flowing from the contract, all rights under that being satisfied by the payment of wages up to the time when the contract was dissolved by an accident of major force; that it cannot be maintained as a salvage reward, because the ship's company can, it is said, in no case claim as salvors, being bound by their contract to use, on these melancholy occasions, their utmost exertions for the preservation of the ship and cargo for their stipulated hire; and the silence of our jurisprudence on a question, which must have frequently been presented to the court, has been strongly urged as a proof that no such principle, as that contended for in behalf of the libellant, is acknowledged by the maritime law of this country. And it is further contended, admitting the rule of the maritime law to be that upon a shipwreck in foreign parts, the crew are entitled to claim against the savings from the wreck a sum sufficient to pay their expenses home, that this rule is superseded in this country by the acts of Congress for the relief of destitute mariners in foreign countries, requiring the consuls of the United States to provide for their return at the public expense. Such I understand to be the general tenor of the arguments at the bar.

I agree with the counsel for the respondent that by the maritime law, as it is received in this country, the seamen are bound to remain by the wreck, and contribute their utmost exertions to rescue as much as possible from the violence of the elements, so long as there is a reasonable probability of saving any thing without too much hazard of life. It is true that a different view is taken of the obligations of the crew by the most distinguished maritime jurists of France. Valin says, that in case of shipwreck the seamen are at liberty to abandon the ship, although he admits that his opinion is in opposition to the decision of the Judgments of Oleron, and the Ordinance of the Hanse Towns. The reason, he says, is, that in this case the owner is under no *personal* obligation to pay their wages or the expenses of their return home, and consequently if they refuse to aid in saving the property he has no cause of complaint.[1] Pothier maintains the same doctrine. By the accident of major force, he says, which prevents the continuation of the voyage, the parties are freed from their engagements, and the seamen are no longer under any obligation to continue their services.[2] Boulay Paty, without being very explicit, seems silently to acquiesce in the same conclusion.[3]

But notwithstanding the imposing authority of these great names, it appears to me that this doctrine is exposed to very grave objections.

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[1] Comm. sur Ordinance de la Marine, liv. 3, tit. 4, art. 9, vol. i. 704.
[2] Contrats Maritimes, No. 127.
[3] Cours de Droit Maritime, vol. ii. 230—1.

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It is true indeed as a general principle, when the performance of a contract is rendered impossible by a fortuitous event, that the parties are freed from its obligations. And in this case the prosecution of the voyage having, by an accident of major force, become impossible, the seamen are undoubtedly discharged from the principal obligation of the contract, that of performing the voyage. But as incidental to that, they are bound at all times to exert themselves for the preservation of the property entrusted to their care. It would be singular if they were released from this collateral obligation on the happening of an event, which rendered it peculiarly necessary. It appears to be a duty resulting directly and necessarily from the nature of their engagement to render their utmost exertions on these occasions to save all that is possible for their employers. This duty is expressly enjoined upon them in nearly all the old maritime ordinances. The law is so stated by Abbot in his Treatise on Shipping, part 4, ch. 2, sect. 6. And so it has I believe been uniformly held in this country.[1] So long as these services are continued their right to wages under the contract remains in full force, and their lien against the fragment of the wreck which they preserve. But by abandoning the wreck they forfeit their wages, nor will their right be restored should the wreck be saved by other hands.[2]

But the question presented in this case is, whether the seamen can claim any thing beyond the full amount of wages up to the time of the actual termination of their services. It is quite clear that this claim cannot be maintained upon the common principles applicable to the contract of hiring. Having agreed to perform the service for a stipulated price, they cannot maintain a claim for extra compensation, although by some fortuitous event, that service may have been rendered more laborious, or have involved more danger than was anticipated. However just and reasonable such an allowance may, in some cases, be as a pure question of casuistry, it cannot be sustained upon any established and known principle of law. Do, then, the principles and policy of the maritime law furnish any ground for making an exception, in favor of maritime services, to the general rule of the common law? After an attentive consideration of the subject, and an examination of all the sources of information within my reach, I am brought to the conclusion, that, to some qualified extent they do; and I will now proceed to explain somewhat at large the grounds, upon which this opinion is founded.

No case was cited at the bar, in which this question has been decided, at least in the form in which it is presented in this case. There are, however, several, in which the general subject of the claims of seamen in case of shipwreck, against the fragments which they save, is considered. Chancellor Kent, in his Commentaries, in speaking of

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[1] 2 Peters, Ad. R. 395. 2 Mason, R. 337.

[2] 3 Kent's Comm. 196. *The Two Catherines*, (2 Mason, R. 347); *Pitman* v. *Hooper*, (3 Sumner, R. 67.)

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shipwreck in connexion with wages, says, that "some of the decisions in this country seem to consider the savings of the wreck as being bound for the arrears of seamen's wages, and *for their expenses home.*" (3 Comm. 195.) Here the expenses home are spoken of as a charge on the wreck, in addition to the arrears of wages. And I refer to this paragraph, not so much as an authority in support of the doctrine, as to show that the idea, that the crew may be entitled to something, beyond their wages, is not such a novelty in our jurisprudence, as was supposed at the argument. In the case of the *Two Catherines*, (2 Mason, 319,) the vessel had performed her outward voyage and earned freight, and was wrecked, and the cargo totally lost on her return in Narraganset Bay, near her home port. The libel was framed with a double aspect, claiming in the alternative wages or salvage. The question, what was due to the crew, appears to have been elaborately argued at the bar, and was profoundly examined by the court. The conclusion of the court was, that no wages were due, but that the crew were entitled to salvage against the materials, which they had saved of the vessel. The court held that there was no principle of law which authorized the position that the character of seamen creates an incapacity to assume the character of salvors, and that the salvage should never be less than the amount of wages, which would have been due had no disaster happened, but may, according to the circumstances of the case, be more. (p. 332—340.) I am aware of the language used by the same learned judge, in delivering the opinion of the court in the case of *Hobart* v. *Drogan*, (10 Peters, 122.) But it does not appear to me to be inconsistent with the decision of this case nor to take from its authority.

In the case of *The Cato*, (1 Peters, Adm. R. 42,) the ship was lost at sea, and the crew taken from the wreck by another vessel. Part of the crew of *The Cato* assisted that of the salvor vessel in saving a portion of the cargo, and they were allowed to claim, as subordinate and auxiliary salvors, one half of the share that was allowed to the crew of the salvor ship. Judge Peters observed, in delivering his opinion in that case, that "the third article of the laws of Oleron has been produced, together with the commentaries upon it, to show that seamen saving from a wreck are entitled to a reward, when sufficient property is saved, beyond the amount of their wages. *I have,*" he says, "*never disputed the doctrine in cases to which it seemed applicable.*" In another part of his opinion he adverts to a previous decision he had made in the case of *The Belle Creole* upon a state of facts similar to those of *The Cato*, and says, "I do not exactly recollect by what rule I estimated the quantum of wages, I ordered to be paid out of the surplus to the officers and crew of *The Belle Creole*, but I think it was *beyond the amount of wages.*" I shall have occasion presently to remark particularly on the third article of the laws of Oleron, and it will be seen how it applies to the present case. The case of *The Catherine Maria*, (2 Peters, Ad. Rep. 424,) was that of a vessel foundered at sea. A part of the cargo was saved by the aid of another vessel, in which the crew was brought home. Salvage

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was allowed to the crew of the salvor vessel, and the crew of the lost vessel were allowed their wages from the property saved, *which was part of the cargo*, not only to the time of the abandonment of the ship, but to the time when the goods were brought into port, and were taken into the custody of the marshal under the process of the court. In the case of *The Brig Sophia*, (Gilpin, R. 77,) the vessel was wrecked on her return voyage to Philadelphia, on the Capes of the Delaware. The cargo was entirely lost, but some of the spars and rigging of the vessel were saved. The seamen filed a libel against the relics of the vessel for their wages, and the mate a separate libel, claiming salvage. The court held that the claim for wages could not be sustained, on the ground that freight is the mother of wages, and that when the freight is entirely lost, no wages *eo nomine*, are due. But it was further decided, that although nothing could be recovered as wages, the seamen were entitled to claim as salvors, and that the amount, which would have been due as wages, had the disaster not happened, might be recovered as salvage. The libel of the seamen was therefore dismissed, and the mate recovered the amount of his wages under the title of salvage.

All these cases clearly sustain the principle, that the seamen, in the event of shipwreck, are entitled to claim, against the property, which they have saved, in the quality of salvors. It is true that in the case from Gilpin, this seems to be treated as a substitute for the claim of wages, and to be measured by the amount which would be due if the disaster had not occurred. In the other cases, it is clear that the court thought it might exceed that amount, and in that of *The Catherine Maria* more was in fact awarded. And if the claim is valid for salvage, it would seem, as in all other cases of salvage, it must be discretionary as to the amount, to be determined by the particular circumstances of the case. But all these cases are open to one general remark, which may be thought to detract something from their authority in support of the principle contended for in the case at bar; it is this, that it seems to have been tacitly assumed that the wages were lost by the calamity, which prevented the earning of freight, and therefore, if the seamen could not be rewarded for their services in the way of salvage, they could claim nothing. Undoubtedly it was formerly the doctrine of the English courts, that freight was the only fund out of which wages could be claimed, and of course when freight was not earned, no wages were due. (Holt, Law of Shipping, 275.) But that is now overruled in England,—*The Neptune*, (1 Hagg. R. 227,) and it was never received in this country but with material qualifications. Freight is indeed the natural fund for the payment of wages, and the seamen have a privileged claim against it. It is a right, which does not stand merely on a dry rule of positive law, but is derived from the nature of things, for it is in part the product of their own labor. But, by the maritime law, the ship is as much pledged for wages as the freight. When the interests of third parties are involved, as between underwriters, when the ship and freight are insured by separate policies, it would seem, upon principles of natural law, that the freight

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ought first to be exhaused, and the vessel resorted to only as a subsidiary fund when the freight proved insufficient. This was the opinion of Emerigon,[1] and in a proper case the court may perhaps have the power of marshalling the funds to meet the claims of natural justice. But at all events, the seamen are to be paid their wages, when enough for that purpose is saved of the ship or freight. *Pitman* v. *Hooper*, (3 Sumner R. 60.) It is not pretended that these authorities establish the principle as a settled rule of jurisprudence in this country, that upon shipwreck, when part of the property has been saved to the owners by the exertions of the crew, they are entitled to an allowance in the nature of salvage beyond the amount of their wages. But to me they seem to prove at least, that the opposite rule is not established, and that the question is fairly open to be decided upon principle, and the authority of the general maritime law.

We will now inquire what grounds it has for its support in the general doctrines of that law. The policy of connecting the interest of the crew with the safety of the ship and cargo is deeply imbedded in the principles of the maritime law. The ship and freight are the only pledge they have for their wages. Their lien upon these and upon every part of them attaches as a privileged hypothecation *tota in toto et tota in qualibet parte*, or, as it has been emphatically expressed, to the last plank of the ship, and to the last fragment of the freight.[2] But this is the whole of their security. If the ship and freight are wholly lost, there is a total loss of wages; and though the ship may be lost on the most distant and inhospitable shore of the ocean, they are not only left pennyless to find their way home as they can, but when through many hardships they have arrived there, however long and perilous their service may have been, they have no personal claim against the owner, unless freight in the course of the voyage has been saved and put on shore. Upon the common principles of the contract of hiring service or labor the title of the laborer to his reward depends on the faithful performance of the service, for which he is engaged, and is not liable to be defeated by the accidents of fortune.[3] The principle which attaches the right to wages to the fortune of the vessel, or in other words, makes the right dependent on the successful issue of the enterprise, for which the men are hired, is a peculiar feature of the modern maritime law. No trace of such a principle is to be found in the Roman law, nor in the maritime legislation of the Eastern Empire, nor in that ancient compilation, which goes under the name of the Rhodian laws.[4] It owes its origin to the necessities and peculiar hazards, which maritime commerce had to encounter in the middle ages, when to the dangers of the winds and

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[1] Traité des Assurances, art. 17, sect. 11, 53.

[2] Jugemens D'Oleron, art. 3. Consulat de la Mer, ch. 132, (edition of Pardessus, 92.) Emerigon Des Assurances, ch. 16, sect. 11, § 2. *Pitman* v. *Hooper*, (3 Sumner, R. 50.)

[3] 2 Kent's Comm. 590—1. Pothier, Contrat de Louage, No. 423.

[4] Pardessus, Lois Maritimes, vol. i. p. 325, note 3.

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waves, were added the more formidable perils of piracy and robbery. The principle having been then established, and found by experience to be favorable to the general interest and security of commerce, it has been preserved in the maritime jurisprudence of Europe, when the special necessities in which it had its birth have ceased to exist.

It is then to the maritime customs and usages of the middle ages, in which this restriction upon the right of wages had its origin, that we are to look for its nature and quality, as well as for any countervailing advantages to the seamen, by which this abridgment of the rights naturally resulting from their contract was compensated, and the scales of justice, which were made to incline in favor of the employer, were equitably readjusted. If we retain the harsher principles of the old law, it is but just that we should also preserve the temperaments, by which its severity and apparent injustice were mitigated.

The earliest monument of the maritime jurisprudence of the middle ages which remains, unless we except the Consulate of the Sea, is the Judgments of Oleron. The rule is there stated in these terms: "When a vessel is lost, in whatever place it may be, the seamen are bound to save all they can of the wreck and cargo. In this case the master shall pay them their reasonable wages, *and the expenses of their return home*, so far as the value of the thing saved is sufficient; and if he has not money enough, he may pledge the objects saved to bring them back to their country. If the seamen refuse to labor for the salvage, there is nothing due to them, and on the contrary when the ship is lost, they lose also their wages." (Art. 3.) The rule cannot well be more explicity declared than in this article. If the ship is totally lost, the seamen lose their wages; but, against the effects which their exertions have rescued from destruction, they have a claim not only for the full amount of their wages, for that I understand to be meant by their reasonable wages, but also for a further sum to defray their expenses home. Thus we see that in the very origin of the custom which restricted the right of seamen for their wages to the effects which they saved, it was connected with another of allowing them against these effects an additional reward for their labor in saving them.

The Judgments, or Roles, or, as they are more frequently called in this country, the Laws of Oleron, do not appear, at first especially, to have been sanctioned by any direct act of legislation. They are apparently a collection of maritime usages, to which custom had given the force of law; but they have at all times been referred to as of high authority by all the most commercial nations of Europe. They were the earliest digest of maritime law in the western part of Europe, and from the general wisdom and equity of their decisions, as well as from other causes, they seem, in one form or another, to have been early incorporated into the maritime jurisprudence of all the western nations of that continent. Being a work of French origin, they were received as common law in Aquitaine, Brittany, Normandy, and the whole extent of the Atlantic coast of France. In England they early

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acquired nearly the same authority, from an opinion there entertained, that they were originally compiled and published by Richard I. in his character of Duke of Aquitaine, on his return from the Holy Land. In the latter part of the twelfth century they were adopted by Alphonso the Wise, King of Castile and Leon, and thus became the law of the northern coast of Spain.[1] They were at an early period translated and adopted as the maritime law of Flanders, under the names of the Judgments of Damme and the laws of West Capelle.[2] The third article above quoted is in its substance incorporated into the ordinance of Philip 2, of 1563. (Part 4, art. 12. 4 Pardessus, 24.) In the more northern countries, this code does not appear to have been received as common law; but the general principles and usages which it established, were incorporated into their own ordinances. The whole of the first twenty-five, which were the primitive articles, are transferred to the ordinance of Wisbuy, from the 15th to the 39th article. The seventeenth article of the laws of Wisbuy is almost a literal translation of the third of Oleron. The Hanseatic ordinance, without copying so closely the article of Oleron, arrives at nearly the same conclusion. In case of shipwreck, the crew are required to assist the master in saving the wreck and cargo, for an equitable compensation in salvage, to be taken from the wreck, and the merchandise, according to the judgment of arbiters. If the master has not money, he shall carry the seamen back to their country if they choose to follow him. But if the seamen do not assist, the master is not bound to pay them any thing, and those, who have not done their duty, are liable to corporal punishment. Where the ship perishes, the whole that is saved is pledged to pay the totality of the wages.[3] The law of Denmark requires the master and crew to save the ship and her rigging as well as the cargo, and a compensation shall be paid them according to the opinion of good men. On the other hand the freight due from the shippers on the merchandise saved, as well as the wages of the crew, shall be paid in proportion to the part of the voyage performed. The mariner who will not aid in saving the ship and cargo shall lose his wages, even what has been advanced, and be regarded as infamous.[4] The same rules are established by the laws of Hamburg. The crew are bound to exert themselves to save the vessel and cargo for an equitable recompense, and if they refuse their assistance, the master shall pay them neither their wages nor any thing else.[5] The law of Lubec substantially agrees with that of Hamburg. It requires the master and crew to exert themselves to save the vessel and cargo, and allows them an equitable compensation, to be determined by arbiters. He who does not assist, shall be paid nothing and

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[1] Pardessus, Collection des Lois Maritimes, Vol. 1, pp. 301 and 306. Vol. 2, p. 29. 1 Black. Comm. 418. 2 do. 423.

[2] Pardessus, Lois Maritimes, Vol. 1, ch. 9.

[3] Ordinance of 1614. Tit. 4, Art 29, and Tit. 9, Art. 5. Ordinance of 1591, Art. 45.

[4] Code of Frederic II. 1561, Art, 24. Pardessus, Lois Maritimes, Vol. 3, p. 250.

[5] Statute of 1603, Tit. 17, Art. 1. 3 Pardessus 325.

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shall besides be deprived of his wages.[1] The Prussian Law also enjoins the same duties upon the crew, and requires the merchant to pay them a liberal reward *honestum premium viri boni arbitrio.*[2] The maritime code of Charles XI. of Sweden, as well as several of the ordinances of the northern nations, prescribes particularly the course to be pursued by the master on these occasions. He shall first save the crew, then the rigging of the ship, and lastly the cargo, for the saving of which he shall employ the boat and the services of his crew, for an equitable compensation. When the ship and cargo are entirely lost, the master and crew can demand nothing that is due to them. But if they save of the wreck the amount of their wages, they shall be paid without deduction. No one shall have reward for a salvage who has not aided; and he who has saved effects, may detain them until he is paid.[3] And finally, the maritime legislation of Russia inculcates the same principles, imposing on the crew, the obligation of saving what they can from the wreck, and giving them an equitable compensation for the salvage.[4]

The French Ordinance of Marine of 1681, was framed upon a review of all the antecedent maritime legislation of Europe, improved and corrected, it is said, by information sought from practical men in every part of the continent. And so admirably was the task executed by the great man who digested it, that from its first publication, it was generally acknowledged as constituting in some sort the text of the commercial law of all nations. In this celebrated code we find the same principles established and confirmed. When the ship and merchandise is entirely lost it is followed by an entire loss of wages. But if any part of the vessel is saved, the seamen engaged for the voyage or by the month shall be paid their wages. If merchandise only is saved they shall be paid their wages in proportion to the freight received. But at all events they shall be paid for their days employed in saving the wreck and the effects shipwrecked.[5]

It is certainly a little remarkable, in passing to the southern coast of Europe, that we find but very slight traces of a custom that seems from the earliest times to have prevailed on the Atlantic coast, that of allowing to the crew something in the nature of salvage from the property they save from the wreck. There is one chapter in the Consulate of the Sea, from which perhaps a custom may be inferred of allowing to seamen the expenses of their return home, when the vessel is lost on a foreign coast. It provides that when a ship sails to the countries of the Saracens and falls into the hands of enemies, or is lost by the fortune of the seas, if the master receive no freight, he shall not be bound to pay the seamen anything. "The master, says the

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[1] Official Code 1586. Tit. 3, Art. 3. 3 Pard. 444.
[2] Code of the Duchy of Prussia 1620. Lib. 4, Tit. 12, Art. 3, § 3.
[3] Code of Charles XI. 1667, Part 5, ch. 2. 3 Pard. 170.
[4] Statute of Riga, 1672, Tit. 5, Art. 1. 3 Pard. 520.
[5] Liv. 3, Tit. 4, Art. 8—9. The same principles are preserved in the Code de Commerce, Art. 52—61.

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Consulate, who by one of the causes mentioned, loses his vessel, is not obliged to furnish the means of passage nor provisions for the seamen till their return to a christian country, because he has lost all he had and peradventure more." (Chap. 228, edition of Pardessus, 194.) The reason given for exempting the master from the charge, in this case, leaves room for the conjecture, that if part of the wreck had been saved by the crew, they might by custom be entitled to some allowance from it. The law of Genoa provides, when any disaster happens to a Genoese vessel, that the crew shall be bound to remain with the master and assist in the salvage, and that the master shall provide for their board and pay them double wages while they are employed in this service.[1] This is all I have been able to find in the legislation of those countries which border on the Mediterranean, indicating the existence of such a custom; while the ordinance of Peter IV. of Aragon and Valentia by its silence seems to negative it. It allows the seamen their wages in these cases to the time of the expiration of their service, provided they exert themselves to save the wreck and cargo, but nothing more, and visits upon their refusal to aid the penalty of the forfeiture of all wages even of that, which has been paid in advance.[2]

From this review of the maritime legislation, and jurisprudence of Europe, and more particularly of the western nations of Europe, commencing with the judgments of Oleron in the twelfth to nearly the close of the seventeenth century, we find, either by positive ordinances or by immemorial usages having the force of law, one prevailing rule applying to the case of shipwreck upon the whole extent of the Atlantic coast. It required the ship's company, in case of disaster, to exert themselves to the utmost of their ability to save as much as possible of the ship and cargo, generally under the penalty for the refusal or neglect to perform this duty, of a forfeiture of wages, and in some cases of additional punishment; but restricting their claim for wages to the effects, which they save, and allowing them against those effects some reward beyond the amount of their wages stipulated by the contract. These principles seem to have been incorporated into the early law of every maritime state on the Atlantic coast, from the extreme west of the Spanish peninsula to Sweden, including the ports of the Baltic. Such a general concurrence, of itself, raises a strong presumption that they are, taken together, founded in justice and wisdom. But independent of the authority of general usage, these principles appear to me to have their foundation in just and enlightened views of public policy, their object being to connect the fortune of the crew with that of the vessel, and thus fortify the obligations of social duty by the ties of pecuniary interest. They are strongly maintained by Mr. Justice Story, in the case of the Two Catherines, before referred to. "In my judgment" says he, "there is not any

[1] Statutum 1441, ch. 14. Pard. Vol. 4, 519.
[2] Ordinance of 1440. Art. 17, 5 Pard. 357.

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principle of law, which authorizes the position, that the character of seamen creates an incapacity to assume that of salvors; and I cannot but view the establishment of such a doctrine as mischievous to the interests of commerce, inconsistent with natural equity and hostile to the growth of sound morals and probity. It is tempting the unfortunate mariner to obtain by plunder and embezzlement, in a common calamity, what he ought to possess upon the purest maxims of social justice." (2 Mason, 332). The rule which restricts the claims of seamen for wages, to the effects, which they save, is one of naked policy; but that which allows them against these effects some reward beyond their wages, seems to me to be founded in a principle of natural equity, that is, that when property has been rescued and saved to the owner from extraordinary perils by extraordinary exertions, the fund, which is thus saved, owes something to the hand which has preserved it. If it be said, that the services, by which it is saved, were due under the contract, the nature of that contract ought also to be considered. Upon principles of public policy, contrary to natural justice and the general law of the contract of hiring in all other cases, if the ship is totally lost without any fault of the mariner, he loses his entire wages. But if a mechanic is hired to build a house, and before it is finished, the building is destroyed by an earthquake, or burnt by lightning, he is not on this account the less entitled to his wages. (Dig. 19, 12, 59.) Or if workemen are employed to build a dike, and before the work is accepted by the employer it is destroyed, not from any fault of the workmen, but from the defect of the soil or any other extraneous cause, the laborer is still entitled to his hire. (Dig. 19, 2, 62). The loss in such cases falls upon the owner or employer; and justly, for the whole profits, on the successful issue of the enterprise, would have gone to him. It is not so with the seaman. He can be paid only from the fund, which he has brought home to the owner; and his compensation is made dependent on the accidents of fortune, as well as on his own fidelity. It is no more than a just compensation for this inequality of the contract, when by extraordinary exertions of skill and intrepidity, he has saved the fortune of his employer from extraordinary perils, that these labors should be acknowledged by some reward beyond his stipulated wages.

And the policy of the principle appears to me to be as clear as its justice. It is a reward held out to induce the crew to persevere and exert the utmost of their skill and courage, even beyond what a court might think itself justified in requiring under their contract, to save what otherwise would be irretrivably lost to the owner. If they can look to nothing beyond their wages they will naturally be inclined to relax their efforts, when enough has been saved for that purpose. They will also naturally turn their attention exclusively to saving that which is pledged for their wages, that is the ship, to the neglect of the cargo. An observation of Judge Peters, whose extensive experience as a maritime judge, entitles his opinion on subjects of this kind to great consideration, is well deserving of attention. In the case of the Cato he remarked — "There is a mistake, evidenced by some of the

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counsel in this and other *salvage* cases, as to the principles regulating the payment of *wages* to the seamen in the cases of wreck. The old law was that they were payable only out of such parts of the wreck of the ship, her cables and furniture as were saved; but it was found that under this impression the mariners were occupied in saving those articles, from which they derived an advantage and to ensure this, they suffered the goods to perish. Modern authorities are clear that both ship and cargo or such parts as are saved are alike responsible; though it should seem that the old fund, to wit, the part of the ship's materials or furniture saved should be exhausted before the cargo be made answerable." The mind of Judge Peters seems to have been vibrating between wages and salvage. Sometimes he calls the claim by one name and sometimes by the other. It seems to me that the seamen in these cases have two distinct claims, one for wages and another for salvage. Their wages are to be paid exclusively from the materials of the ship, they being specially pledged for that purpose, and the full amount due is to be paid without deduction. But they have no claim for wages against the cargo, except for the freight due upon it. Their claim for salvage is against the general mass of the property saved, and, as in all cases of salvage, the amount is uncertain, depending upon the particular circumstances of the case.

Upon the whole, after the best consideration that I have been able to give to the subject, it appears to me that on these melancholy occasions the crew are bound to remain by the vessel and contribute their utmost exertions to save as much as possible from the wreck; that if this is done, they are always entitled to their full wages if enough is saved for that purpose; but if they abandon the wreck and refuse to aid in saving it, their wages are forfeited. But that they may not rest satisfied with saving what is merely sufficient to pay their wages, and may be induced to persevere in their exertions so long as the chance of saving any thing remains, the law, from motives of policy, allows them, according to the circumstances and merits of their services, a further reward in the nature of salvage. The wages are to be paid exclusively from the materials of the ship, but the salvage is a general charge upon the whole mass of property saved. It is not, however, intended to be said that they can claim as general salvors, that is as persons, who being under no obligation to the ship, engage in this service as volunteers, or that they are entitled to be rewarded at the same liberal rate. Such a rule might sometimes increase the hazards instead of contributing to the safety of commerce. A crew who had from any cause become dissatisfied with their officers, or owners, might be willing to see the vessel placed in danger at the risk of some personal peril to themselves, in the hope of obtaining a large reward for rescuing her. But they are to be allowed a reasonable compensation *pro opera et labore*, as the rule is laid down in many of the old ordinances *boni viri arbitrio*. If the disaster happens in a foreign country it ought to be at least a sum sufficient to pay the expenses of their return home. Such, I think, are the principles of the general maritime law. And

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if they have not been directly and to their full extent sanctioned by any judicial decision in this country, the reasoning of the courts, in the cases which have been cited, appears to lead to the same conclusion.

But it was contended at the argument, whatever may be the doctrines of the general maritime law on this subject, that it has been superseded in this country by the acts of congress, which provide for sending home destitute seamen from foreign countries, at the public expense. The argument proceeds on the ground that the only motive for this allowance is to furnish the seamen the means of returning home. But the maritime law, as we have seen, places it upon a broader foundation, that of general commercial policy as well as the intrinsic equity of the claim. It never could have been the intention of these statutes, made for the benefit and relief of seamen, to abridge any of the rights derived from their service under the general maritime law. They have their origin in a great principle of public policy, that of preserving to the country the services of this most useful but most improvident and often destitute class of citizens.

The case at bar was not one of absolute shipwreck, but rather what has been called *semi naufragium.* The vessel was brought into port in so damaged a condition and requiring so large an outlay in repairs to refit her for sea, that for the interest of the owner she was sold as a wreck. Between the owners and the crew she must be considered for the purposes of this case either as a wreck, or not a wreck. Upon the latter hypothesis the sale must be considered as voluntary, and then the two months wages under the statute will be due. On the other, the principles of the maritime law will apply. Between the owners and the crew, it appears to me in the present case, that the true measure of justice will be to consider her to be what the owners treated her as being, a wreck. And as the libellant faithfully performed his duty so long as his service was required, he is entitled to the benefit of the rule that in addition to his wages the master shall provide for his expenses home. I shall allow for this purpose one month's additional wages.

Supreme Judicial Court, Maine, April Term, 1841, *at Portland.*

WATERHOUSE *v.* MAXWELL.

Who may take advantage of a fraudulent deed.

TRESPASS for cutting timber on the plaintiff's land. The defence was, that the defendant acted under a power of attorney from the plaintiff's grantor, and that at the time of the conveyance, the grantor was *non*

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compos, and that the deed was fraudulent. At the trial the judge ruled out this evidence, and a verdict was taken for the plaintiff. The defendant filed exceptions to the ruling of the jndge.

Willis and *Fessenden* for the plaintiff.

Smith and *Bradford* for the defendant.

EMERY J. delivered the opinion of the court which overruled the exceptions; none, except those claiming under a grantor, or creditors, can contest the deed which he may have given. Heirs cannot take advantage of a fraudulent deed, nor the grantor himself.

Judgment on the verdict.

BANK OF PORTLAND *v.* FOX.

A mortgagee may sue the mortgage note at any time before the expiration of the right of redemption.

THE plaintiff, as mortgagee of the defendant, entered upon the mortgaged premises for breach of the condition of the mortgage; and afterwards, before foreclosure, commenced the present action upon the note secured by the mortgage. The defence was, that the entry for breach of the condition was a satisfaction of the note to the value of the mortgaged premises; and the defendant claimed a right to show that the property was worth the amount of the note. The defence was overruled at the trial and exceptions taken.

Longfellow for the plaintiff.

Codman and *Fox* for the defendant.

SHEPLEY J. delivered the opinion of the court, that a mortgage was not payment or satisfaction of a debt so long as the right of redemption remained open. Until a foreclosure, the possession may be defeated by the payment of the debt and the mortgagee may maintain an action upon the mortgage note at any time, before the expiration of the right of redemption.

DENNETT ET UX *v.* DOW.

This was an appeal from the judge of probate approving a will. The decree was reversed in this court, and both parties moved for costs. The court decided, that although they had a discretionary power to award cost in cases like the present, the circumstances of the present case would not justify them in awarding it to either party; the defendant had a decree in favor of the will in the probate court, from which the plaintiffs appealed; he could not, therefore, properly avoid coming into this court, and it would not be reasonable to submit him to costs in the discharge of this duty. To compel the plaintiffs, the prevailing party, to pay cost, would not be to exercise a sound discretion. Both motions overruled.

Fessenden and *Deblois*, and *W. P. Fessenden* for the plaintiffs.

Preble for the defendant.

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Drinkwater *v.* Portland Marine Railway.

Liability of individual stockholders in incorporated companies.

The plaintiff's stock in the marine railway was attached on a writ, *Marwich* v. *Georgia Lumber Company*, of which the plaintiff was alleged to be a stockholder. The Georgia Lumber Co. was a corporation established by the state of Georgia, and recognised by a law of Maine; by the charter the private property of the stockholders is liable for the debts of the corporation: to secure a debt against the company this attachment was made, and that suit is still pending in court.

Preble for the plaintiff.

Willis and *Fessenden* for the defendants.

Per Curiam. The property of a stockholder cannot be attached and held on mesne process, in a suit against the company. The creditor must first obtain his judgment against the corporation, before he can pursue his remedy against the individual stockholders. The plaintiff's interest in the marine railway was therefore wrongfully attached, and judgment must accordingly be rendered against the defendants.

Haskell and another *v.* Whittemore.

The purchaser of a promissory note of hand from one who did not know it was without consideration, may maintain an action on it; although the purchaser knew all the facts.

Assumpsit on a promissory note by an indorsee. The note was originally without consideration, and was transferred by the payee to a third person for a valuable consideration and without knowledge of the original transaction. From his hands it passed, before it became due, to the plaintiffs for value, one of whom knew that it was given without consideration, the other did not. It was contended by the defendant that the note was void, and especially in the hands of the plaintiffs, one of whom knew of the original defect. Judgment was rendered for the plaintiffs.

Willis and *Fessenden* for the plaintiffs.

Codman and *Fox* for the defendant.

Shepley J. delivered the opinion of the court. The first indorsee being an innocent purchaser, had a legal right to recover the amount of the note; he could negotiate it, and the maker could not impair that right by giving notice that it was made without consideration; nor would he be injured by a transfer to one having a full knowledge of the facts; for his position would not be more unfavorable than before. If the relation between the maker and holder only were to be considered, the want of consideration would be a good defence to a holder who had purchased with notice; but purchasing of one who had no notice he must be considered to be in the same situation and entitled to the same protection.

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DIGEST OF AMERICAN CASES.

Selections from 8 New Hampshire Reports.

AGENT.

Where one furnishes an agent with money to make a purchase, and the agent purchases the goods on credit, the principal is not liable to the vendor, notwithstanding the goods have come to his use, unless he had previously allowed the agent to purchase on credit, and thus authorized the vendor to trust him. *Boston Iron Co.* v. *Hale*, 363.

ARBITRAMENT AND AWARD.

1. A report of referees made under a rule of court, is, when presented for acceptance, open to every objection, whether the grounds of the objection appear on the face of the report or not. *Adams* v. *Adams*, 82.

2. The question, whether a particular demand was within the submission, is a question, the final decision of which belongs to the court. *Ib.*

3. It is a valid objection to an award, that the referees have taken into consideration matters not submitted to them, and founded their report in part upon such matters. *Ib.*

4. And if in such a case they award a gross sum, and do not state the grounds on which the award is founded particularly, so that the court may see what is awarded on account of demands that are within the submission, the whole award is void. *Ib.*

5. Where an award is vitiated by being founded in part on demands not submitted, but which one of the parties had improperly laid before the referees, the court will not recommit the case to the referees, in order that the report may be amended, on the motion of such party. *Ib.*

6. Awards must be certain and intelligible; and where the controversy is as to lines of land, in order to be conclusive as to the issue, should be so distinct that an officer may be able to give possession of the premises, and designate its limits by metes and bounds. Any award in such case short of this will be void. *Aldrich* v. *Jessiman*, 516.

7. When arbitrators have once made an award, their office is at an end. They cannot afterwards correct mistakes by a new award, or explain it by affidavit. Any construction given to it must rest on what is apparent in the original award. *Ib.*

ASSUMPSIT.

Where any person is arrested for a just cause, and by lawful authority, for an improper purpose, any money he may pay for his enlargement may be considered as paid by duress of imprisonment, and may be recovered back in an action for money had and received. *Severance* v. *Kimball*, 386.

ATTACHMENT.

Where an officer makes a nominal attachment of goods, receiving the receipt of a third person for an amount sufficient to satisfy the demand, and returns an attachment upon the writ, it is not competent for the receipter to contest the attachment, or set up a want of consideration. *Morrison* v. *Blodgett*, 238.

BAILMENT.

1. Where the owners of a stage coach employ a driver under contract that he shall receive a certain sum of money per month and the compensation which shall be paid for the carriage of small parcels, the owners are answerable for the negligence of the driver in not delivering a parcel of that description, entrusted to him to carry, unless this

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arrangement is known to the proprietor of the goods, so that he contracts with the driver as principal. *Bean* v. *Sturtevant*, 146.

2. Where one receives goods upon a contract, by which he is to keep them a certain period, and if in that time he pays for them he is to become the owner, but otherwise he is to pay for the use of them, he receives them as a bailee, and the property of the goods is not changed until the price is paid. *Sargent* v. *Gile*, 325.

3. If a bailee for hire, for a limited period, sell the goods before the expiration of the term, the bailment is thereby ended; and the owner may maintain trover, if the vendee refuses to deliver them up on demand. And it will not alter the case, if the bailee had, by his contract, a right to purchase the goods within the term, by paying a certain price. *Ib.*

4. Where a traveller, after arriving at an inn, placed his loaded wagon under an open shed, near the highway, and made no request to the innkeeper to take the custody of it, and goods were stolen from it in the night; it was *held*, that the innkeeper was not liable for the loss, notwithstanding it was usual to place loaded teams in that place. *Albin* v. *Presby*, 408.

BILLS AND NOTES.

1. Where a draft has been protested for non-acceptance, the holder is not bound to present it at maturity, for payment. *Exeter Bank* v. *Gordon*, 66.

2. Where an agent receives the negotiable note of a third person from his principal, with authority to collect and apply the proceeds to the payment of a debt due from the principal to the agent, if the contents of the note are lost by the fraud or negligence of the agent, it will operate as a payment of the debt of the principal. *Ib.*

3. But if in such a case the agent, by a compromise, on the whole advantageous to all parties, release the third person on receiving one half the debt, in such a case the release will not operate as a payment of the debt of the principal beyond the amount received by the agent, although the compromise was made without the authority of the principal. *Ib.*

4. Where a creditor charged his travelling and other expenses, incurred on a journey made for the purpose of collecting a debt, which expenses were included in a new note given by the debtor,—*held*, that the note to this extent was without consideration. *Bean* v. *Jones*, 149.

5. But where each note was subsequently voluntarily paid by the debtor,—*held*, that an action would not lie to recover the same back. *Ib.*

6. A note payable to order may be assigned by delivery without endorsement; but such assignment is invalid except made by the rightful holder, or by his authority. *Davis* v. *Lane*, 224.

7. Where, on the decease of a promisee of a negotiable note, the note was taken without endorsement and in fraud of the estate to the promissor, and he paid it, *held*, that the payment did not avail against the administrator, and suit was maintained in his favor for the original consideration of the note. *Ib.*

8. In a suit, by the endorsee of a note against the maker, where the defence set up is that the note was endorsed after it was discredited, and is therefore liable to any defence existing before the assignment, the burthen of proof, as to the time of the endorsement, rests upon the maker of the note. *Burnham* v. *Wood*, 334.

9. The ordinary presumption is that the note was endorsed within a reasonable time of the date of the note, unless the contrary is proved; and this presumption is the same, whether the note is specially declared on, or is offered in evidence under a general count for money had and received. *Ib.*

10. A covenant not to sue one of two or more joint and several promissors, who are principals on a note, will not operate as a release to discharge the other promissors. *Durell* v. *Wendell*, 369.

11. Where L as principal, and S as surety, gave a note to A, and L having died the payee neglected to exhibit the note to L's executor within two years from the grant of administration, it was *held* that the surety still remained liable, and having paid the note was entitled to recover the amount of the executor. *Sibley* v. *McAllaster*, 389.

12. If the maker of a note, which is not in its nature assignable without his consent, when notified by a third person that it has been assigned to him by the payee, make no objection, his si-

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lence in this respect is to be considered as an assent to the assignment. *Clement* v. *Clement*, 472.

13. Where a promissory note was signed by one as principal, and another as surety, evidence that the creditor, upon a request by the surety that he would collect the debt, said that the principal had paid a part, and was making arrangements to pay the residue, and that he should not call on him for the note, or words to that effect, is not sufficient to discharge the surety. *Mahurin* v. *Pearson*, 539.

BOND.

1. Where a bond has been once rejected by the obligees, a re-execution is not required to render it valid in the hands of the obligees by an after acceptance. *Pequawkett Bridge* v. *Mathes*, 139.

2. The alteration in an instrument after delivery, made by the obligee, or a stranger, to affect its validity must be material. *Ib.*

3. Where the whole penalty of a bond has become a debt, which the obligors unjustly detain, the obligee is entitled to recover interest upon the penalty, during the time it was detained. *Judge of Probate* v. *Heydock*, 491.

4. The sureties in an administration bond are liable for the proceeds of lands in another state, with which the principal has been charged on the settlement of his administration account in this state. *Ib.*

5. Where an action is commenced on an administration bond, and a breach of the condition is found, or admitted, execution may be awarded, upon a hearing in chancery, for money, the non-payment of which could not have been given in evidence to support the action at law. Thus—

6. Where an action was brought in the name of the judge of probate, against an executor and his sureties, and a breach of the condition was acknowledged, and a motion made to be heard in chancery, after which the executor's account was settled in the probate court, and he died—it was *held*, that the administrator *de bonis non* had a legal claim to the balance left in the hands of the executor, on such settlement, and might have execution for it, or so much of it as the bond was sufficient to cover, on the hearing in chancery, (unless it was shown that it had been reduced by farther payments in the course of the administration,) and that no decree of the judge of probate ordering such balance to be paid to the administrator *de bonis non* was necessary, under such circumstances, for that purpose. *Ib.*

7. An administration bond is not discharged by an accounting for moneys to the amount of the penalty. Payments made by an executor, or administrator, in the due course of administration, are to be applied to diminish the balance in his hands, and the bond stands as a security for such balance. *Ib.*

CASE.

Where A, finding the sheep of B in A's close, drove them out of the close and then drove them away to a considerable distance, to the injury of B—it was *held*, that the driving of the sheep away was a wrongful act, which made A a trespasser *ab initio*, and amounted to a conversion of the property; but that B might waive the trespass and conversion, and recover for the damage sustained, in a special action on the case. *Gilson* v. *Fisk*, 404.

CHANCERY.

1. A special performance of a parol agreement for the sale of land, may be decreed in equity, when the agreement is admitted, unless the party insists upon the benefit of the statute of frauds. *Newton* v. *Swazey & a.* 9.

2. And a part performance of such contract will take it out of the statute. If the vendee, with the assent of the vendor, enters into the land and makes improvements, it will constitute such part performance. *Ib.*

3. A bill for specific performance may be maintained against the heirs of the vendor. *Ib.*

4. A resulting trust may be raised, rebutted, or discharged by parol evidence. *Page* v. *Page*, 187.

5. Where P bought land and took a deed in the name of L, and L advanced the purchase money and took the notes of P for the same, and agreed to convey the land to P on being repaid the money advanced, and interest—it was *held*, that the money thus advanced by L might be considered as a loan to P, and the land as purchased with the money of P so as to raise a resulting trust. *Ib.*

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6. In general, where there is a resulting trust in lands, whoever purchases the land of the trustee, with the notice of the trust, becomes a trustee. *Ib.*

7. But this rule does not apply when the land is purchased of the trustee with the assent and at the request of the *cestui que trust. Ib.*

8. When the facts charged in a bill in equity are fully denied in the answer, there can be no decree against the answer on the evidence of a single witness, without corroborating circumstances to supply the place of a second witness. *Ib.*

9. When a father purchases land in the name of a son, no trust will in general result, but the conveyance to the son will be deemed an advancement. *Ib.*

10. After the filing of a general replication to a plea in chancery, nothing is in controversy but the truth of the matters alleged in the pleadings, and it is then too late to except to the sufficiency of the plea. *Bellows* v. *Stone*, 280.

11. If the defendant's pleading does not contain a full answer to the matters alleged in the bill, the course is to except to its sufficiency, and not to reply. *Ib.*

12. Where circumstances are stated in the bill, which if admitted to be true would be evidence to avoid the bar attempted to be set up by the plea, it is necessary to negative such circumstances by general averments in the plea, and to support the plea by an answer containing a particular denial of them. *Ib.*

COMMON LAW.

The body of the common law, and the English statutes in amendment of it, so far as they were applicable to our institutions and the circumstances of the country, were in force here upon the organization of the provincial government; and they have been continued in force by the constitution, so far as they are not repugnant to that instrument, until altered or repealed by the legislature. *State* v. *Rollins*, 550.

CONTRACT.

1. A verbal promise by the vendee, as part of the consideration for the conveyance of a tract of land, that he will pay the vendor whatever he may receive over a certain sum upon a re-sale of the land, is valid, and the money may be recovered in an action of assumpsit, notwithstanding the deed contains an acknowledgment that the consideration has been paid. *Hall* v. *Hall*, 129.

2. Where a contract was made payable in labor within the year, to be rendered on articles furnished to be manufactured by the plaintiff, *held* that such articles must be furnished seasonably for the manufacture of them within the time assigned in the contract, otherwise the defendant would be discharged from all liability for the performance of such labor. *Clement* v. *Clement*, 210.

3. Where a party gave a written promise to pay a certain sum in one year, for a clock, or interest on the sum, and the clock uninjured; and the writing purported to have been made at the town where the promisor resided, the promisee living in another state; *held*, that the place of performance was the house of the promisor; that he had an election to pay the money, or deliver the clock and pay the interest, and that no action could be sustained until after a demand, or evidence that the promisee was ready to receive performance at the place, or that the defendant was unable to perform the contract. *Barker* v. *Jones*, 413.

CORPORATIONS.

1. A corporation, created by the laws of another state, has power to take and hold lands in this state. *Lumbard* v. *Aldrich*, 31.

2. A vote of a corporation to authorize an agent to convey lands must specify the tract to be conveyed, or give some description by which it can be ascertained. A vote that the agent be authorized to execute two deeds of pieces of land in C, one to A, and another to B, is uncertain and insufficient. The power of attorney ought to be as certain as it is necessary for the deed to be which is to be executed under it. *Ib.*

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INTELLIGENCE AND MISCELLANY.

THE BENCH AND BAR IN ILLINOIS. We have recently received a communication from a gentleman who went from New England and has established himself in Illinois, in which he says an important change was made in the judiciary system of that state by the last legislature. The old system consisted of a supreme court of four judges, and a circuit court of nine judges. The circuit court was abolished, and five judges were added to the supreme court, and a judge of the supreme court assigned to each circuit, in addition to his duties as a judge of the supreme court, which sits twice a year, and once during the session of the legislature, as a council of revision, in connection with the governor. "This was a party movement, openly avowed, for the purpose of settling two or three party questions, such as the naturalization question, &c., and to remove certain obnoxious judges, two of them whigs and one a democrat. Four of the old circuit judges were put upon the new bench, and two of them had previously resigned. The judge of our circuit is S. A. Douglass, a youth of 28, who was the democratic candidate for congress in 1838, in opposition to Stuart, the late member from this district. He is a Vermonter, a man of considerable talent, and in the way of despatching business, is a perfect "steam engine in breeches." This despatch is the only benefit our circuit will derive from the change. He is the most *democratic* judge I ever knew. While a case is going on, he leaves the bench and goes among the *people* and among the members of the bar, takes his cigar and has a social smoke with them, or often sitting in their laps, being in person, say five feet *nothing*, or thereabouts, and probably weighing one hundred pounds. I have often thought we should cut a queer figure, if one of your Suffolk bar should accidentally drop in. After all, however, we are a considerably civilized set at the —— Bar, eighteen of us, about one third of whom are Yankees, and the eldest of us only about forty years old. There is much less civilization in the other counties of this circuit, eight in number. Our practice is very different from the New England practice. I like it in many respects better, and in others not so well. It is fast improving, like every thing else about us, making rapid strides, in fact."

LORD THURLOW. It is related of Lord Thurlow that when his patent of peerage was registered at the heralds' college, the herald begged to know the name of his lordship's mother? The reply was delivered in a voice of thunder, "I cannot tell!"

It is stated in Lardner's Cyclopedia, that Lavater, on seeing a picture of Lord Thurlow, examined it for a moment, and said, "whether this man be on earth or in hell I know not; but wherever he is, he is a tyrant, and will rule if he can.

LAWYERS IN NAPLES. In Michael Kelly's memoirs it is stated, that there are twenty thousand lawyers in the kingdom of Naples, most of them younger branches of the nobility; and there is no nation in which so many lawsuits are carried on.

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MONTHLY LIST OF INSOLVENTS.

Name	Occupation
Boston.	
Davis, Ambrose,	Traders,
Collomore, George W.	Copartners.
Dickinson, Dexter O.	Merchants,
Sweet, William L	Copartners.
Hayward, George A.	Shoe-dealer.
Melville, John,	Provision-dealer.
Meyer, Borchart,	Merchant.
Nettleton, Charles L.	Trader.
Clark, Uriah J.	Broker.
Hastings, Ebenezer G.	Laborer.
Cambridge.	
Newell, Frederic R.	Cabinet mak'r.
Charlestown.	
Kimball, William W.	Master mariner.
Concord.	
Wetherbee, Charles R.	Trader.
Lowell.	
Barratt, John S.	
Davis, Abram B.	Manufacturer.
Russell, Israel D.	Trader.
Sawtell, Isaac.	
Medford.	
Barker, William S.	Trader.
Marlborough.	
Cunningham, Jona. B.	Mason.
Howe, William,	Yeoman.
Middleborough.	
Burgess, Cornelius S.	Carpenter.
Milford.	
Chapin, Adams,	Cordwainer.
Newton.	
Henry, William,	Paper maker.
New Bedford.	
Parsons, John,	Trader.
Roxbury.	
Briggs, Cornelius,	CabinetManufacturer.
Southborough.	
Stow, Samuel D.	Laborer.
South Hadley.	
Merchants, Elihu B.	
Springfield.	
Rice, Charles W.	Carpenter.
Stow.	
Brooks, Isaac,	Gentleman.
Wilbraham.	
Hancock, Lumbard L.	
Watertown.	
Pierce, Otis,	Teacher.

NEW PUBLICATIONS.

Reports of cases argued and determined in the Superior Court of Judicature, of New Hampshire. Volume VIII. Concord: Marsh, Capen, Lyon & Webb, 1840. We have received the third part of this volume, and have given an abstract of some of the important decisions in our digest of cases in the present number. The present volume commences with the July term, 1835, in Grafton, and ends with the December term, 1837, in Rockingham. The decisions of the superior court of New Hampshire, compare favorably with those of other states, and the reputation of the bar there has always been high. There are three men now living, either of whom is scarcely equalled in the whole country, who received their legal education and commenced their career of fame amid the hills of the granite state. What need to mention the names of Daniel Webster, Jeremiah Mason and Jeremiah Smith?

We understand that Mr. Scammon, the reporter of Illinois, who lost nearly all the copies of the first volume of his reports by fire recently, is now reprinting it in Philadelphia. The second volume is also nearly ready for the press.

A second edition of Williams on Executors, with notes, by Francis J. Troubat, has been published in Philadelphia.

*** TO OUR READERS. Some complaints have come to our ears in relation to the non-reception of all the numbers of the last volume of the Law Reporter. Our readers are aware, that the work passed into the hands of new publishers at the commencement of the present volume; and we would call the attention of those aggrieved by the negligence of the old publishers, to the advertisement on the third page of the cover.

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THE LAW REPORTER.

AUGUST, 1841.

REMARKABLE TRIALS. — No. III.

CASE OF HENRY ALEXANDER CAMPBELL.

That duelling is not entirely unknown in modern days is not the fault of the law; but it must be confessed, that penal enactments against the practice are rarely enforced, and public sympathy protects offenders who are liable to the severest of human punishments. Within a few months one of the most contemptible scenes of judicial trifling on record, has been enacted in the English house of lords, in the case of the Earl of Cardigan; and the opinion has become stronger than ever, that duelling is a necessary evil of civilized life. Occasionally, however, a case of punishment occurs, which stands out in terrible distinctness, and reveals the full horrors of this barbarous custom. Among the most interesting trials for this cause, in the annals of jurisprudence, is that of Henry Alexander Campbell, a brevet major in the English army and a captain in the twenty-first regiment of foot, which took place at the Armagh assizes in Ireland, in 1808. A duel between this gentleman and Captain Alexander Boyd, of the same regiment, having resulted in the death of the latter, Major Campbell was indicted and tried for the wilful and felonious murder of his friend.

The difficulty between the parties was of a trifling character. On June 23d, 1807, the regiment having been inspected by General Ker, the officers messed together. When they had all left the room excepting Major Campbell, Captain Boyd and two others, the gentleman first named remarked that General Ker corrected him that day about

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a particular mode of giving a word of command, when he conceived he gave it right; he mentioned how he gave it, and how the general corrected him. Captain Boyd remarked, that neither was correct according to Dundas, which was the king's order. Major Campbell said, it might not be according to the king's order, but still he conceived it was not incorrect. Captain Boyd still insisted it was not correct, according to the king's order. They argued this sometime, till Captain Boyd said, he knew it as well as any man; Major Campbell replied, he doubted that much. Captain Boyd at length said, he knew it better than he, let him take that as he liked. Major Campbell then got up and said, "Then, Captain Boyd, do you say I am wrong?" Captain Boyd replied, "I do — I know I am right according to the king's order." Major Campbell immediately left the room; went home and sent a challenge to Captain Boyd, requesting an interview at the mess room, in thirty minutes, without seconds. At this place, at the appointed time, the parties met, when Boyd expressed a willingness to proceed with the business, but wished that the matter might be peaceably adjusted, saying the altercation was too trifling to produce such serious consequences; it would tarnish both their names; at the same time asserting that Campbell was the first aggressor. Both parties were heated with wine and too much excited to allow of a satisfactory adjustment, and the duel proceeded. The weapons chosen were pistols; distance, the extremities of the room, about seven paces. By mutual agreement Campbell turned up a guinea to determine the first fire; it fell to his opponent. They took their stations. Boyd then said, "are you ready?" "Yes." He fired and the ball grazed the left cheek of his companion. Major Campbell then put the same question and on receiving the same answer, he immediately fired. Captain Boyd gave a violent spring, and exclaimed faintly, "Campbell I am a dying man." "Then," said the other, "on the word of a dying man, is every thing fair?" Gentlemen came into the room, when Boyd replied, "Campbell you have hurried me, you are a bad man." Campbell, in great distress, again asked him, "Boyd, before these gentlemen, was not everything right?" "No, Campbell, you well know I wished you to wait, and have friends." "Great God," said the other, "do you accuse me before these gentlemen of being your murderer?" Boyd replied, "Yes," and soon after said, "Campbell, you are a bad man." He now grew very weak from loss of blood and was helped into the next room, whither Campbell followed and told him as he was dying, that he was infinitely the happiest person of the two. He asked Captain Boyd if he forgave him. The latter stretched out his hand and said, "I forgive you I feel for you, and am sure you do for me." Major Campbell then left the room. Captain Boyd, shortly before his death, asked for him saying, "poor man, I am sorry for him."

Major Campbell made his escape from Ireland after the duel and lived with his family several months at Chelsea, under a fictitious

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name. But becoming very wretched, he resolved to surrender himself for trial, feeling certain what the result would be. "I will die," he said in a letter to a friend, "but not by my own hand: I will surrender myself to justice, and before the offended laws of my country, stand an unhappy example, and suffer a violent and ignominious death for the benefit of my countrymen, who by my unhappy exit shall learn to abhor the too prevalent and fashionable crime of duelling."

His trial took place at the Armagh assizes, August 10th, 1808. The only defence set up was the character of the prisoner for humanity, peaceable conduct and proper behavior, to which several officers of high rank testified in the fullest manner. The judge who presided at the trial, recapitulated the facts and thus concluded:

"It has been very accurately stated to you by the counsel for the prosecution, that illegally killing a man, by the law of England, must fall within one of the three species — homicide, manslaughter, or murder; and that with homicide you had nothing to do, as the case before you was clearly neither chance-medley, self-defence, nor any kind of justifiable homicide. The case, then, must either be manslaughter, or murder. Manslaughter is illegally killing a man under the strong impuse of natural passion. Three qualities are necessary to constitute it. In the first place, the passion must be natural; that is to say, such as is natural to human infirmity under the provocation given; — secondly, the act must be such as the passion naturally, and according to the ordinary course of human actions, would impel; — and thirdly, and indeed mainly, the criminal act must be committed in the actual moment of the passion, *flagrante animo*, as it is termed, and before the mind has time to cool. The act of killing, under such circumstances, is manslaughter. But if any of these circumstances be wanted; if the passion be beyond the provocation — beyond what the provocation should naturally and ordinarily produce; if the act be beyond the passion — beyond what the passion would naturally and ordinarily impel, or if it be not committed in the very moment of the passion, and before the passion either has or should have passed away; — in all these cases, the act of criminal killing is not manslaughter, but murder.

Now to apply this to the present case. The provocation, as atated by the evidence, consisted in these words, "Do you say I am wrong?" — "Yes, I do;" and the manner in which those words were said. It remains for you, therefore, gentlemen, to judge, whether such a provocation was sufficient to constitute that passion which, under the interpretation of the law, would render the prisoner at the bar guilty of manslaughter only, or whether the consequent passion was not above the provocation, and, therefore, that the prisoner is guilty of murder. You will consider this coolly in your own judgment, and will remember upon this point the evidence that has been given; that the words were certainly offensively spoken, but that it was in the heat of argument, and that by a candid explanation, as the evidence expressed it, the affair might not have occurred.

You will next have to consider, whether the criminal act was committed in the moment, the actual moment of the passion; or whether the prisoner had time to cool, and to return to the use of his reason. Upon this point you must keep your attention more particularly fixed on that part of the evidence which goes to state that major Campbell returned home, took his tea, and executed some domestic arrangements, after the words, and before the meeting. If you are of opinion, either that the provocation, which I have mentioned to you, and which you collect from the evidence, was too slight to excite that violence of passion which the law requires for manslaughter; or that, be the passion and the provocation what it might, still that the prisoner had time to cool, and return to his reason — in either of these cases, you are bound upon your oaths to find the prisoner guilty of murder.

There still is another point for your serious consideration. It has been correctly

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stated to you by the counsel, that there is such a thing which is called the point of *honor* — a principal totally false in itself, and unrecognised both by law and morality; but which, from its practical importance, and the mischief attending any disregard of it to the individual concerned, and particularly to a military individual, has usually been taken into consideration by juries, and admitted as a kind of extenuation. But in all such cases, gentlemen of the jury, there have been, and there must be, certain grounds for such indulgent consideration — such departure from the letter and spirit of the law. In the first place, the provocation must be great; in the second place, there must be a perfect fair dealing — the contract to oppose life to life, must be perfect on both sides, the consent of both must be full, neither of them must be forced into the field: — and thirdly, there must be something of necessity, to give and take the meeting; the consequence of refusing it being the loss of reputation, and there being no means of honorable reconciliation left.

Let me not be mistaken on this serious point. I am not justifying duelling; I am only stating those circumstances of extenuation, which are the only grounds that can justify a jury in dispensing with the letter of the law. You have to consider, therefore, gentlemen of the jury, whether this case has these circumstances of extenuation. You must here recall to your minds the words of the deceased, Captain Boyd — "You have hurried me — I wanted to wait and have friends — Campbell you are a bad man." These words are very important; and if you deem them sufficiently proved, they certainly do away all extenuation. If you think them proved, the prisoner is most clearly guilty of murder; the deceased will then have been hurried into the field; the contract of opposing life to life could not have been perfect. It is important, likewise, in this part of your consideration, that you should revert to the provocation, and to the evidence which stated that the words were offensively spoken, so as not to be passed over; but that the affair would not have happened, if there had been a candid explanation. Gentlemen of the jury, you will consider these points, and make your verdict accordingly."

The jury were out about half an hour and returned a verdict of guilty, but recommended the prisoner to mercy. Sentence of death was immediately passed on him, and he was ordered for execution on the following Monday, but in consequence of the recommendation of the jury, he was respited till Wednesday.

In the mean time, every effort was made by the friends of the unfortunate man to procure his pardon. The grand jury of the county, and the jury who found him guilty, presented petitions to the Lord Lieutenant of Dublin. Mrs. Campbell, his wife and the mother of his four children, on hearing the verdict, immediately set off for Dublin, and, finding the packet had sailed, crossed the channel in an open boat, landed in safety at Holyhead and arrived in London within twenty-eight hours. She then proceeded without loss of time to Windsor, and presented an affecting petition to the queen, drawn up by herself. It was eight o'clock when she arrived and his majesty had retired to his apartment; but the queen presented the memorial that night and Mrs. Campbell received the utmost kindness. But it was a case to which the royal mercy could not be extended. Mrs. Campbell went to Brighton to wait on the Prince of Wales, who immediately wrote a note to the Duke of Portland. This note Mrs. Campbell presented to his grace, who gave no hope that her application would be attended with success. But the wretched woman continued incessant in her entreaties and exertions even after it was forever too late.

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Major Campbell's deportment, during the whole time between his sentence and execution was manly and penitent. From the moment he determined to surrender himself, he had no expectation of escaping death. He said, that if he were convicted of murder he should suffer as an example to duelists in Ireland; and it was always his opinion that a jury would convict him. He wrote a long and affecting letter to his wife, dated the day previous to his death, in which he continued writing and dating from hour to hour till within a few moments before he was taken out for execution. It commences thus: — "Dearest and most unfortunate of wives: My trial is at length over. Twelve impartial men, and my countrymen, have on their oaths declared me guilty of murder. This world has now no charms for me. When the honor of a soldier is tarnished, the mantle of death cannot envelop him too quickly; but the separation from you and my children, embitters the last moments of existence. Death, but for this, would be a pleasing emancipation from woe: Now, alas! his dread summons will be obeyed with unspeakable, unavailing regret; but since my hitherto fair name is now coupled with infamy and crime, neither yourself nor my children ought to wish me to live." The concluding words were these:

"Half past 10 o'clock, A. M. My chaplain has just left me: the milk of human kindness circulates in his heart; and he hath imparted much consolation. A few moments only shall I inhale the vital air: the golden chalice shall be broken, and my immortal spirit reascend to the bosom of that God from whom it emanated! Farewell, best and dearest of wives: — Farewell, — forever! — Forever? No — In a future state we shall know each other again. Let this thought inspire thee with fortitude, and even tranquillity. Yes, my dear wife — we shall know each other hereafter. The few remaining moments of my wretched life, must be devoted to God, in fervent prayer."

He spent his last moments with Dr. Bowie, the father of his wife. He repeatedly entreated that he might be shot, but this being inconsistent with the forms of the common law, was refused. The respite having expired on the 23d of August, an order was sent from Dublin castle to Armagh for the execution of the unfortunate gentleman on the next day. He was executed before an immense multitude of people. His body was delivered to his friends and was put into a hearse in waiting, which immediately left town, escorted by Dr. Bowie, for Ayr, in Scotland, to be interred in the family vault. Mrs. Campbell left London by the Glascow mail on Saturday night, frantic betwixt hope and despair, but still cheered with the probability of her husband obtaining, at least, another respite. On Monday morning the friend of her husband in London, at whose house she had resided, received a letter from the lady's father, with the intelligence that "Major Campbell was no more." Mrs. Campbell reached Ayr at the same time with the corpse of her husband, learning then, for the first time, the full extent of her misery.

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RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Rhode Island, June Term, 1841, at Newport.

Clarke v. New Jersey Steam Navigation Company.

Whenever a court of admiralty has jurisdiction over the thing itself, it is wholly unimportant to whom it belongs.

By the common law, foreign corporations and non-resident foreigners cannot be served with process by any of the courts of common law, nor can their property be attached to compel their appearance. This authority results from special custom or statute provisions.

It seems, that the principles of the common law are inapplicable to process and proceedings in courts of admiralty.

The district courts of the United States, as courts of admiralty, may award attachments against the property of foreign corporations, found within their local jurisdiction.

It is well settled, that a foreign corporation may sue in another jurisdiction.

This was a suit in admiralty, brought by an appeal from a *pro formâ* decree of the district court dismissing the libel. The original libel was brought in February, 1841, and prayed only personal process against the corporation, and that Moses B. Ives, one of the directors of the company, might be brought to appear and answer the libel. At the return day Moses B. Ives appeared and declining to appear for the company, prayed that the writ might be Sismissed ; and thereupon it was dismissed against him personally; but the libel was retained for further process against the property of the company. Afterwards an amended libel was filed praying process against the property of the company to be found within the District ; and accordingly the District Judge awarded a process of attachment against the property ; and upon that process the marshal attached a scow, the property of the company, found within the district.

The amended libel was in substance as follows :

First. That the respondents in the month of January, in the year of our Lord one thousand eight hundred and forty, were common carriers of merchandise on the high seas, from the city of New York, in the state of New York, to Stonington, in the State of Connecticut, and were then owners of the steamboat Lexington, then lying at the port of New York, in the state of New York, and which vessel was then used by the defendants as common carriers as aforesaid, for the transportation of goods, wares and merchandise on the high seas from the said port of New York to the port of Stonington, in the state of Connecticut.

Second. That the complainant, on the high seas and within the ebb and flow of the tide and within the admiralty and maritime jurisdic-

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tion of the United States, and of this court, on the thirteenth day of January, A. D. 1840, contracted with the respondents for the transportation by water, on board of the said steamboat Lexington, from the said port of New York to the said port of Stonington, of twenty bales of cotton to the libellants belonging, of the value of fifteen hundred dollars. And the said respondents then and there for a reasonable hire or reward to be paid by the libellant therefor contracted with the libellants, that they would receive said twenty bales of cotton on board of the said steamboat Lexington, and transport the same therein on the high seas from said New York to said Stonington and safely deliver the same to the libellant.

Third. That the complainant on the high seas and within the ebb and flow of the tide and within the admiralty and maritime jurisdiction of the United States and of this court, on the thirteenth day of January, A. D. 1840, contracted with the respondents for the transportation by water on board of the said steamboat Lexington, from the said port of New York to said port of Stonington, of twenty bales of cotton of the value of fifteen hundred dollars to the libellant belonging, and thence by the railroad of the New York, Providence and Boston railroad company, to the city of Providence, in the state of Rhode Island; and the respondents then and there for a reasonable hire or reward to be paid them therefor by the libellant, contracted with the libellant that they would receive said twenty bales of cotton on board of said steamboat Lexington, and transport the same therein from said port of New York on the high seas to said Stonington and there receive said cotton upon the cars of the said railroad company, and convey the same thereon to Providence, in the state of Rhode Island, and safely deliver the same to the libellant.

Fourth. That the libellant, on the said 13th day of January, A. D. 1840, at said New York delivered to the respondents at said port of New York, on board of the said steamboat Lexington, then lying at said New York and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, and the respondents then and there received on board of the said steamboat the said cotton, for the purpose of transporting the same by water on the high seas from said New York to said Stonington, and to deliver the same to the libellant as aforesaid.

Fifth. That the said steamboat Lexington sailed from said New York on said 13th day of January, 1840, with the said cotton on board and bound to said port of Stonington. Yet the said respondents, their officers, servants and agents so carelessly and improperly stowed the said cotton, and the engine, machinery, furniture, rigging and equipments of the said steamboat were so imperfect and insufficient, and the said respondents, their officers, servants, and agents so carelessly, improperly and negligently managed and conducted the said steamboat Lexington during her said voyage, that by reason of such improper storage, imperfect and insufficient engine, machinery,

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furniture, rigging and equipments, and of such careless, negligent and improper conduct, the said steamboat, together with the said cotton to the libellant belonging, was destroyed by fire on the high seas and within the admiralty and maritime jurisdiction of the United States and of this court, and wholly lost.

Sixth. That by reason of the destruction of the said steamboat Lexington and of the said cotton the libellant has sustained damage to the amount of two thousand dollars.

Seventh. That the said New Jersey Steam Navigation Company are possessed of certain personal property within the said Rhode Island District, and within the ebb and flow of the sea, and within the maritime and admiralty jurisdiction of this court, to wit: of the steamboat called the Rhode Island, her tackle, apparel, furniture and appurtenances, and of other personal property.

Eighth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this court, in verification whereof, if denied, the libellant craves leave to refer to the depositions and other proofs to be by him exhibited in the cause.

Wherefore, the libellant prays that process in due form of law according to the course of admiralty and of this court, in causes of admiralty and maritime jurisdiction may issue against the respondents, and against the said steamboat Rhode Island, her tackle, apparel, furniture and appurtenances, or any other property to the respondents belonging, within the said Rhode Island District, and that the said property or any part therof may be attached and held to enforce the appearance of the respondents in this court to answer the matters particularly propounded and to answer the damages which may be awarded to the libellant for the causes aforesaid. And that this court would be pleased to pronounce for the damages aforesaid and to decree such damages to the libellant as shall to law and justice appertain.

To this process the company appeared under protest against the jurisdiction; and afterwards by their proctor and counsel they filed the following plea:

And now the New Jersey Steam Navigation Company, a corporation duly and legally incorporated by the legislature of the state of New Jersey, established and transacting business in Jersey City, in said state of New Jersey, appear before this honorable court by Peter Pratt, their proctor and attorney, and protesting against the process and the service of the same in manner and form as the same has been issued and served in the case of the libel and complaint of John H. Clarke, of Providence, in the Rhode Island District against the said corporation and say that this honorable court here have no cognizance or jurisdiction over this corporation or the subject matters set forth in the libel of the said libellant to compel or require them to appear in this court and to plead to or answer to the said libel and complaint. Because the said New Jersey Steam Navigation Company are a cor-

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poration legally incorporated by the Legislature of the State of New Jersey, established and transacting business in Jersey City within the limits and jurisdiction of the District of New Jersey and can alone be required and compelled to appear and plead or answer to matters within the maritime and admiralty jurisdiction of the United States in the district court of the district of New Jersey, and this honorable court have not jurisdiction and ought not to proceed to enforce their pretended claim alleged in the libel aforesaid against their property or against the said corporation. Wherefore the said New Jersey Steam Navigation Company pray that this honorable court would be pleased to pronounce against the libel and the process and service thereof as aforesaid, and that the same may be dismissed with their costs.

The cause was then by consent of the parties brought by appeal to this court from a *pro forma* decree of the district court dismissing the libel. The question of jurisdiction was now argued by *R. W. Greene* for the libellant, and by *Pratt and Whipple* for the respondents.

STORY J. No question has been made at the bar, that the case stated in the libel is a case of admiralty and maritime jurisdiction, it being founded in a maritime contract, and asserting as a breach thereof a maritime loss by negligence.[1] Neither has it been doubted, that the process of attachment well lies in an admiralty suit against the property of private persons, whose property is found within the district, although their persons may not be found there, as well to enforce their appearance to the suit, as to apply it in satisfaction of the decree rendered in the suit. Ever since the elaborate examination of this whole subject in the case of *Manro* v. *Almeida*, (10 Wheat. R. 473) this question has been deemed entirely at rest.

The real point of controversy is, whether the respondents, being a corporation created by, and having its corporate existence and organization in, the state of New Jersey, is, as a foreign corporation, liable to a suit *in personam* in the admiralty in this district, not directly, but indirectly through its attachable property here, so as to compel the appearance of the corporation to answer the suit, or at all events to subject the property attached to the final judgment and decree of the court. The whole argument turns upon this proposition, that there is a distinction between the case of a private person and that of a corporation. The former is suable in the admiralty by process of attachment in a suit *in personam*, against his property found in the district, although he may not personally be found within the district; whereas a corporation is liable to be sued only in the state,

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[1] *Steamboat Orleans* v. *Phœbus*, (11 Peters R. 175-184.)

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where it has its corporate existence, and from which it derives its charter, and not elsewhere, although its property may be found in the district, where the suit is brought.

If the present were a suit *in rem* against the property to enforce a right of property or a lien, or to subject it, as the offending thing, (as in cases of collision) to the direct action of the court, the case could not admit of any real doubt; for in all proceedings in rem, the court having jurisdiction over the property itself, it is wholly unimportant, whether the property belongs to a private person or to a corporation, to a citizen or to a foreigner, to a resident or to a non-resident, to a domestic or to a foreign corporation. In each and in every such case the jurisdiction is complete and conclusive. If the case were one exclusively dependent upon the local law of Rhode Island, the jurisdiction of the court would be equally clear; for by the statute of Rhode Island of January, 1840, (Session Acts, p. 103) it is enacted that, "when any incorporated company established without this state shall be indebted or liable to any person or persons, the personal and real estate of such company shall be liable to be attached and held to answer any just debt and demand." And the mode of serving the process is specially pointed out by the act.

The exemption of the corporation is sought to be established upon other grounds; upon the ground, that the state law is not applicable to an admiralty suit, the state being incapable of conferring or taking away the jurisdiction of the courts of the United States; and also upon the ground that the non-amesnability of a foreign corporation to answer in any suit in any other state, than that from which it derives its corporate existence and charter, upon the principles of the common law, which furnish a just authority or analogy for a similar rule in courts of admiralty. It may well be doubted, whether the principles of the common law, as to process and proceedings, can be properly imported into courts of admiralty to regulate their process or proceedings, or jurisdiction. It is plain, that the supreme court of the United States in *Manro* v. *Almeida*, (10 Wheat. R. 473–490) repudiated any such doctrine, and treated it as a grave mistake to suppose, that the process of attachment in the admiralty was borrowed from the foreign attachment by the custom of London; or indeed that it had any other origin than in the civil law.

But the argument, founded on the supposed analogies of the common law, is not as stringent, as has been supposed. The process of the common law could not reach foreign corporations, for the plain reason, that they were not inhabitants of and had not any corporate existence within the realm. But this was equally true in respect to natural persons, not inhabitants of, or found within the realm. Foreigners, who were non-residents, could not be served with process to appear in any of the courts of common law, nor could their property be attached to compel their appearance. Whenever and wherever in any such cases process can be served upon the property either of foreign cor-

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porations or of foreign natural persons who are non-residents, the authority to do so results either from special custom or from statute provisions.[1]

The cases cited at the bar all turn upon this distinction. In *Mc Queen* v. *The Middletown Manufacturing Company*, (16 John. R. 5) the only question was, whether a foreign attachment under the foreign attachment act of New York lay against the property of a foreign corporation; and it was held, that no such attachment did lay upon the true interpretation of the act; and indeed that it could not lie against a domestic corporation; for it could not conceal itself or abscond. The court, upon that occasion said, that a foreign corporation could not be sued in New York; for the process against a corporation must be served upon its head or principal officer within the jurisdiction of the sovereignty, where this artificial body exists. This is clear enough upon the principles of the common law, as already stated. The case of *Peckham* v. *North Parish of Haverhill*, (16 Pick. R. 274, 285, 286) merely affirms the same doctrine, that foreign corporations are without the jurisdiction of the courts of the State. But it so happens, that an opposite doctrine has been asserted, as to the operation of the local laws of Pennsylvania, in cases of the process of foreign attachment, and it has been held, that foreign corporations are within the reach of that process.[2] The decision in the case of *Wilson* v. *Graham*, (4 Wash. Cir. R. 53,) and that of *Ex parte Graham*, (4 Wash. Cir. R. 211) turned upon other considerations. But the court there affirmed a principle, which seems directly applicable to the present case; and that is, that it is essential to give jurisdiction to the district and circuit courts of the United States in any district, that the person or the thing against which the proceedings are directed should be within their local jurisdiction. Now, here the thing is within the jurisdiction, and it may be added, that even in suits *in personam* only, if a person, who is out of the jurisdiction, chooses to appear and defend the suit without objection, there is nothing to prevent the courts of the United States from entertaining the suit, if otherwise unexceptionable; for his appearance without process is a waiver of the objection of the non-service of process within the district; and the case does not fall within the prohibitory clause of the 11th section of the Judiciary Act of 1789, ch. 20. This is clearly established.[3] It was applied to the very case of a foreign attachment against the property of non-resident defendants in the case of *Pollard* v. *Dwight*, (4 Cranch R. 421) where it was held, that the appearance of the defendants was a waiver of all objections to the non-service of process upon them within the district, where the suit was brought. There is nothing in the nature

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[1] See Com. Dig. Attachment B. D.

[2] *Bushel* v. *Com'th. Insur. Company*, (15 Serg. & Rawle, 176.)

[3] See *Harrison* v. *Rowan*, (1 Peters Cir. R. 489); *Gracie* v. *Palmer*, (8 Wheat. 699); *Pollard* v. *Dwight*, (4 Cranch 421); *Knox* v. *Summers*, (3 Cranch, 496); *Logan* v. *Patrick*, (5 Cranch, 280.)

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or character of a corporation, which prevents it from falling within the scope of the same doctrine. The case of *Flanders* v. *The Ætna Insurance Company*, (3 Mason R. 158,) is directly in point on this very question; for there the corporation was a foreign corporation; and it was held, that the jurisdiction attached and the non-service of process within the district did not present any obstacle to the proceedings, as the corporation had appeared and defended the suit; and it was but a privilege to the corporation to be sued within the district, where it was established, which it was at full liberty to waive.

The supposed authorities, then, at the common law, which have been relied on, furnish no ground on which the present objection can be sustained. They all turn upon this simple proposition, that a foreign corporation cannot be compelled to appear and defend a suit in any other state than that, where it is created and established, unless the local law otherwise provides, and property or effects of the corporation can be found, and by the local law can be attached, to respond the exigency of the suit, or to compel an appearance thereto. If the local law provides such a remedy, then it is competent for the local tribunals to exert it against the foreign corporation.

Now, it is precisely in this very view, that the jurisdiction of the courts of admiralty applies. That jurisdiction may be executed not only against persons found within the district, but also by attachment against their property found within the district, although the persons are not there. This was the very point decided (as we have seen) in *Manro* v. *Almeida*, (10 Wheat. 473.) So that the jurisdiction is as complete, when the property is found within the district, as it is when the person is there.

What difference then can it make upon principle, whether the owner of the property be a natural person or a corporation? In each case, where the court acts upon the property, it acts solely *in rem*; and it is at the option of the owner, whether he will appear and allow the proceedings to go on *in personam* or not. What ground is there to say, that a foreign corporation may not appear and defend its rights of property, as well as a natural person in a foreign jurisdiction? In all proceedings directly *in rem*, this is the universal rule and practice. It is difficult to perceive, why it is not equally true, where the property is before the court to be subjected to its action; for unless there is an appearance and general defence, the decree of the court ultimately binds and acts *in rem* only upon the thing, which is attached.

But upon principle, what is the foundation of the objection? It is exceedingly clear, that a foreign corporation may sue in another jurisdiction. Not to multiply authorities upon so clear a point I will refer simply to the case of *The Bank of Augusta* v. *Earle*, (13 Peters R. 519, 520, 587, 588, 589, 590, 591,) where Mr. Chief Justice Taney, in delivering the opinion of the court, examined the subject as well upon principle as upon authority. If a foreign corporation may sue,

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it may also be sued in another jurisdiction, at least to the extent of subjecting its property found within the jurisdiction, to the process and decree of the courts thereof, upon the acknowledged principle, that all persons and all property found within the territorial limits of any sovereignty are subject to its authority and laws. This is a well established doctrine of international law.[1] Even the property of foreign sovereigns has not been deemed exempt from this territorial jurisdiction; and courts of admiralty have not unfrequently exerted their authority over such property.[2] Bynkershoek and other jurists maintain, that the private property of foreign sovereigns, whatever may be the case as to public property, is subject to the local jurisdiction of the courts, where it is found.[3]

Upon the whole I find no sufficient authority upon principles of general, or maritime, or admiralty law, to maintain the distinction contended for between the cases of an attachment of the property of a foreign corporation and that of a private person, so far as the process of the admiralty is concerned. The exceptive plea or allegation to the jurisdiction of the court must therefore be overruled, and the corporation assigned to appear and answer over to the merits of the cause, otherwise proceedings will be had upon their default against the property, as in other like cases.

Dunnell v. Mason.

Where a consignee, with a *del credere* commission, sells goods for his principal at a certain price, and afterwards, upon a suspension of specie payments in the state, receives payment in bank notes of the state banks at a depreciated value, he is not entitled to deduct the amount of the depreciation from the debt, but must account for the full price at the specie or par value to his principal.

This was an action of the case to recover a balance of account claimed by the plaintiff, under the following circumstances. The plaintiff was a calico printer at Providence; the defendant, a commission merchant, of the firm of Otis & Mason, New York. In the year of 1838, the plaintiff contracted with the firm of Otis & Mason to print for them a large quantity of cotton cloth at a rate fixed by the contract, and to receive payment for said printing in the cloth furnished by the plaintiff, at a price ascertained by the contract. The entire parcel of these prints were to be consigned to Otis & Mason to charge the plaintiff, on his proportion of them, the ordinary commission and guaranty, and the usual small charges. Instead of a division of the

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[1] Story on Conflict of Laws § 530 to § 618.
[2] *United States* v. *Wilder*, (3 Sumner R. 308, 314 to 317.)
[3] Bynk. De Foro Legatorum. ch. 3 and 4. S. P. cited 7 Cranch, 125–126. The *Prins Frederik*, (2 Dodson R. 458–462.) Martin's Law of Nations, B. 5, § 9.

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prints into parcels, one for the plaintiff and one for the house of Otis & Mason, it was agreed, in order to secure fairness in the sales, that the plaintiff should be entitled to that proportion of the proceeds of the whole of the sales, deducting commission, guaranty, and the usual small charges, which his (the plaintiff's) proportion of the prints bore to the entire parcel. Sales of these prints were effected at Baltimore and Philadelphia by Otis & Mason, before and after the suspension of specie payments by the banks of those cities in October 1839. In making up the account with the plaintiff, the defendant's firm, in addition to charges of commission, guaranty, &c., charged against the plaintiff the difference of exchange between the cities of Philadelphia, Baltimore and New York, at rates varying from 6 to 10 per cent. To this charge for difference of exchange on sales effected before the *suspension* of the banks the plaintiff objected. The objection was urged on the ground, that this was, in effect, the result of a composition by the defendant's firm with the purchasers of the prints, inasmuch as Otis & Mason appear to have preferred taking the depreciated currency of the banks of the cities of Philadelphia and Baltimore in payment, rather than take the risk of the delay of payment, which would have been the consequence of exacting specie or its equivalent. This, however, was no matter of concern to the plaintiff, who was protected by the guaranty of Otis & Mason, as well from a partial as a total loss.

The plaintiff allowed in his statement of the account for the difference of exchange on sales made after the suspension. This he allowed to be fair, as the price of the goods was probably enhanced by the price being fixed under a depreciated currency, out of which enhancement he could afford to allow the difference of exchange. But as to the charge for difference of exchange on sales before the suspension, he insisted that the guaranty protected him from that in fairness and in justice, as well as at law. If the firm of Otis & Mason had preferred taking payment for the sales made in Baltimore and Philadelphia under a specie basis, after the suspension in a depreciated currency, rather than risk delay, or incur the expenses of a suit, or hazard some other loss, that was their concern, not the concern of the plaintiff, who was protected from all these accidents by Otis & Mason's guaranty.

For the defendant, it was contended, that this was a partnership in joint adventure. This difference of exchange was a loss not contemplated by the parties to the contract at the time it was formed, and it ought therefore to be borne equally between the parties. As the difference of exchange was a loss, which did not originally enter into the contemplation of the parties, it could not have been embraced within the objects of the guaranty.

Ames for the plaintiff.

Whipple and *Rivers* for the defendant.

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Story J. in delivering the opinion of the court, said, If the plaintiff and defendants were originally partners in the goods, it would make no difference. The defendant acted under a *del credere* commission, and is therefore bound to act to the plaintiff as his principal for the full price, for which the goods were sold, the sale having been at the specie or par price. The plaintiff has nothing to do with the mode, in which the defendant collected the debt. If the purchaser had been totally insolvent, the defendant must have paid the full specie value to the plaintiff under his guaranty ; and receiving the amount in a depreciated currency is a *pro tanto* loss, for which the defendant is accountable to the plaintiff.

Holbrook *v.* Seagraves.

Where a cause is removed from a state court to the circuit court of the United States under the judiciary act of 1789, ch. 20, § 12, and special bail is given ; if the bail afterwards seek to surrender the principal, it should be in open court, and not by a commitment to gaol according to the local law of the state. But if the party is so committed, the circuit court will, upon the petition of the bail, grant a writ of habeas corpus to bring the party into court, to be surrendered in discharge of his bail.

This was the case of a *scire facias* against the defendant as *special* bail for Willard Holbrook. The suit was commenced against the original defendant in the state court of common pleas. Upon the removal of the cause into this court, the bail on the original writ became discharged, and Seagraves became special bail for the defendant, in conformity with the provisions of an act of congress in relation to such cases. Since the taking out of this *scire facias*, the present defendant had committed his principal to the Providence county jail, and now moved the court, that he be discharged upon payment of costs on the *scire facias*. The motion being objected to, the court decided, that the commitment of the principal did not in this case discharge the bail. Cases of special bail entered for the defendant upon a removal of his cause from a state court into this court, are not governed by the Rhode Island statute, but by the common law and the acts of congress. This bail, therefore, could only be discharged by surrendering his principal into court to be taken in execution, as at common law. The defendant then took leave to answer the cause, and prayed a writ of *habeas corpus*, in order to bring the principal into court.

On a subsequent day in the term, the party was brought into court upon the writ of *habeas corpus*, and surrendered in discharge of his bail, and thereupon was committed to the custody of the marshal for twenty days, in order that he might be charged in execution upon an alias execution. On this occasion, Story J. said,—The case does not fall within the provision of the statute of Rhode Island respecting the commitment of the principal to gaol by his bail ; but it must be governed by the act of 1789, ch. 20, § 12, and the doctrines of the

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common law applicable to bail. We shall, therefore, order the party into the custody of the marshal, to remain under his custody in gaol for thirty days, that the plaintiff may sue out an alias writ of execution, and charge him thereon, if he shall be so advised.

Pratt and *Atwell* for the plaintiff.
Robinson and *R. W. Greene* for the defendant.

Supreme Court of Pennsylvania, May Term, 1841.

GORDON *v.* HUTCHINSON, IN ERROR.

A farmer, who seeks employment as a common carrier occasionally, or only *pro hac vice*, is responsible as such; and not merely for negligence as an ordinary bailee.

To this writ of error the common pleas of Mifflin county returned the record of an action on the case against a common carrier. The defendant was a farmer, and not a carrier by profession; but he had, in two or three instances, carried goods for the merchants in a neighboring town. In the autumn of 1838, he came to the plaintiff's store in Belfonte, and inquired, whether he had not goods to be carried from Lewistown. The plaintiff gave him an order for them; but when they arrived some days afterwards, the head of a hogshead of molasses was broken out and the contents were lost. The defence set up was, that the defendant was answerable, not as a common carrier, but only for negligence as an ordinary bailee. The judge who tried the cause, directed the jury to find their verdict for the plaintiff.

The cause was argued in this court by *Blanchard* for the plaintiff in error, and by *Hale* for the defendant; and the opinion of the court was delivered by,

GIBSON C. J. The best definition of a common carrier in its application to the business of this country, is that which Mr. Jeremy (Law of Carriers, 4,) has taken from *Gisbourne* v. *Hurst* (1 Salk. 249,) which was the case of one who was at first not thought to be a common carrier because he had, only *for some small time before*, brought cheese to London and taken such goods as he could get to carry back into the country at a reasonable price; but the goods having been distrained for the rent of a barn, into which he had put his waggon for safe keeping, it was finally resolved, that any man undertaking to carry the goods of *all persons indifferently*, is, as to exemption from distress, a common carrier. Mr. Justice Story has cited this case (Commentaries on Bailm. 322,) to prove, that a common carrier is one, who

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holds himself out as ready to engage in the transportation of goods for hire *as a business*, and not as a casual occupation *pro hac vice*. My conclusion from it is entirely different. I take it a waggoner who carries goods for hire, is a common carrier, whether transportation be his principal and direct business or only an occasional and incidental employment. It is true the court went no further than to say the waggoner was a common carrier as to the privilege of exemption from distress; but his contract was held to be, not a private undertaking as the court was at first inclined to consider it, but a public engagement by reason of his readiness to carry for any one who would employ him, without regard to his other avocations, and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common carrier: indeed they are correlative, and there is no reason why he should enjoy the one without being burthened with the other. Chancellor Kent (2 Comm. 597,) states the law, on the authority of *Robinson* v. *Dunmore* (2 Bos. and P. 416,) to be that a carrier for hire in a *particular* case, not exercising the business of a common carrier, is answerable only for ordinary neglect, unless he assume the risk of a common carrier by express contract; and Mr. Justice Story (Comm. on B. 298.) as well as the learned annotator on Sir William Jones's essay (Law of Bailm. 103 d. note 3,) does the same on the authority of the same case. Then, however, the defendant was held liable on a special contract of warranty that the goods should go safe; and it was therefore not material whether he was a general carrier or not. The judges indeed said, that the defendant was not a common carrier, but one who had put himself in the case of a common carrier by his agreement; yet even a common carrier may restrict his responsibility by a special acceptance of the goods, and may also make himself responsible by special agreement as well as on the custom. The question of carrier or not, therefore, did not necessarily enter into the inquiry, and we cannot suppose that the judges gave it their principal attention.

But rules which have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price; but it will not be thought that he is bound to do so here, any more than an innkeeper is bound to receive without distinction all who come. There, an obligation to carry at request upon the carrier's particular route, is the criterion of the profession, but it certainly is not so here. In Pennsylvania, we had no carriers exclusively between particular places before the establishment of our public lines of transportation; and, according to the English principle, we could have had no common carriers, for it was not pretended that a waggoner could be compelled to load for any part of the continent. But the policy of holding him answerable as an

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insurer, was more obviously dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England. But the Pennsylvania waggoner was not always such even by profession. No inconsiderable part of the transportation was done by the farmers of the interior who took their produce to Philadelphia and procured return loads for the retail merchants in the neighboring towns; and many of them passed by their homes with loads to Pittsburg or Wheeling, the principal points of embarkation on the Ohio. But no one supposed they were not responsible as common carriers; and they always compensated losses as such. They presented themselves as applicants for employment to those who could give it; and were not distinguishable in their appearance or in the equipments of their teams, from carriers by profession. I can readily understand why a carpenter, encouraged by an employer to undertake the job of a cabinet maker, shall not be bound to buy the skill of a workman to the execution of it; or why a farmer taking his horses from the plough to turn teamster at the solicitation of his neighbor, shall be answerable for nothing less than want of good faith: but I am unable to understand why a waggoner soliciting employment as a common carrier shall be prevented by the nature of any other employment which he may sometimes follow, from contracting the responsibility of one. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and in the absence of express reservation, they contract to perform it on the usual terms and under the usual responsibility. Now what is the case here? The defendant is a farmer, but has occasionally done jobs as a carrier. That however is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him — there was nothing special in the case — on the contrary the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility. There was evidence of negligence before the jury; but independent of that we are of opinion that he is liable for the loss as an insurer.

Judgment affirmed.

Supreme Judicial Court, Massachusetts, March Term, (held by adjournment in June) 1841, *at Boston.*

COMMONWEALTH *v.* DANA.

The right to search for and seize private papers does not exist by the common law.

The provision in the Revised Statutes of Massachusetts, by which any magistrate, under certain circumstances, is autherized to issue warrants to search for and seize lottery

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tickets, or materials for a lottery, is not inconsistent with the 14th article of the bill of rights.

Held, that the warrant in this case was in conformity with all the requisitions of the statute and the declaration of rights; and that it was properly executed.

When papers are offered in evidence, the court will take no notice how they were obtained, whether lawfully or unlawfully; nor will the court form a collateral issue to determine that question.

It is no valid defence to a charge of selling lottery tickets contrary to the statute of this state, that they were tickets of a lottery authorized by the laws of another state.

A defendant is not to be convicted by circumstantial evidence, if all the facts proved can be reasonably accounted for, without inferring his guilt.

Objections to the sufficiency of the indictment, overruled.

The facts in this case sufficiently appear in the opinion of the court, which was delivered by

WILDE J. This was an indictment for the alleged violation of chapter 132 of the Revised Statutes, prohibiting the sale of lottery tickets, or the possession of the same with intent to sell or to offer them for sale, or the aiding and assisting in any such sale. The case comes before the court on sundry exceptions to the rulings of the judge of the municipal court, at the trial.

In support of the issue joined in the case, the attorney for the commonwealth offered in evidence the copy of a search warrant, issued from the police court, to the admission of which the defendant's counsel objected, on the ground that the same had been issued improvidently, and was void in law. It appears that the warrant was issued on the complaint of one Jonathan F. Pulsifer, under oath, in which he alleges, that he had good reason to believe, and did believe, that lottery tickets, and materials for a lottery, unlawfully made, for the purpose of drawing a lottery, were concealed in the office of the defendant and sundry other places.

By the Revised Statutes, ch. 142, sec. 2, any magistrate is authorized to issue warrants to search for and seize lottery tickets, or materials for a lottery, unlawfully made, provided or procured, for the purpose of drawing a lottery, when he shall be satisfied that there is reasonable cause, upon complaint made on oath, that the complainant believes that lottery tickets or materials for a lottery, are concealed in any particular house or place.

If this be a valid law, the objection of the defendant's counsel fails, but they contend that it is void, being contrary to civil liberty, natural justice, and the bill of rights, the 14th article of which declares that "every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions; all warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation."

The question is, whether the search for, and the seizure of, the defendant's papers and property, directed by the warrant in this case, were an unreasonable search and seizure. The defendant's counsel maintain that such searches and seizures are utterly inconsistent with

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the plainest principles of the common law, and the natural rights of mankind. That the right to search for and seize private papers is unknown to the common law, was most conclusively shown by the able opinion of Lord Camden, in the case of *Entick* v. *Carrington*, (19 Howell's State Trials, 1029.) Such a right or power had for a long time before been exercised and maintained during the arbitrary reigns of the Stuarts and afterwards. The power assumed was to search any man's house, to break open every room, desk or trunk, if necessary, and to seize and carry away all his books and papers of every description, and this on mere suspicion, without probable cause, and without any previous accusation against him. Under this was the power claimed by the secretary of state, Lord Halifax, in the case of *Entick* v. *Carrington*, which was decided by the whole court to be manifestly illegal, and "unsupported by one single citation from any law book extant." "Papers," said Lord Camden, "are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the law of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society." It was urged by counsel in that case that though the practice could not be maintained by any direct law, yet it bore a resemblance to the known case of search for, and seizure of stolen goods. This case of searching for stolen goods, said Lord Camden, crept into the law by imperceptible practice, and that Lord Coke denied its legality. "Observe too," he says, "the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant to show them the officer, who must see that they answer the description." "If it should be said," he adds, "that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in the other case protect the subject by adding proper checks, &c. My answer is that precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing."

These citations from the opinion of Lord Camden, in the opinion of the court, show, to some extent, the grounds and principles upon which the important decision in *Entick* v. *Carrington* was founded. And they show clearly, that that decision and those principles have but little bearing on the present case. The framers of our constitution were not ignorant of those principles. They were well known

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and warmly cherished by those enlightened statesmen as important and necessary for the security of civil liberty. They had been discussed and powerfully and eloquently maintained in the discussions had respecting writs of assistance, several years before the decision in *Entick* v. *Carrington.*

With the fresh recollection of those stirring discussions, and of the revolution which followed them, the article in the bill of rights respecting searches and seizures was framed and adopted. This article does not prohibit all searches and seizures of a man's person, his papers, and possessions ; but such only as are unreasonable, and the foundation of which is not previously supported by oath or affirmation. But the legislature were not deprived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law. The law therefore, authorizing search warrants, in certain cases, is in no respect inconsistent with the declaration of rights.

We are also of opinion, that the warrant in this case is in conformity with all the requisitions of the statute and the declaration of rights. The complaint is under oath, and alleges a probable cause to authorize the search and seizure. The articles seized are described, and the place in which they were concealed is designated, with sufficient certainty. There could be no difficulty in ascertaining by inspection the articles which the officer was directed to seize. The place of concealment is alleged to be the office of the defendant, No. 2, Devonshire street, rear of 23, State street. The defendant occupied that office, and the fact that another person occupied it with him cannot be considered as constituting a material variance.

It has been objected that the articles seized are not described, nor is the place of concealment designated in the warrant, but only in the complaint. But considering that the complaint and the warrant are on the same paper, that there is a reference in the warrant to the complaint, for the description of the articles to be seized, and that this form of proceeding has been uniform for more than fifty years in search warrants for stolen goods. We cannot think that this formal objection has any foundation.

It has been objected further, that the warrant was illegally served because the officer seized "books, &c." and it is argued that books were not "materials for a lottery." But we think that books kept in relation to the proceedings relative to a lottery are to be considered as materials for a lottery, and it does not appear that any other books were seized.

Again, it has been urged, that the seizure of the lottery tickets and materials for a lottery, for the purpose of using them as evidence against the defendant, is virtually compelling him to furnish evidence against himself in violation of another article in the declaration of rights. But the right of search and seizure does not depend on the

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question, whether the papers or property seized were intended to be used in evidence against the offender or not.

The possession of lottery tickets with the intent to sell them was a violation of law. The defendant's possession therefore was unlawful, and the tickets were liable to seizure as belonging to the *corpus delicti,* or for the purpose of preventing any further violations of law.

In cases of the seizure of stolen goods on search warrants, the goods have in almost all cases been given in evidence against the offender, and no one, I apprehend, ever supposed that a seizure for that purpose is a violation of the declaration of rights, and in this respect there is no distinction between the seizure of stolen goods and the seizure of lottery tickets.

There is another conclusive answer to all these objections. Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer would be responsible for the wrong done ; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully ; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Jordan* v. *Lewis* and *Legatt* v. *Tollervey*, (14 East. 304–306) ; and we are entirely satisfied that the principle on which these cases were decided is sound and well established. On either of these grounds, therefore, we are of the opinion, that the evidence on the part of the commonwealth was rightfully admitted.

In the defence, a copy of an act of the state of Rhode Island was offered in evidence, by which it appeared, that the tickets seized in the defendant's possession were duly issued under the authority of that state. This evidence was rejected as immaterial, and we think it was rightfully rejected for that reason. The laws of Rhode Island, or any other state, have no force in this commonwealth. It was true, the court, on the principle of comity, will take notice of the laws of another state, and will enforce contracts made there, or in reference to such laws.

But the principle of comity has no application to the present case. The defendant is charged with an offence committed in this commonwealth, in violation of the Revised Statutes, ch. 132, §§. 1, 2. And according to the construction we give to that statute, it would be no defence to prove that the tickets found in the defendant's possession, with the intent charged in the indictment, were duly issued by the authority of the state of Rhode Island.

By the first section, "Every person who shall set up or promote any lottery, not authorized by law, for money, &c.," is made liable to

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be punished by a fine not exceeding two thousand dollars. And by the second section, "Every person who shall sell, or shall offer for sale, or shall have in his possession, with intent to sell, or to offer to sell, any ticket, or share of a ticket, in any such lottery, shall be liable to be punished by a like fine.

The question depends on the meaning of the words "not authorized by law," in respect to which we cannot entertain a doubt. By the word "law," as we think, the legislature intended to refer to the municipal law of this commonwealth—the law of the land—or in other words any law having force in this commonwealth, either by a statute of its legislature, or by a law of the United States. To suppose that the legislature intended to allow the sale of tickets in a lottery, authorized by another state, is such an impeachment of the discernment and foresight of the legislature, as cannot be admitted. Such a supposition is inconsistent with the manifest design of the statute, which was to suppress lotteries not authorized by law, and to prevent the sale of any tickets in such lotteries, and thus to put a stop, as far as might be, to the many evils resulting from that species of gambling.

It has been argued by the defendant's counsel, that the legislature did not intend to prohibit the sale of tickets in lotteries authorized by the law of another state, because, by a former statute, the sale of all tickets not authorized "by the law of this commonwealth," were prohibited, whereas, by the Revised Statutes, a different phraseology was adopted, and the words "of this commonwealth" are omitted, and the rule of construction laid down in *Ellis* v. *Paige and another*, (1 Pickering's Reports, 45,) is relied on, which is, "that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled." This rule, in the opinion of the court, has no bearing upon the question in controversy. There is no necessity for reviving by construction, the words omitted, for the omission does not change the meaning. The words are superfluous, and no certain inference can be drawn from the omission of them in the Revised Statutes. One of the objects of the revision of our laws was to condense them by change of phraseology, and the rejection of all superfluous words, which has been frequently done, where there is evidently no change of meaning by the change of language or the omission of the superfluous parts of the former statutes. We think, therefore, that the statute under consideration, is to be construed in the same manner as it would be if there had been no previous statute on the same subject.

The only remaining exception is to the instruction of the court to the jury. The defendant's counsel except to the instruction as to the evidence of the defendant's intent to sell the tickets found in his possession. The court was requested to instruct the jury that they could not infer a guilty intention on the part of the defendant, unless all the

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circumstances were such as to be inconsistent with any other hypothesis than an intention to sell the tickets.

Such an instruction would be clearly wrong, for the most extravagant and unreasonable hypothesis may be imagined to account for any facts on false grounds.

The true rule is, that a defendant is not to be convicted by circumstantial evidence, if all the facts proved, can be reasonably accounted for, without inferring the defendant's guilt. And substantially, though not in terms, the jury were so instructed. They were instructed, that if from the whole of the evidence on the part of the commonwealth, they were led to the belief that the defendant did sell and deal in lottery tickets, and had them in his possession for that purpose, as charged in the indictment, to find him guilty, unless he had succeeded on his part, as it had become his duty, to explain those facts and circumstances consistently with his innocence of that unlawful intention."

To this charge to the jury, if rightly understood, we think there is no legal exception. It has been objected that by the charge the burden of proof was thrown on the defendant to prove his innocence. But we think this is not the meaning of the charge, for the jury were instructed, that they were not authorized to find the defendant guilty, unless the evidence was such as to lead them to believe that he was guilty. The remark that it was the duty of the defendant to explain those facts and circumstances proved against him, consistently with his innocence, meant no more than he ought so to do. But still, if he failed, they were not to find a verdict against him, unless on the whole evidence they believed him guilty. If they doubted, they were to acquit him. So the case was left to the jury on the right footing, namely, that the burden of proof was not shifted. but still remained on the commonwealth to prove the guilt of the defendant, and if a reasonable doubt remained, the defendant was to be acquitted. Exceptions overruled.

Austin, attorney general, for the commonwealth.

Choate and *English*, and *Patten* of New York, for the defendant.

At a subsequent day of the term, the counsel for the defendent made a motion in arrest of judgment, which was argued by

English, for the defendant, and by

Austin, attorney general, for the commonwealth.

Shaw C. J. said the court were not aware of any definite rule against hearing a motion of this kind, even at so late a period, but it was their wish, that whenever counsel intended to move in arrest, in a case where exceptions were already pending, the motion should accompany the exceptions in point of time, because the consideration of the one might save the trouble, in some cases, of argument and consideration

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of the other. The main ground of the motion in arrest of judgment in this case was, that the indictment did not aver, that the intent of the defendant was to sell lottery tickets *in this commonwealth.* The averment was general, not specifying the place where the tickets were intended to be sold, whether in this commonwealth or elsewhere. In this respect the indictment followed the express phraseology of the statute. In the opinion of the court, the intent to sell generally, included the intent to sell in this commonwealth as well as any other place, but if a party accused should, upon his trial before the jury, offer to prove that he was merely conveying tickets through this state to some other, to be there disposed of, and not to be sold here, it would be a question well worthy of consideration, whether such fact, if proved, would not constitute a good defence.

Judgment was thereupon rendered for the commonwealth. The defendant was immediately put to the bar and sentenced to pay a fine of two hundred dollars to the use of the commonwealth, and the costs of prosecution.

District Court of the United States, Massachusetts, July 7, 1841, *at Boston.*

Clark *v.* The Bark Leopard.

Under the circumstances of this case, the court refused to enforce certain bottomry bonds.

This was a libel filed for the recovery of several sums of money, alleged to have been advanced at different times by the libellant in the years 1834 and 1835, and claimed to be secured by different instruments, designated as bottomry bonds. The Ocean Insurance Company appeared as claimants, under protest, as owners of a bottomry bond executed by P. & C. Flint & Co. on the 20th July, 1833, on a loan of $8,000; and excepted to the jurisdiction of the court, on the ground that the bonds stated in the libel were not bottomry bonds, (1) inasmuch as the respective masters of the bark had bound themselves *personally* and at all events for the repayment of the money; and (2) because the lender took upon himself no maritime risks, although there was a stipulation for maritime interest in the different instruments. A defensive allegation was also made, that if the instruments were to be considered as of the character of bottomry bonds, they ought not to have priority over the bond of the claimants, because the libellant had wrongfully taken possession of the bark, and the expenses, &c. to secure which the bonds articled were taken, arose during a wrongful detention. There was much evidence in the case, but the most important of it disclosed the following facts.

In January, 1834, an arrangement was made in Boston, between the Flints, Clark, and S. Austin, agent for George Wildes & Co. to

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send the bark to the Havana, to Clark's consignment, to be there loaded for Cowes and a market. In February afterwards the Flints stopped payment, and made an assignment of their property to Cartwright & Train, for the benefit of their creditors: the latter confirmed the arrangement about the bark, but Clark declined to become a party to the assignment; sent out to the Havana to countermand the loading of the bark, and claimed to hold her as security, or rather, as he termed it, to "embargo her," for the amount due to him from Flint & Co. Both the assignees and the Ocean Insurance Company, sent out powers to the Havana to demand there the restoration of the bark, but were unsuccessful in the object. Those of the bonds articled in the libel were executed at Havana during the detention, one by the master originally appointed, the others by masters appointed under the direction of Clark. It appeared, that after some detention, the bark was despatched by Clark on various voyages, and without crediting the freights earned against the expenses, he passed them to the credit side of a general account with the Flints, and debited them with a loss on cargo upon one of the voyages. The bonds were taken by his direction, so as to include wages and all port charges, with insurance, &c. Eventually the bark was sent to Antwerp, where a fourth bond of similar character was executed, and from that port she departed for and arrived at Monte Video, where, after legal proceedings of many months duration, the bark was delivered up by the tribunals to the agents of the assignees. To cover the expenses of these last proceedings, a fifth bond was executed, under which the vessel returned to Boston in the spring of 1837. No sanction to the doings of Clark appeared to have been given at any time by the Flints, the assignees, or the Insurance Company.

This case was argued at much length more than a year ago, and has since been retained under advisement.

Washburn for the libellant.

Aylwin and *Paine* for the claimants.

Davis J. now delivered his opinion. After remarking that the case was peculiar, and having much in the various transactions that was strange, he proceeded shortly to recapitulate the facts. Passing over the exceptions taken to the jurisdiction, and the point raised, whether the libellant was entitled to any relief either in a court of law or equity, he held that Clark, having abandoned his character of consignee, had placed himself in a position that did not permit the court to enforce the instruments articled as bottomry bonds. He gave up the relation of consignee, in which, under proper circumstances, a bond might be taken to himself, and chose to employ the vessel as he saw fit, without accounting for the earnings. It was impossible that these bonds could be sustained here, whatever might be done in any other jurisdiction. The judge then declared that he must dismiss the libel with costs to the claimants.

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DIGEST OF AMERICAN CASES.

Selections from 1 Meigs's (Tennessee) Reports.

ACCOUNT.

1. If a machinest sell a worthless machine for a good one, he will be compelled in equity to account for any part of the purchase money paid him, or his *bonâ fide* assignee by the purchaser. *Donelson* v. *Young*, 155.

2. A receipt obtained from a ward by a guardian, acknowledging satisfaction of all demands against him, though given after the majority of the ward, will be no bar to the guardian's accounting in equity with the ward. *McCollom* v. *Smith*, 342.

ACTION.

1. An action at law cannot be sustained against a person in the character of guardian of a lunatic, without joining the *non compos* in the action as a party defendant. He must be a party plaintiff when suing, and a party defendant when sued. 2 Saund. 333; note 4. *Rodgers* v. *Ellison*, 88.

2. If a count against a party as guardian of a lunatic be joined with one against him in his own right, it is a misjoinder, and may be excepted to by demurrer, or in arrest of judgment. *Ib.* 90.

3. The general language in Mills *v.* Duryee, 7 Cranch, 481, and Hampton *v.* McConnell, 3 Wheaton, 234, — "that whatever pleas would be good to a suit brought upon a judgment in the state where it was originally rendered, and none other can be pleaded in any other court in the United States" — is to be understood of pleas affecting the validity and conclusive effect of judgments as evidence, — not of pleas affecting only the remedy. *Estes* v. *Kyle*, 34.

AGENT AND PRINCIPAL.

The contracts and acts of a general agent within the scope of his authority, will bind the principal though the agent has secret instruction limiting his power as to such contracts or acts specifically. *Walker* v. *Skipwith*, 508.

AGREEMENT.

1. If a creditor, having executed a mortgage or deed of trust of certain town lots, to secure the payment of a debt, refuse to acknowledge the execution of the deed so as to admit it to registration, and thereby extract from the creditor an agreement to receive the lots in payment and a submission to referees of the question whether the creditor should receive the lots in payment at a price to be fixed by them, and an award be made accordingly, — such agreement and award will not be specifically executed in chancery, because of the moral constraint under which the party acted in making the agreement and submission, and the violation of good faith whereby they were obtained. *Rice* v. *Rawlings*, 499.

2. The specific execution of an agreement for the construction of machinery for a certain purpose, will not be decreed at the suit of the undertaker or his assignee, if the machinery fail to answer the purpose of its construction, though the party, on whose premises, and for whose use the work was done, take possession of the premises. To entitle the undertaker to a specific execution in such case, that is, to a decree for the stipulated compensation for his labor, the party for whom the work was done, must take possession of, use, and occupy the works as his own, and for the end for which they were designed. *Pearl* v. *Nashville*, 597.

ARBITRATION.

A submission to referees to value

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realty, which the parties had verbally agreed to give and take payment of a debt at the valuation of the referees, and a valuation in writing and under the seal of the referees will not take the case out of the statute of frauds. *Rice* v. *Rawlings*, 496.

ASSIGNMENT IN TRUST FOR CREDITORS.

1. If an assigning debtor make his note, at the time of the assignment, to the creditor, not to secure a debt then due, or advance then made; but in consideration of the creditor's verbal promise to allow him a further credit to support his family, or carry on his business, and such note purport to be secured by the assignment amongst the real debts mentioned in it, — the deed will be set aside at the suit of a judgment creditor of the assignor, as fraudulent and void. *Peacock* v. *Tomkins*, 317.

2. If an assignment embrace some effects which are liable to execution at law, and some that are not, and it be set aside for constructive fraud at the suit of a judgment creditor of the assignor, the assignee will account.

To the judgment Creditor —

1. For such effects, as existing in specie, when the *fi. fa.* was issued, would, in the absence of the assignment, have been subject to its lien.

2. For the proceeds of such effects.

To all the creditors parties in the suit —

3. For all effects in his hands not subject to execution at law, as choses in action, money, stock, &c.

Exceptions —

4. He will be allowed to retain so much of the proceeds of the debtor's effects converted into cash, as will pay his own debts if a creditor; and he will also be allowed a credit for any *bonâ fide* debt of the assigning debtor paid by him as assignee or trustee before the complainant's lien attached: as also for all reasonable charges and commissions for care, and sale of effects, and collections. *Ib.* 329.

3. An assignment of articles consumable in the using, to secure the payment of a debt, is fraudulent, *per se*, if the deed stipulate that the debtor shall retain the possession and use of them. But a reservation by the vendor, with the purchaser's consent, of the possession and use of articles absolutely sold, though they are consumable in the using, is only a badge of fraud. 3 Yerger, 502; 4 Ib. 541; 8 Ib. 419. *Richmond* v. *Crudup*, 581.

BAILMENT.

1. A hirer of a slave for a specific purpose is responsible for all damages arising from employing the slave in a different service; as he is also, for a loss occurring while the slave is so employed, though the proximate cause of such loss was inevitable casualty. *Angus* v. *Dickerson*, 459.

2. It is a fraud upon the rights of the owner, and a conversion, to put a slave to a service entirely different from that for which he was hired. Story, Bailments, § 413. *Ib.* 469.

3. In case of a general hiring, the hirer is only responsible for ordinary neglect. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Though the holder of a negotiable security know the residence of the indorser, yet he may not know the post office nearest thereto; and in such case, notice of the protest directed to the post office, which, after diligent inquiry, is supposed to be nearest, will bind the indorser. *Marsh* v. *Barr*, 68.

2. Inquiry made of such persons where the security is made payable, as may reasonably be supposed capable of giving the desired information, is diligent inquiry in legal contemplation. *Ib.* 70.

3. Collection of note given to a machinist for a worthless machine, whether he knew its quality or not, will be restrained by injunction. But not in the hands of a *bonâ fide* assignee. *Donelson* v. *Young*, 156. So if obtained by fraud or deceit. Note 158, *Ib.* Chitty on Bills, 119, 8th Am. Ed. But collection of one given for price of land will not be enjoined at the suit of the purchaser who has not been disturbed in the possession, though the vender had no title, or his title was incumbered. *Meadows* v. *Hopkins*, 181.

4. The force of an undertaking by one indorser "to take the shoes of the other as regards the indorsement," for a certain sum, is not to pay that sum in discharge of the liability, but to be liable instead of the party whose place is assumed. *Nashville Bank* v. *Grundy*, 256.

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BOUNDARIES.

1. If granted land, not originally marked by the surveyor, — or whose marks have become obliterated or obscure, be afterwards marked, or re-marked, by the owner of the whole, or part, in good faith, and in reasonable conformity with the calls of the patent; — such private marking or re-marking operates as an estoppel on the owner, the state, and subsequent parties, — precluding the owner from claiming land not included by the newly marked or re-marked lines, and the state from claiming that which is included thereby. *Riggs* v. *Parker's lessee*, 43.

2. What marking or re-marking is *boná fide*, and in reasonable conformity with the calls of the patent, is a question of fact, depending on the circumstances of each case. *Ib.* 50.

3. Where the original boundaries of private possessions have been destroyed, or are unknown, or not well ascertained, — a survey made by the owner in reasonable conformity with his title deeds or papers, is held to be an ascertainment of the very land owned by him, —— and to conclude him upon grounds of public policy, and for the security and repose of others. *Quære*, whether the reason of the doctrine applies to *femes covert?* *Yarborough* v. *Abernethy*, 413.

4. If the parties know where the true line is, and by agreement make another, — this would be a parol transfer of land, and would be void by the statute of frauds. *Ib.* 420.

CARRIER.

1. The liability of a common carrier cannot be limited by secret instructions given to his general agent. *Walker* v. *Skipwith*, 502.

2. When a stage proprietor has habitually carried in his coaches persons and baggage, or packages, the regulations of his line and instructions to his agents — not to receive goods to be carried, except as the baggage of passengers, or in the care of passengers, but at the risk of the owner, or persons sending them, — will not limit his liability for the goods received by his agents, unless the owner or his agent was notified of the rule or instructions at the time of the receipt of the goods. *Ib.* 507. Harrison's Digest, 555–6–7.

CASE, ACTION OF.

1. The performance in an improper manner, place, or time, of an act which it was a party's duty, contract, or right to do, is a misfeasance. Chitty's General Practice, 9. *Childress* v. *Yourie*, 561.

2. To go through the exercises of the militia drill in the public squares and business resorts of towns and villages is a misfeasance. *Ib.* 563.

3. The officer, under whose command the exercises of the militia drill is performed in the business resorts of towns, is responsible for consequential damages; as if a team hitched to a wagon and standing in the usual resorts of business run away, whereby one of the horses is killed, the captain is responsible for his value. *Ib.* 563.

CONFLICT OF LAWS.

1. The marital right to the wife's movables is determined as follows: (1.) In case there is no determinate domicil of either husband or wife, at the time of the marriage, — by the *lex loci contractus*. (2.) In case they have different domicils — by the law of the husband's domicil. (3.) In case they agree, previously to the marriage, upon a place of residence after it, and that place actually become the place of the matrimonial domicil, — by the law of that place. (4.) In case there is a change of domicil after the marriage, — the law of the new domicil determines the marital right in the wife's movables, acquired after the change, in the place of the new domicil.

2. And in all cases, the marital right to the wife's immovables is determined by the *lex loci rei sitæ*.

3. If the husband and wife have their domicil in Tennessee, and a person die intestate in Louisiana, of whom the wife is a legal heir, leaving movables and immovables, which on petition of some of the heirs, are converted into cash or choses in action by a judicial sale, — the conversion, *per se*, will not affect the marital right; but that right will be determined by the law of Tennessee as to so much of the share as was movable, and by the law of Louisiana as to the rest. And the law is the same, though he reduce the share, thus converted to possession, if it be done without her consent; but if it be reduced into possession by the husband

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under a power of attorney from his wife, his marital right will be determined by the law of Tennessee. *Kneeland* v. *Ensley*, 620.

CONSTITUTIONAL LAW.

1. Defendants in criminal cases have the constitutional right to have the witnesses personally present at the trial; and this though the prosecuting officer is willing to admit the facts which it is expected they will prove. *Goodman* v. *The State*, 195.

2. The admission of them in evidence is no violation of this provision of the constitution. The right of confronting witnesses, and the admissibility of dying declarations are coeval principles of the common law. The first was inserted in the constitution because it had been maintained with difficulty against the crown by the popular party. The other had never been debated between these, and hence was omitted. *Anthony* v. *The State*, 265.

3. It is not a violation of the obligation of contracts to release prosecution surety or bail, and substitute another instead of the first, — there being no contract on the part of him for whose indemnity the surety was taken. *Craighead* v. *The State Bank*, 199.

4. Free blacks are not citizens within the meaning of the constitution of the United States, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *The State* v. *Claiborne*, 331.

5. A state statute making it unlawful for any free person of color to remove himself to the state to reside therein, and remain therein twenty days, does not violate this provision of the constitution. *Ib.* 338.

HUSBAND AND WIFE.

A disposition made by a *feme sole* of her property after a contract of marriage, and before its solemnization, will be fraudulent as against the husband, who has been kept ignorant of the transaction. 2 P. W. 674; 2 Bro. C. C. 345; 1 Ves. jr. 22; 2 Cox. 28; 1 Cond. Eng. Ch. R. 188. *Jordan* v. *Black*, 142.

SALE OF LAND.

1. A right of permanently overflowing the land of another, by a mill-dam to be constructed below his line is a hereditament; and a contract for the sale of it must, therefore, be in writing. *Harris* v. *Miller*, 158.

2. Re-marking does not proceed upon the idea of a transmission of title, but upon that of ascertaining boundaries which are unknown; and though it have, in any case, the effect of changing the possession of any given land from one to another, it is not within the statute of frauds, because it is not a sale; but if the boundary be known, and the parties agree upon a new one, whereby there is a change of possession, that is void under the statute of frauds. *Yarboroagh* v. *Abernethy*, 413.

3. A verbal agreement to receive real estate in discharge of debt, will not be taken out of the statute of frauds, by a submission to referees of the question — at what price it should be received — though the referees fix the price in writing under seal, and in the shape of an award. *Rice* v. *Rowlings*, 496.

4. In a contract for the sale and purchase, at a gross sum, of a given number of acres — off the west end of the vender's tract to come to a road, thence in the direction of a certain fence, to a specified point — the vendee will be entitled to the named quantity of acres, though not included between the west end of the tract, the road and the line, run thence to the point. And the construction of the contract will be the same towards a subsequent contractor for the residue of the tract after the first vendee's purchase should be surveyed. *Harper* v. *Lindsey*, 310.

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INTELLIGENCE AND MISCELLANY.

Resignation of Judge Davis. At a meeting of the Suffolk Bar, held at the Law Library, in Boston, on the 9th of July, 1841, it having been made known to the bar, that the Hon. John Davis was about to resign the office of judge of the district court of the United States, for the district of Massachusetts, and that after Saturday next he would not return to the bench, where he had presided for more than forty years; it was thereupon unanimously "*Resolved*, That the attorney of the United States be requested, in the name of this bar, to make known to Judge Davis the high sense we all entertain of the importance of his judicial labors, which for so many years have exhibited varied and accurate learning, sound and discriminating judgment, unwearied patience, gentleness of manners, and perfect purity; and that Mr. Attorney be requested to express our heartfelt wishes, that he may find in retirement, that dignified repose, which forms the appropriate close of a long and useful life, and to bid him an affectionate farewell."

In accordance with these resolutions, Franklin Dexter, the district attorney of the United States, at the time appointed, rose in his place, and addressed Judge Davis as follows:

May it please your Honor:—By these resolutions I am requested in the name of the Suffolk bar, to express to you their high sense of the value of your judicial labors, and their acknowledgment of their personal kindness, as well as the distinguished ability with which they have been performed. This is, sir, to me a most grateful duty—and yet I feel the difficulty of giving any adequate expression of the deep feelings of my brethren, without danger of offending the modesty which, through a long life of usefulness, has adorned so many talents and so many virtues. I will not, therefore, depart from the simple but comprehensive language of the resolution in describing to you our general estimation of your judicial character and conduct. But let me assure you, sir, that these are not words of mere form, required by the occasion; but the sincere and spontaneous expression of the feelings and opinions of every member of the bar, and of this commercial community. It can rarely happen, that a judge who is called upon to decide so many delicate and important questions of property and of personal right, should so entirely have escaped all imputation of prejudice or passion, and should have found so general an acquiescence in his results. It is not to be forgotten in the peaceful tenor of the present times, that your official career has been formerly marked with extraordinary difficulties. When you assumed its duties—more than forty years ago—before any of this fraternity had begun the active business of life—the stores of judicial learning in that peculiar branch of the law which you have been called most frequently to administer, were by no means so near at hand as at present—then it was necessary *accedere fontes*, and from those fountains your own decisions have, with those of your distinguished cotemporaries in Europe and America, drawn down the principles of the admiralty law within the reach of comparatively easy exertion. A few years after that time the system of commercial restriction adopted by the general government threw this portion of the country into a state of unparalleled distress and exasperation. An abundant and overflowing commerce was suddenly checked

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in all its issues and enterprises, and the revulsion threatened to break down the barriers of law by which it was restrained. It was in the district court and under your administration that this struggle took place; and although juries refused to execute the obnoxious restrictions in cases required by the constitution to be submitted to them, yet the supremacy of the law suffered no detriment in the hands of the court. Few of us can remember this *civium ardor jubentium*, but all can imagine how painful a duty it was to be thus placed in opposition to the feelings and interests of this community. Perhaps I may be pardoned for recalling to the minds of the bar, in your presence, the beautiful language in which your own regrets were expressed when you felt obliged to declare that disastrous as its consequences were to the country, the embargo was still the law of the land and as such to be obeyed.

"I lament the privations, the interruption of profitable pursuits and manly enterprise to which it has been thought necessary to subject the citizens of this great community. I respect the merchant and his employment. The disconcerted mariner demands our sympathy. The sound of the axe and of the hammer would be grateful music. Ocean, in itself a dreary waste, by the swelling sail and floating streamer, becomes an exhilarating object; and it is painful to perceive, by force of any contingencies, the American stars and stripes vanishing from the scene. Commerce, indeed, merits all the eulogy which we have heard so eloquently pronounced at the bar. It is the welcome attendant of civilized man, in all his various stations. It is the nurse of arts; the genial friend of liberty, justice and order; the sure source of national wealth and greatness; the promoter of moral and intellectual improvement; of generous affections and enlarged philanthropy. Connecting seas, flowing rivers, and capacious havens, equally with the fertile bosom of the earth, suggest, to the reflecting mind, the purposes of a beneficent Deity, relative to the destination and employments of man. Let us not entertain the gloomy apprehension, that advantages so precious are altogether abandoned; that pursuits so interesting and beneficial are not to be resumed. Let us rather cherish a hope that commercial activity and intercourse, with all their wholesome energies, will be revived; and that our merchants and our mariners will, again, be permitted to pursue their wonted employments, consistently with the NATIONAL SAFETY, HONOR and INDEPENDENCE."

From that time, sir, down to this most interesting period when you are about to surrender the high trust you have so long holden, it is enough for me to say, that the bar have felt undiminished confidence in the ability and integrity of your administration of the law, and that our filial respect and affection for yourself has constantly increased with your increasing years; and while we acknowledge your right now to seek the repose of private life, we feel that your retirement is, not less than it ever would have been, a loss to the profession and to the public.

I am further instructed, sir, by the fraternity to bid you an affectionate farewell, and to express to you their heartfelt wishes that you may find in retirement that dignified repose which forms the appropriate close of a long and useful life. May it be so, sir. May you live long and happily—as long as life shall continue to be a blessing to you; and so long will that life be a blessing to your friends and to society.

Judge Davis was sensibly affected at this address, and it was some moments before he was able to respond. When he commenced his reply, the bar rose and gathered round the bench, while the venerable judge delivered the following address in a sitting posture, presenting the appearance of a patriarch, counselling his descendants.

Gentlemen of the Suffolk Bar:—I receive gratefully and with deep sensibility your generous and kind expressions, communicated by a representative most justly entitled to that selection, and to whom I would tender my acknowledgments for his very acceptable performance of the duty, which it has been your pleasure to assign to him on this occasion.

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There are considerations besides habitual taste and temperament, which would dispose me to meet the event of this day in silent soberness, with full persuasion, which I was assured might be indulged, that our official relation would be dissolved with mutual friendly regards; but I yield to an arrangement which is more consonant with your kind wishes, and in which there seems to be an obvious propriety and fitness. At all times, and especially in this place, we are bound to regard the fitness of things.

Somewhat more than half of my life has been spent in the office which I am now to relinquish. With the members of this bar, and with their predecessors, I have had frequent, gratifying and improving intercourse. Should I attempt to give expression to the recollections which on this occasion arise rapidly and somewhat confusedly to my view, I could do it but imperfectly. If a history of my time should ever be sketched, it must be with more deliberate preparation. Some reminiscences, however, seem due to the occasion, the indulgence is among the privileges of age—a privilege I hope which will not be abused.

The Suffolk bar, at the commencement of the present century, was not numerous, though even then, I believe, solicitous aspirants were heard to complain that the profession was crowded. The whole number was but thirty-three; five barristers; twenty attorneys of the supreme judicial court, and eight of the common pleas. The barristers were James Sullivan, Theophilus Parsons, William Tudor, Perez Morton, and Shearjashub Bourne.

Attorneys of the Supreme Court.

Thomas Edwards,	John Quincy Adams,
Jonathan Mason,	John Phillips,
Christopher Gore,	George Blake,
Rufus G. Amory,	Ebenezer Gay,
Joseph Hall,	Josiah Quincy,
Edward Gray,	Joseph Rowe,
John Davis,	William Sullivan,
Harrison G. Otis,	Charles Paine,
Joseph Blake, jr.	John Williams,
John Lowell, jr.	William Thurston.

Attorneys of the Court of Common Pleas.

Edward Jackson,	Charles Davis,
Foster Waterman,	Charles Cushing, jr.
David Everett,	J. W. Gurley,
John Heard,	H. M. Lisle.

Of these, there remain nine fellow surviving associates;—Hall, Otis, Adams, George Blake, Gay, Quincy, Rowe, Williams, and Cushing. Messrs. Hall, Otis, and Blake have retired from the bar. Adams, Gay, Rowe, Quincy, and Cushing have changed their residence; and Mr. Williams is the only one of the number now having a place at the Suffolk bar.

The officers connected with the United States courts, in this district, in my time, besides the present occupants, are H. G. Otis, George Blake, Andrew Dunlap, and John Mills, attorneys; Nathan Goodale, William G. Shaw and John W. Davis, clerks; Samuel Bradford, Thompson J. Skinner, James Prince, Samuel Harris, and Jonas Sibley, marshals.

Mr. Otis was but a short time in office, being removed by president Jefferson, in a few months after the appointment received from president Adams. Mr. Blake held the office many years, some of them years of great and peculiar pressure and perplexity, with eminent ability and assiduity. His successor, Mr. Dunlap, performed his official duties with similar energies, and with his characteristic ardor, tempered with gentlemanly address. Many now present remember his signal exertions, when he stood alone in the arduous trial of the pirates, in 1834, the number of the men on trial for their lives, as was remarked by their junior counsel, being equal to the number of the jury, by whom their fate was to be decided.

Mr. Mills, who succeeded Mr. Dunlap, has recently resigned. He left us with

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the cordial esteem of all with whom he was connected—faithful, accurate, and able in his official transactions. It was only regretted, that he did not find it convenient to make this place of business in office, his place of abode. The discreet employment of a competent and very attentive assistant, in a great degree, was a sufficient substitute. It has always, I think, been important, and the urgency is continually augmenting, that the attorney, marshals, and clerks of the United States courts in this district, should reside in or near the place where the business to which their offices have relation, is almost wholly transacted. Of marshals Bradford, Prince, Harris and Sibley, I have spoken in deserved terms of commendation, when the present marshal, Mr. Lincoln, took the requisite official oaths in this place. Of his immediate predecessor, Mr. Sibley, I feel bound to say, in addition, that to his attention and exertions, we are very much indebted for the ample and very acceptable accommodations for the United States courts, and all connected with them, in this edifice, by arrangements with the city government. There have been times when there has been peculiar embarrassment in this particular. Frequently no place could be found for holding the courts of the United States, but in a hotel; and at one time, I recollect, marshal Prince announced, that he had written or should write to Washington, that he knew not where to find a place for the court, but under the great tree on the common.

Among the clerks of this court, the last named was, as you know, most near and dear to me. I am happy to say, also, that most of you were witnesses of his carefulness and courtesy, and how faithfully and acceptably he discharged all the duties of his trust. When your obliging sentiments were read, and I listened to the interesting accompaniments offered by a son of an esteemed friend and classmate, it brought to recollection a reply made at a council fire, in a *talk* in our forest border. "Good words," said an aged chief, "Good words, and I will tell them to my children." Your good words I cannot tell to my son, but I shall tell them to his children. Of his six sons, all now very young, some one or more may, at some future time, have the ambition to take a place in your corps. If so, I am sure they will find a welcome, and be received with generous good will. Mr. Bassett, my son's assistant in his illness, and his tried friend and classmate, became his successor in the office. You well know his merits, his accuracy and fidelity. Every thing in his department is to my entire satisfaction.

The connexion of the court with the present district attorney and marshal is quite recent. If I should have remained in office, I well know the satisfaction with which my intercourse with them would be attended. It will be experienced, I am confident, in abundant measure by my successor, and by all with whom they may have connexion, in the interesting offices committed to their charge.

The Suffolk bar is greatly increased in the forty years of my judicial life. There are on its list more than six times the number of 1801. If we deduct from the list those who are engaged in other pursuits, though their names still stand on the honorable roll, the acting number will still far exceed the rate of increase of population in the scene of action. There are other causes prevailing in this very busy and flourishing portion of the community, greatly affecting and varying the statistics and condition of the bar, in this city and its vicinity, on which I cannot here enlarge, but which every intelligent observer must have perceived. They are considerations which have brought here and well rewarded the transition of distinguished advocates from other counties and from sister states. The fair field has been occupied and honored by Dexter, Ward, Prescott, Jackson, Bigelow, Webster, Pickering, Choate, Jeremiah Mason, Fletcher, Sprague, Peabody, and others, who have been cordially received by those whom I may term the home members. Men of eminent attainments, now in judicial office—Story, Putnam, Shaw, and Thacher—have appeared as advocates in this court, and occasionally distinguished counsellors from other counties and from other states. If in my deportment I have been deserving of the commendation which it has been your pleasure to bestow, much, very much is due to my cherished intercourse with such men, as well as from my habitual respect and regard for your profession.

It is a profession highly honorable, for it is highly useful. It has been em-

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braced by the wisest and best of men, and in every country having any pretensions to freedom or intelligence, the able, upright, well instructed lawyer is of high consideration. The studies in which he is accomplished, his knowledge of men in all their relations, his habits of research, reflection, and discrimination, the frank and independent tone of his character, inspired by the very genius of his profession, his unshaken fidelity to his trust, his varied intellectual acquisitions, his power of clear, forcible, and impressive communication—all inspire confidence, respect, and esteem. In the various perplexities of life he is the safe and confidential counsellor. He enters the temple of justice, a representative of others, with rights which all are bound to respect. Property, reputation, the peace and repose of families, the affairs of various associations, the dearest temporal interests, are occasionally committed to his charge—too often does the sad occasion occur, when some forlorn being in a state of awful uncertainty leans on him for support, and life hangs trembling on his exertions. The learned author of *Eunomus* suggests an opinion of one of his friends, a respected veteran who had retired from practice, in regard to the moral tendency of the profession, which, if it were just, would impair its estimation and cloud its brightest honors. That friend is represented as declaring that "he would never breed up a son of his to the profession, if he could not leave him a competence independent of it, because he doubted much whether he could thrive in it, at all events without sacrificing more of his honor and conscience than a man of any delicacy would wish for." Very different was the opinion of my excellent predecessor, the Hon. Judge Lowell, an ornament of his profession, the delight of every friend and admirer of virtue, genius and intelligence. I remember to have heard him more than once express, in his emphatic manner, his persuasion that the sentiments and habits generated by legal studies and pursuits, were a precious security against wreck of character, and that they had a favorable tendency to invigorate and improve the moral sense as well as the intellectual faculties. In this sentiment he is sustained by Lord Coke. "For thy encouragement," says that eminent jurist, "cast thine eye upon the sages of the law that have been before thee, and never shalt thou find any that have excelled in the knowledge of the law, but hath drawn from the breasts of that divine knowledge, honesty, gravity, and integrity."

With such convictions and the eminent examples which it has been my good fortune to witness, it has been my endeavor to maintain a corresponding deportment. We have all, I trust, been habitually mindful of our respective relations. Truth, says Malebranche, loves gentleness and peace. It has, I hope, been evinced, in our transactions together, sometimes of exciting tendency, that irritation and ill humor are not necessary incidents in legal controversies, but that the precious elements truly and essentially appertaining to tribunals of justice, forbearance, moderation, and mutual civility, are the most favorable for full discussion and just decision, and in entire consistency with that manly character and uniform assertion of right, which it is the honor and the duty of the bar and the bench respectively to maintain.

When I received my appointment there was a distinct circuit court. The district judge had not a seat in that court. It was then my impression, abundantly confirmed since, that the alteration of the law in that particular is not an improvement. The employments of the district judge, of various descriptions in court, and of ministerial and miscellaneous character, are of such amount in this highly commercial district, that it seems neither reasonable or advantageous to require his attendance and agency in another court. This consideration will be more specially urgent if a bankrupt law should be enacted, and the jurisdiction of the court should be enlarged in reference to crimes and offences, one or both of which augmentations of the duties of the district judge, there seems reason to expect.

By becoming connected with the circuit court, I had the satisfaction of an association and intimacy with the venerable Judge Cushing, and of affording, I believe, some acceptable aid in his decline of life—and have, in my turn, received relief and great enjoyment with his distinguished successor, Hon. Justice Story. In that connexion I have found every thing that could be wished. In

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business, never asking or expecting from me more than my engagements in my own special sphere would consistently admit. By his eminent ability and unwearied industry, in a great degree relieving a solicitude which I might otherwise have experienced from responsibilities in reference to the circuit court, and by his able decisions, as well as by his learned labors, *inter sylvas academiæ*, affording salutary aid in various departments of my official duty. I have noticed with pleasure the improving influence of the law school in the university. The professional publications from some of his young pupils at this bar, are highly honorable to them and to their instructer.

I must forbear, gentlemen, to enlarge, though there remain topics, connected with my position, which it would not be impertinent to consider. A great portion of the business which we have been concerned in transacting, has been of admiralty jurisdiction, in which the trial rests wholly with the judge, fact as well as law. This characteristic, in regard to a large portion of the cases before him, is attended with peculiar solicitudes, requiring the candid consideration which I have had the happiness to experience. It would be a great relief to the judge, and might be an improvement, though of this I am not certain, if *facts* in admiralty and maritime cases, were made triable by jury, as they are rendered by statute in regard to seizures on land. The solicitudes of the bench, arising from the present law and practice in that particular, are, however, not of such character and degree as to call for the alteration suggested. In this respect, as well as in all other branches of practice, I have been relieved by the courtesies of the bar, which I have uniformly enjoyed, and for which you have my cordial thanks.

Dr. Taylor, in his Elements of Civil Law, has a remark not inapplicable to my present position. It is relative to the passes or bridges over which the voters in ancient Rome proceeded to give in their ballots.

"It was in this pass, that people of sixty years and upwards were objected to, and refused the right of suffrage; for as sexagenarians could not be members of the *comitia*, as they could not be compelled to execute any public office after that age, so the younger sort thought it unreasonable they should be indulged their suffrage, and thrust them by as they came along—whence the phrase *depontani senes*." Upon this rigid system, I should long ago have been *depontanus*, but am willing to believe my generous auditors would consent to give me still further grace.

But the time of release has arrived, and meets with my acceptance. I bid you an affectionate adieu, thankful for all your kindness, and for the gratifying and improving opportunities which it has been my favored lot to enjoy, in the connexion now to be dissolved. It is painful to employ the solemn word *dissolved*. Our official connexion will cease, but reciprocal esteem and good-will, will, I trust, remain in continued exercise. I shall rejoice in all I may see or hear of your prosperity and honor, and may the Father of Mercies, the giver of every good gift, sustain, animate, and guide you in your assiduous progress in the path of arduous duty.

Upon concluding his address, Judge Davis descended from the bench, and took a formal leave of the bar and the officers of the court. He lingered a moment, until others had retired, and a tear stood in his eye as he left the scene, where he was to enter no more in his judicial character. It is unnecessary to speak of this excellent and learned man in terms of eulogy. Other judges there have been as learned in the law and able in the application of its principles; but it can also be said of him, that he is beloved by all who have ever done business in his court. He has well illustrated throughout his long and useful career, that "truth loves gentleness and peace."

Litigation. A brisk litigation was carried on in the justices court, in Boston, last month, which afforded no small amusement to those who are in the habit of attending the sessions of that semi-weekly tribunal. The owner of a shop, leased by the month, having an offer of higher rent, gave the tenant notice to quit. The latter not fancying this summary mode of ejectment and

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being disposed to keep possession as long as possible, refused to vacate the premises, and, process being commenced against him, he retained counsel for the the express purpose of "fighting off," as long as possible. When the action came on for trial, the plaintiff was put to prove his case, and was unable to show, by competent evidence, that the tenant had received legal notice to quit. "Neither party" was thereupon entered; and the plaintiff made a fresh start. When the second action came on, it appeared that the writ was unfortunately made one day too soon, and the defendant took judgment. The unlucky plaintiff immediately dismissed his counsel, and ordered another gentleman to commence a third action, who, with fresh vigor, renewed the war. But he also failed for want of proof of the day when the rent was payable, and the defendant took a second judgment for costs. The plaintiff appealed to the court of common pleas, and entered his action; but in a few days without going to trial, it was there entered "neither party." The plaintiff gave two more notices to quit; but probably growing shy of actions to get possession, commenced no suit upon either of them. The truth was, the defendant, by advice of his counsel, would pay his rent upon no day of the month, except under a protest that it was not due, and in that way the plaintiff was defeated in all his attempts to prove what was the rent day by the admissions of the other party. Meanwhile the two last notices to quit had been given, and the plaintiff concluding "to try another heat," sued for the last month's rent and put a keeper into the defendant's shop, when the latter made a tender of the amount due and the costs. The plaintiff nevertheless entered his action, insisting that he was entitled to all costs till judgment. The defendant pleaded the tender, and the court gave him another judgment for costs. Another month passed and another action for rent was brought for double the usual sum, the tenant having been informed that if he remained in possession, he must pay additional rent. This action is returnable to a term of the common pleas which has not yet arrived, but as soon as the officer took possession, the defendant took advantage of the insolvent law; the messenger took possession of the shop, and the plaintiff *will* take a dividend, if any is declared.

James Montgomery's Imprisonment for a Libel.—Montgomery is now publishing his collected poetical works. The first volume contains his "Prison Amusements," written by the poet when under confinement in York Castle, for a political offence. There is a curious revelation about the matter in the volume which illustrates the English toryism of those good old days. It has been generally supposed, that Mr. Montgomery, at that period and for many successive years, the editor of the Sheffield Iris, had suffered imprisonment for an overheated effusion of his own. It appears that this was not the case. He was prosecuted merely as the printer of an alleged seditious ballad, sung in the streets of Sheffield by an eccentric old ballad monger. This composition had appeared in the paper when under the direction of Mr. Montgomery's predecessor, and being accidentally kept in type until his own time, was suffered to be struck off in a certain quantity, at a cheap rate, in pure charity to the old man. Mr. Montgomery knew nothing of the ballad, except that it had been composed for an anniversary celebration of the destruction of the Bastile, and referred to the invasion of France by the Austrians, in 1792. The ballad monger himself seems to have been equally ignorant, till a constable carried him off to the house of correction for singing it, alarmed him into the disclosure where it had been printed, and waited on poor Mr. Montgomery with a warrant of arrest for sedition. This was in 1795; and it was alleged that this song, written in '92, could only refer to the war between England and France, begun in '93, and could only have been designed to encourage traitorous and seditious designs against England. All Mr. Montgomery's remonstrances were met by the quotation of this doggrel stanza:

"Europe's fate on the contest's decision depends;
Most important its issue will be;
For should France be subdued, Europe's liberty ends,
If she triumphs, the world will be free;"

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and he was ultimately condemned to imprisonment and fine by the Yorkshire magistracy. What his real persecutors were, he shrewdly suspected at the time. but forty-five years passed before their full disclosure. Here it is:—"Five-and-forty years after these things, in the spring of 1839, a packet was put into my hands, containing several of the original documents connected with my trial for a seditious libel, at Doncaster, in 1795. Among these there is a letter signed by the Duke of Portland, his majesty's secretary of state for the home department, addressed to a magistrate of this neighborhood, apparently in answer to a communication from the latter, wherein his grace approved of the several steps taken against the song seller and myself, accompanied with some statesman-like hints respecting further proceedings. There are several letters from Mr. White, the solicitor of the treasury, to the attorney for the prosecution here, in one of which the latter is authorized to give briefs to three counsel named, "with the attorney general's compliments." Thus I learned, that I had actually suffered, not to say enjoyed, the honor of a state prosecution. Another document is the Sheffield solicitor's bill of costs, at full length, endorsed, "*Rex* v. *Montgomery, J. B.'s bill,* £66 8*s.* 2*d. Mr. White paid this.*" What Mr. White himself, and the attorney general, Sir John Scott, afterwards Lord Eldon received, I know not. There are several other memoranda of no signification now. But the most precious of these ancient manuscripts, rescued as unexpectedly from hopeless perdition as any classic treasure from the ruins of Herculaneum, is *a fragment of the original draft of the brief,* delivered to the counsel for the prosecution. From this I make the following extract. After some high seasoned vituperation of my predecessor, the scribe proceeds thus: "The prisoner (myself) for a long time acted as his (Mr. G's) amanuensis," the next seven words expressed an after-thought, being interpolated in the draft, "and occasionally wrote essays for the newspaper. Since he has been the ostensible manager and proprietor of the *Iris*, he has pursued the same line of conduct, and his printing office has been precisely or the same stamp." This refers to a charge in the foregoing clause respecting Mr. G.'s office, that from it "all the inflammatory and seditious resolutions, pamphlets, and papers issued" of the political societies in Sheffield. The paragraph goes on, referring to myself:—"Without calling in question the names or characters of his principal supporters, who ought to act differently, suffice it to say, that *this* prosecution is carried on *chiefly* with a view of *putting a stop to the meetings of the associated clubs in Sheffield;* and it is hoped, that if we are fortunate enough to succeed in convicting the prisoner, it will go a great way towards curbing the insolence they have uniformly manifested, and particularly since the late acquittals." Thus, after the lapse of nearly half a century, this true key to the measures of my adversaries against me is found. And another true key to the character of toryism.

Personalities in Congress.—The manner in which new members of congress are sometimes dishonorably driven from their positions by old politicians, is a great mortification to their friends. Members of the legal profession, too, who have served a severe apprenticeship in legal discussions, are sometimes found utterly inadequate to meet their inferiors on another scene. Recent occurrences call to mind a scene which took place many years ago, and which we have never seen in print. The famous George McDuffie, of South Carolina, then member of the national house of representatives, in a speech upon that floor, made some cunning and indirect attacks upon Mr. Trimble, a member from Ohio, who was not at that time greatly distinguished in the house, and it was a subject of some interest, to see what steps he would pursue. Every body who heard Mr. McDuffie, was well aware that his remarks were intended to have a personal application, but so carefully were they guarded by skilful phraseology, that to resent them would seem like fitting a coat to one's own back, not intended for his wearing. Trimble, however, replied the next day in a speech of exactly the same character. He covertly and with great ingenuity attacked McDuffie in the same style, without taking any application to himself of the speech to which he was replying, thus throwing upon his opponent all the responsibility of a quarrel. At the close of Trimble's reply, McDuffie rose and in a manner and

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aspect of vehement defiance, demanded a direct answer to the question, whether the member from Ohio meant to be personal towards himself, in the remarks just submitted to the house? The member from Ohio rose and addressed the speaker. "The member from South Carolina *demands* of me an answer to his question. I give it to him in a question to himself. Did he mean to be personal towards me, in his remarks of yesterday? If he did, then I did in mine of to-day. If he did not, I did not. He has my answer. If the member from South Carolina meant nothing personal towards myself in the remarks he yesterday submitted to the house, then I did not mean to reflect personally upon him, or may I never see the smile of God! If the member from South Carolina meant aught personal with regard to me, then, I meant to be just *as* personal towards him, or may the lightnings of heaven blast me where I stand!" Mr. McDuffie never replied. The reader may judge who took most by his motion.

Merchant Seamen. A Treatise on the rights and duties of merchant seamen, according to the general and maritime law and the statutes of the United States, by George T. Curtis, has been published in Boston by Little & Brown. The most obvious remark, suggested by the appearance of the work, is its extremely neat, not to say elegant, mechanical execution; excelling, in this respect, any law book ever issued from the American press. The work is evidently the result of much and careful investigation; and is, undoubtedly, as a whole, the best treatise on the subject in our language. It will be found useful to the general, as well as the professional, reader, and ought to find a place in the counting room, the ship's cabin, and the gentleman's library. We cannot help remarking, that it contains some peculiarities in point of style, which, however, as matters of taste, are not, by the old rule, the subject of criticism; and perhaps it might be considered an ill-natured act to point out blemishes of this sort in a work, for the preparation of which the profession are under great obligations to the industrious author.

The Law Library. The number of this valuable publication for July contains the first part of Shelford's treatise on Marriage and Divorce. The Law Library is well known throughout this country, and we believe its great merits are generally appreciated. It contains the most valuable republications of standard works, on legal subjects which are thus brought within the means of all; and, by the convenient form of the publication, its transportation to any part of the country is easy and cheap; so that those members of the profession in remote places may be placed on an equality with those of the sea-board. We unhesitatingly recommend it as among the most valuable law publications of the day. We take occasion to add that an arrangement has been made by which it may be obtained in Boston upon terms somewhat reduced, as is mentioned in our advertising sheet.

Litigation in Massachusetts Bay.—In 1656, a law was passed in Massachusetts, in the following terms: "This court, taking into consideration the great charge resting upon the colony, by reason of the many and tedious discourses and pleadings in courts, both of plaintiff and defendant, as also the readiness of many to prosecute suits in law for small matters. It is therefore ordered, by this court and the authority thereof, that when any plaintiff or defendant shall plead, by himself or his attorney, for a longer time than *one hour*, the party that is sentenced or condemned shall pay twenty shillings for every hour so pleading more than the common fees appointed by the court for the entrance of actions, to be added to the execution for the use of the country."

McLeod's Case. A decision has been pronounced by the supreme court of New York, in this famous case, the publication of which in our magazine is rendered unnecessary, by the great publicity which is given to it in the newspapers. Without pronouncing any opinion upon the merits of the case, we may remark, that the opinion, as a legal performance, is open to severe criticism, and will not be very creditable to the country abroad. We shall probably remark at length upon this subject in a future number.

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MONTHLY LIST OF INSOLVENTS.

Place	Name	Occupation
Boston.		
	Boyd, George E.	Merch. tailor.
	Cook, Charles,	Engineer.
	Cuningham, Simon D.	Shoe-dealer.
	Perkins, Henry I.	Trader.
	Sayward, James H.	Gentleman.
	Whiting, Oliver R.	Housewright.
	Morgan, Albert,	Printer.
	Stearns, Thomas C.	Merchant.
	Winkley, Swain,	Merch. tailor.
	Homer, Gilman,	Pile drivers.
	Morris, Robert R.	Copartners.
	Payne, Thomas.	
Belchertown.		
	Wiley, Otis.	
Charlestown.		
	Chamberlin, Abram,	Teamster.
	Dorr, Joseph A.	Baker.
Egremont.		
	Mooney, Grove S.	Marble deal.
	Gurner, Thaddeus R.	Copartners.
Hanson.		
	Perry, Edward Y.	
Hingham.		
	Hersey, Joshua Jr.	Traders.
	Lincoln, Jotham.	Copartners.
Lee.		
	Phelps, George H.	Gentleman.
	Strickland, Porter,	Gentleman.
Lynn.		
	Davis, Edward S.	Trader.
Lowell.		
	Diggles, John,	Merch. tailor.
	Whitcomb, William H.	Innholder.
	Pickering, Loring,	Carpenters.
	Brown, Aaron,	Copartners.
	Russell, Hiram,	Trader.
Nantucket.		
	Holmes, Oliver,	Ship carpent'r.
Newburyport.		
	Stevens, Elbridge,	Grocer.
Stoneham.		
	Cleaves, Thomas J.	Cabinetmaker.
Stow.		
	Brooks, Isaac,	Gentleman.
South Redding.		
	Allen, John A.	Cordwainer.
Springfield.		
	Moseley, Nathaniel B.	
	Willis, Lemuel.	
Uxbridge.		
	Adams, Samuel J.	Machinist.
Ware.		
	Sweat, Amos L.	
Worcester.		
	Eaton, Nathaniel,	Traders.
	Heywood, Daniel,	Copartners.
Yarmouth.		
	Baker, Seth,	Mast. mariner.

NEW PUBLICATIONS.

The American Jurist for July, 1841, contains an unusual variety of interesting and valuable articles upon various subjects, useful to the lawyer, the statesman, and the man of business. It also contains a number of critical notices, and the usual digests of English and American cases.

Thomas W. Clerke, of New York, has prepared a Practical Elementary Digest of the reported cases in the Supreme Court, the Court of Errors, and the Superior Court of the city of New York, in two volumes.

A volume of reports of the cases argued and determined in the Circuit Court of the United States, seventh circuit; by John McLean, circuit judge, has been published in Cincinnati.

John S. Little, of Philadelphia, has nearly ready for publication, in two volumes, a Treatise on the Law of Executors and Administrators generally in use in the United States; and adapted more particularly to the practice of Virginia; by John P. Lomax.

A volume of Reports of Cases decided in the eighth circuit of the state of New York, by Charles L. Clarke, has been published in Rochester. Also, in New York city, a volume of cases decided by the assistant vice chancellor of the first circuit.

Albert Pike, the reporter of Arkansas, has issued his first volume, embracing the decisions in law and equity, from 1837 to 1839.

A Treatise on the Law of Sales of Personal Property, by Francis Hilliard, of Boston, is advertised in New York.

The Monthly, English, Law Magazine, has been discontinued. It had reached ten volumes.

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THE LAW REPORTER.

SEPTEMBER, 1841.

CASE OF ALEXANDER McLEOD.

THE DECISION OF THE SUPREME COURT OF NEW YORK.

In our last number we alluded briefly to this great national case, and the extraordinary judgment pronounced in it by the supreme court of the state of New York; which, we then thought, as a legal performance, was open to criticism, and, we feared, would not be entirely creditable to the country abroad. We regret to be obliged to say, with all that respect which is due to a high judicial tribunal of a great state of the Union, that a farther examination of the opinion given by the court has not tended to change the views which we then took of it. In regard to foreign nations, we must add, that if their governments had previously any grounds for entertaining a distrust of our state courts in dealing with great questions of *international* law — which, for the most part, lie beyond the sphere of their ordinary action — those governments, we are apprehensive, will not find new inducements, in the present decision, to lead them to place any greater confidence in those local tribunals, than heretofore. Even considering our state courts as tribunals administering the comparatively insignificant regulations of common municipal law, what estimate will English lawyers be likely to form of the legal learning of our highest state courts, and what confidence will they place in that learning, when they find a court of that rank, in reviewing the catalogue of principal cases, respecting admission to bail, to be apparently quite unimformed of a well known law authority, in which a principal case is reported. The New York court, in the present case, after observing, that the com-

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piler, Petersdorf, refers to Chitty, and that this latter cites "*Cases K. B.* 96," gravely remark — "this book, eo nomine, *does not appear now to be extant;* (!) and 12 Mod., the only reference I am aware of, which among the English quotations is synonymous with Chitty's, does not appear to contain the case stated by him." The book in question, however, which the court says does not appear now to be extant, is familiarly known to all criminal lawyers in this part of the United States, if not to all practisers on the civil side, as *Cunningham's Reports*, though it is not always cited as his, (from the circumstance of his name not being in the title page), but in the manner adopted by Chitty, or, sometimes, as *Rep. Temp. Hardwicke*, the later editions of which, however, do not contain *all* the cases to be found in Cunningham's original edition, of 1766. The volume in question may be seen in the Bar Library of Boston, (where the case cited by Chitty may be found, *Rex* v. *Parnam*, page 96), and we presume, also, in every other well furnished law library in the United States.

In ordinary cases, we should not have deemed this matter deserving of so particular notice; but in a case involving the life of the individual accused, and, what is of immeasurably greater consequence, involving the question of peace or war to the millions of human beings in our own country and in England, such an omission can hardly be excused. But we proceed to the case before us; making an abridged history of its origin from the *Monthly Chronicle* of May, 1841, a valuable periodical, now well known to be under the charge of the editor of the Boston Daily Advertiser, whose circumspection and accuracy are familiar to every reader.

In December, 1837, on the defeat of the party in Upper Canada, who had taken up arms against the colonial government, William Lyon Mackenzie and Dr. Rolf, two principal leaders of the insurrection, made their escape to the state of New York. They immediately proceeded to the city of Buffalo, where a strong popular feeling had been manifested in favor of the insurrection. There, after two or three preliminary meetings, a large popular assembly was held on the 12th of December, at the theatre, where were assembled two thousand people, and large numbers were unable to gain admittance to the theatre for want of room. Mackenzie was present, and made a speech, recounting his exploits, and strongly exciting the feelings of the assembly against the British authorities. The speech was received with bursts of applause; and resolutions were entered into, to aid the cause of the colonial insurrection by encouraging the enlistment of men and by contributions in money. Shortly afterwards a party was organized, consisting partly of refugee Canadians, but chiefly of Americans, for the invasion of the province. As they could not openly embody themselves in the United States, and were too feeble to maintain a position in Canada within reach of the military force embodied there, they adopted the expedient of taking possession of *Navy Island*, a small uninhabited island in Niagara river, *belonging to Canada*, and

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situated a few miles above Niagara Falls. It is only half a mile from the Canada shore, but is in a great measure secured from invasion, from this quarter, by the rapidity of the current; yet it is easily accessible by boats and vessels from the *American* shore. Here a provisional government was established, and Mackenzie was placed at its head. Rensselaer van Rensselaer, an American citizen from Albany, was appointed military commander. Proclamations were issued, inviting the discontented to flock to the standard of Canadian liberty, and offering rewards, for military services, in lands to be conquered in Canada. Paper money was issued, redeemable from the resources of the government when it should require any, and in this medium purchases were made of munitions of war, and provisions for the rapidly increasing army, except so far as these were not gratuitously furnished. Batteries were erected, in which cannon, *stolen from the arsenals of New York*, were mounted, for the defence of the island, and for bombarding the town of Chippewa on the opposite shore. The force on the island increased so rapidly, that they talked loudly of crossing over to the neighboring continent; and the colonial governor assembled a body of volunteer militia at Chippewa, under Colonel McNab, for the defence of the colony, with threats of making a hostile descent upon the island.

By the 20th of December, the adventurers were reported at seven or eight hundred men, with twelve or fifteen cannon — the state arsenal of New York was entered, and five hundred stand of arms and several pieces of ordnance stolen from it. On the other hand, a body of two hundred colonial volunteers was stationed in Chippewa, (opposite to the island) which had been evacuated by the inhabitants; and a cannonading was commenced from the island, to the great alarm of the colonists. The provincial force was augmented in Chippewa, rumors were current, that an attack upon the islanders was meditated, and that they meditated a descent upon the Canadian territory. In the mean time, very little effort had been used by the authorities of New York, to prevent this invasion of that province or the plunder of the state arsenals; the government of the United States, however, by Mr. Forsyth, secretary of state, gave instructions to their law officer in that quarter, to prosecute for any violations of law; and it was stated, that the marshal of the United States met a party of men marching towards Navy Island with a field piece, but that *he had no power to stop it.*

During this time, a constant intercourse was kept up between the Navy Islanders and the American shore; and, to facilitate this, as well as to derive a revenue from the crowds of people flocking to the island, a steamboat, called the *Caroline*, belonging to William Wells, of Buffalo, and commanded by captain Appleby, was employed as a regular passage boat between the island and the American port of *Schlosser*, nearly opposite, a few miles above Niagara Falls. She was cut out of the ice and put in a condition for this service; of which

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the Canadian commander, Colonel McNab, had notice, and promptly resolved to destroy her. On the 29th, this steamer proceeded down to Navy Island, and thence passed over to Schlosser, where she arrived at 3 o'clock, P. M. She afterwards made two trips to the island and back, on the same afternoon, carrying passengers, at twenty-five cents each, and, as alleged by the British officers, carrying also munitions of war and a cannon for the use of the invaders. She was moored to the wharf at night, and in addition to the crew, ten in number, who slept on board, several persons who had resorted to Schlosser from curiosity or other motives, went on board to lodge, and retired to rest in the cabin. One of the crew kept watch on deck, who at midnight gave the alarm that boats were approaching from the opposite, Canadian, shore; and, by the time that the unarmed crew and lodgers were aroused from sleep, the steamer was boarded by a party of armed men, who drove them on shore; the boat was towed out from the harbor, set on fire, and suffered to drift down the river over the cataract of the Niagara. One man, *Amos Durfee*, a citizen of Buffalo, was found dead on the wharf, shot through the head by a musket ball, and three men were wounded by blows from the assailants. It was at first currently reported, that there were several persons on board the steamer when she went over the falls; but it did not appear, from subsequent proof, that any person was missing. Colonel McNab reported the exploit to Lieutenant Governor Head, *as performed under his orders*, in the most gallant manner, by Captain Drew, of the royal navy, with a party of volunteers.

The sensation and alarm excited on this occasion are well known. The president of the United States issued a proclamation, reciting this violation of the public peace, and that "a military force, consisting in part, at least, of citizens of the United States, had been actually organized, had congregated at Navy Island, and were still in arms under the command of a citizen of the United States;" and he earnestly exhorted all citizens, who had thus violated their duties, to return to their homes; warning them, that in thus compromitting the *neutrality* of the government, they would render themselves liable to punishment, and would receive no aid or countenance from their government. General Scott, of the United States army, and Governor Marcy, of New York, repaired to Buffalo on the 10th of January; Mackenzie, the head of the island government, and General Van Rensselaer, having come over to Buffalo, were arrested by the United States marshal; the island was finally evacuated, and the British flag hoisted on it.

We have given this particular history of the affair, for the purpose of putting the reader in possession of all the material circumstances, which would be taken into view in settling this case as a diplomatic, or international question, and as a purely legal one; for, whatever may be the decision of a *judicial* tribunal on such questions as may be technically presented to it in cases of this nature, the great ques-

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tion, after all, in which the American people are interested, and on which they would be most anxious to form a sound opinion, is one of *international* law.

We will now proceed to consider, as briefly as possible, the questions that have arisen in this important case — questions of as great magnitude, as have ever come before any judicial tribunal in our country since the adoption of the Federal constitution.

It appears by the foregoing statement, that, in the attack, which was made by the party of volunteers, under orders from the British officer, Col. McNab, upon the American steamer Caroline, while lying in the American port of Schlosser, one man, *Amos Durfee*, a citizen of Buffalo, was killed,—that subsequently *Alexander McLeod*, a British subject, having come within the territory of the state of New York, was arrested under process issued by the state authorities, on a charge of having been one of the party that attacked the Caroline, and of having killed Durfee. An indictment, for murder, was accordingly found by the grand jury of the county against McLeod, who was held to answer to it, and was kept a prisoner in the common jail, as in ordinary cases, for an offence under the municipal laws, considered to be not bailable. Not being able to obtain his enlargement, on bail, he made application to the court for his discharge, on a *habeas corpus*.

The question, then, which was submitted to the state court, was — whether he was entitled to his discharge on that process, under the circumstances of the case.

This general question is to be considered under different points of view; as a purely technical question under the municipal laws of New York, which it was in its origin, and as a question of international law, which it became by the accession of new elements subsequently to the first institution of the proceedings; then, again, its international character is to be considered in relation to the peculiar organization and powers of the government of the *Union*, and the *state* governments respectively. The reader will at once perceive, therefore, that this question is not to be settled upon the narrow principles and technical rules of municipal law, which are sufficient for the decision of the ordinary controversies between fellow-subjects of the same sovereign state, living under the influence of the same local institutions, usages and habits; but that it must be decided by those more large and liberal rules of *justice*, which are sufficiently generalized to be admitted as binding on all nations, however diversified their local institutions, habits, and usages, who acknowledge the same code of *international law*—in the present case, the international code of the European community, of which the United States are a member. We say, emphatically, the rules of *justice*, and not the rules of *policy*, in its usual application; which last we hope never to see influencing any *judicial* decision, however right it may be deemed in any cases of diplomatic strategy. Even there, however, we would say with the

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great British statesman—that *justice* is itself the great standing *policy* of civil society; and any eminent departure from it, *under any circumstances*, lies under the suspicion of being no policy at all."[1] But before the ministers of the holy temple of *Justice*, both friend and foe — nations and individuals — our own country and foreign ones — must bow in submission to the sternest decrees of the divinity, that there rules over the affairs of men — *Tros, Rutulusve fuat, nullo discrimine habebo; Rex Jupiter omnibus idem.*

We have alluded to the relation in which the state governments of our confederacy stand towards the general government; and, lest any suspicion should be harbored of our want of due regard for state rights, we say in the outset, that we yield to no man in asserting them; they must be held sacred; they are the maintaining power of the union, at once the centrifugal and centripetal forces, which keep the members of the system from flying asunder, on the one hand, or, on the other, from dashing together in one common chaos. We are not displeased, therefore, to see a state court manifest a disposition to support what it honestly believes to be the rights of its own state. But, while we would sacredly respect the rights of each state individually, we should, on the other hand, as strenuously maintain the *national* rights, which are secured to *all* the states jointly by the federal constitution. The people of all the states, who constitute the political body called the American *nation*, have *rights* under the solemn compact, which must be respected by every individual state; otherwise, the *nation* cannot perform its *duties* — alike sacred with its *rights* — to each member of the confederacy. If, therefore, we should in the course of our remarks, make different limitations of state rights from those of the New York court, it will proceed from an honest conviction, that such must be the construction of the respective powers of the state and general governments, in order to carry into effect the objects, for which those powers were conferred by the whole people of the United States.

We add one remark farther in relation to the opinions of foreign nations, by their diplomatic agents, on the powers and duties of our judicial and other officers, whether of the states or of the union. We maintain, that the public officers of the United States must, so far as foreign nations are concerned, be the sole judges of the respective powers and duties of the state and general governments. When, therefore, Mr. Fox addresses an official note to the secretary of state in the tone he has adopted, and proceeds to impugn the doctrine of Mr. Forsyth, who asserts "that the federal government of the United States has no power to interfere in the matter in question, and that the decision thereof must rest solely and entirely with the state of New York" — when he assumes such a tone, we say, and goes on to im-

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[1] Burke's Works, Vol. III., page 184.

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pugn the construction which is put upon its own powers by the very government to which he is accredited, — whether he is right or wrong in his opinions, — he goes beyond the sphere of his official functions, and commits, what, in the mildest language, would be a marked diplomatic indecorum, and, in some countries, of a less pacific disposition than ours, might have led to other consequences than have here taken place. We make this remark, not in any unfriendly spirit towards the minister himself or the nation he represents, but simply because impartiality demands it.

We will now consider, in detail, the several questions arising in this case. And first, the technical question, whether McLeod was entitled, under the *state* laws to his discharge, on the process of *habeas corpus*; which, if the court had not labored with such an array of learning, we should think might have been disposed of without great difficulty.

The learned judge, who delivered the opinion of the court, states this part of the case thus: "The sheriff returns an indictment for murder, found by a grand jury of that county [Niagara] against the prisoner, in which he appears to have been arraigned at the court of oyer and terminer holden in the same county. It further appears, that he pleaded *not guilty*, and was duly committed for trial. The indictment charges, in the usual form, the murder of Amos Durfee, by the prisoner, on a certain day and at a certain town within the county. These facts, though officially returned by the sheriff, were by a provision in the *habeas corpus* act, (2 Rev. Stat. 471, 2d edit. § 50,) open to a denial by affidavit, or the allegation of any fact to show, that the imprisonment or detention is unlawful. In such case, the same section requires this court to proceed in a summary way, to hear allegations and proofs in support of the imprisonment or detention and dispose of the party, as the justice of the case may require. Under color of complying with this provision, which is of recent introduction, the prisoner, not denying the jurisdiction of the court over the crime as charged in the indictment, or the regularity of the commitment, has interposed an affidavit, stating certain extrinsic facts. One is, that he was absent, and did not at all participate in the alleged offence; the other, that if present and acting, it was in the necessary defence or protection of his country against a treasonable insurrection, of which Durfee was acting in aid at the time." The learned judge then adds — "Taking these facts to be mere matters of evidence upon the issue of not guilty, and of themselves they are clearly nothing more, I am of opinion, that they *are not available on habeas corpus*, even as an argument for letting the prisoner to bail, much less for ordering his unqualified discharge. That this would be so on all the authorities previous to the Revised Statutes, his counsel do not deny."

Notwithstanding this admission, or non-denial on the part of the prisoner's counsel, however, the learned judge goes into an elaborate detail of English cases in support of the doctrine thus laid down by

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him respecting bail; including in his enumeration the book before mentioned, cited by Chitty as "Cases, K. B. 96," (supposed to be "not now extant *eo nomine*") and two ancient cases, 2 Str. 911, and 1 Salk. 104, which the court of New York had several years ago condemned "as of little or no weight," in 5 Cow. 39. But it is unnecessary for us to contest the English rule as laid down in the cases that are properly adjudged; for, admitting the English law to be as stated from those books; still, that whole class of cases appears to us to be inapplicable, or aside of the true question in the case before the court. All those cases assume as their basis, that the party applying for bail is confessedly liable to be *tried;* and the question upon his application then is, not whether he shall take his trial at all — for it is already settled that he shall — but whether he shall, for his personal accommodation, be allowed his liberty on bail, till his day of trial arrives. The actual imprisonment is not imposed as a punishment, but merely to secure his appearance at the trial; for the same reason bail is taken; but if it could be made judicially certain, that he would voluntarily appear and submit to that trial which the law has decided he must undergo, he would be allowed his liberty without bail.

Now the true question before the court, in the case of McLeod, as we understand it, was, not whether the prisoner, as an acknowledged subject of trial, should be allowed to go at large and await that trial, but, whether he was *liable to be tried at all.* Between the two questions, there is a wide distinction; and the copious learning of the court upon the former question is wasted when applied to the latter.[1]

The court, after considering and applying the English cases in the manner we have stated, and remarking, very justly we have no doubt, that the law of England was the law of New York, until the new *habeas corpus* act of the state took effect, proceed next to inquire, whether that new statute has worked any enlargement of those powers, beyond what they before possessed.

The section of the statute relied upon by the prisoner's counsel, is thus cited by the court: "The party brought before such court or officer, on the return of any writ of *habeas corpus*, may *deny* any of the *material* facts set forth in the return, or *allege any fact* to show, either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials shall be on oath; and thereupon such court or officer shall proceed, *in a summary way*, to hear such allegations and proofs, as may be produced in support of such imprisonment or detention, or against the same, and *to dispose* of such party as *the justice of the case may require.*"

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[1] If we are right in this view of the two questions, the argument of the court (speaking in scholastic language) is not *ad idem*, but rests upon an *ignoratio elenchi*, which has been ranked in the category of logical fallacies, from the time of Aristotle to Burgersdicius and all his successors. *Aristot. Organ. De Sophisticis Elenchis, cap.* 5.

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Under this statute, say the court, "the prisoner's counsel claim the right of going behind the indictment, and proving that he is not guilty, by affidavit, as he may by oral testimony before the jury." But they further say — "We have already shown the absurdity of such a proposition in practice, and its consequent repudiation by the English courts. And we were not disposed to admit its adoption by our legislature without clear words or necessary construction. We think its object entirely plain without a resort to the rules of construction. Its words are satisfied by being limited to the *lawfulness of the authority* under which the prisoner is detained, without being extended to the force of the evidence upon which the authority was exerted, or which it may be in the prisoner's power to adduce at the trial. This, if necessary, is rendered still more plain, by considering the evil which the statute was intended to remedy. At common law it was doubtful, whether the prisoner could question the truth of the return, or overcome it by showing extrinsic matter, upon the point of authority to imprison. The statute was passed to obviate the oppression, which might sometimes arise from the necessity of holding a return to be final and conclusive, which is false in fact, or, if true, depending for its validity on the act of a magistrate or court, which can be shown by proofs *aliunde* to have been destitute of jurisdiction." The court add — "There are various cases in which the enactment allowing proof extrinsic to the return may have effect, without supposing it applicable here. It must, we apprehend, for the most part, apply to the cases where the original commitment was lawful, but, in consequence of the happening of *some subsequent event* the party has become entitled to his discharge; as, if he be committed till he pay a fine, which he has paid accordingly, and the return states the commitment only; so, after conviction he may allege a pardon, or that the judgment under which he was imprisoned has been reversed."

Now, though there are some things here from which we should not dissent, yet we must add, with great submission, that this view of the original objects of the process of *habeas corpus*, and of the New York provisions for carrying into effect this great remedial writ — the citizen's safeguard — strikes us as too narrow and refined to answer the great practical purposes intended in a free country. We cannot bring our minds to the opinion, that this great legal, or, more justly speaking, constitutional provision against oppression under color of law or otherwise, is to be construed and applied with the subtilty and strictness, that a special pleader would use in construing an ordinary statute provision regulating eaves-droppings or pound breach. It is, in our judgment, to be construed as all *constitutional* privileges are; the citizen is to be made *absolutely sure* of protection in his personal liberty. In questions of this magnitude, there is to be no room for the application of those narrow and artificial rules, by which — useful and necessary as they may be, in the ordinary administration of justice between party and party — the astuteness, or the corruption, or the

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timidity, of a judge may, under a legal form, deprive a citizen of the substance of his political privileges. We trust it is unnecessary to add, that these remarks are general, and not intended to imply any fears or suspicions of the honorable individuals who now fill the New York bench.

Without, therefore, attempting a minute analysis of the New York statute — which might be presumptuous in those who live in another state — we cannot but direct the attention of the reader to the language of the *substantial* parts of it; which really seems to be as broad and comprehensive as it could be made for the purpose of insuring the great objects in view. The party brought before the court on this process may " deny any of the *material* facts set forth in the return, or allege *any fact* to show, either that his *imprisonment or detention is unlawful*, or *that he is entitled to his discharge*." What are the " material " facts here spoken of? Does not the statute include facts that go to the *merits*? or are they to be excluded? An issue is made; and that issue is to be tried " in a summary way " by the *court*; who, after hearing the allegations and proofs produced, in support of such imprisonment or against the same, are directed " to *dispose* of such party as *the justice of the case* may require."

Can it be, that the legislature of New York intended, by these particular provisions for hearing the party, that he should only be heard upon " the lawfulness of the authority " under which he was detained? The statute appears to us to provide, in terms, for something more than this; the prisoner may not only deny the material facts in the return, but he may also allege, on his part, *any* fact to show — either that his imprisonment or detention is unlawful, or, that *he is entitled to his discharge*; and these questions are to be determined, not by a jury, but by the court, in " a summary way " — a provision as to the mode of trial, which was probably introduced into the law, to prevent the possibility of an inference, that an issue involving so much matter of fact, as would thus be open to the party, should be sent to a jury.

The restricted view above taken of the statute by the court, had not, if we are rightly informed, been the prevailing opinion of the profession in New York, previously to this decision. One eminent jurist of that state, Chancellor Kent, states briefly the provisions of their *habeas corpus* act, thus:

Persons restrained of their liberty *are not* entitled to the process of *habeas corpus*, if they are detained (1) by process from any court or judge of the United States having exclusive jurisdiction — (2) or by *final* judgment, or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction; — or (3) for any contempt specially and plainly charged in the commitment by some court, &c., having authority to commit on such a charge, &c. On the other hand, he says, affirmatively, that all persons restrained of their liberty *are* entitled to this writ, unless detained (1) by process from any court or judge of the United States (as above), and (2) by *final* judgment

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or decree, or execution, &c. as before stated. This eminent writer then adds, that no inquiry is to be made into the legality of any process, judgment or decree of the United States courts (as above) nor where a party is detained under *final* process, or for contempt, as before stated. But, he adds, that the court awarding the writ "may in other cases examine into the *merits* of the commitment, and hear the allegations and proofs arising thereon in a summary way, and dispose of the party as justice may require." 2 Kent's Com. 29, 30, fourth edition.

On this subordinate part of this great subject we will only add one further remark. Considering the case as it was originally presented to the court, and abstractedly from the political circumstances connected with it, we do not mean to say, the court might not have found sufficient legal grounds for refusing at that time to discharge the prisoner under the process pending before them; unless the provisions of their revised *habeas corpus* act required, in favor of personal liberty, that liberal construction, which upon a general view, this remedial statute would seem to admit of. On this point we have already ventured to remark, as far as would be becoming, and, we hope — for such was our intention — with all that deference, which practisers under a different jurisdiction ought to entertain upon questions of this description.

We forbear any further remarks upon this part of the case; and, passing by the minor question, which is next argued by the court, as to the power of entering a *nolle prosequi* under the laws of New York, we now proceed to a consideration of the remaining, and fundamental question arising in the case; that is, the want of jurisdiction in the courts of the state from the moment it appeared, that the act of McLeod was adopted, or recognized as an act done under the authority of his government; from that time, as we understand the law of nations and the rights of the whole "people of the United States," the American nation, who established their Federal constitution "for the common defence" and "general welfare," from that time, we say, the jurisdiction of the state court ceased, and the United States, the nation, had jurisdiction of the case. We say, emphatically, the rights of the nation; for the nation has rights corresponding to its obligations, as well as the individual states composing the nation. We say this with all tenderness for state pride, and with the most sincere regard for state rights; which we shall be as unwilling to surrender, as we are the rights of the nation.

Regarding this question as fundamental, and considering the vital importance of a right decision of it to the peace and safety of our country, we have deeply regretted, that the court of New York should have been prevented by any other business, however "pressing," from bestowing upon this question the fullest consideration. They remark, that they "have looked into it as far as possible, during a very short vacation, consistently with other pressing judicial avocations." It is

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one of the misfortunes of our country, that our judicial officers, in all the states, and in none more than in our own, are so oppressed with the constantly accumulating load of business, that they are not able, even at the sacrifice of health and domestic comforts, to discharge their onerous duties, to their own satisfaction, even in the limited sphere of ordinary municipal law; that they accomplish as much as they do, ought to excite our wonder, instead of the complaints, that we sometimes hear, of the delays and impediments in the proceedings of our courts. This pressure of business must, undoubtedly, be severely felt in the courts of a state, like New York, where, in addition to its own vast concerns, the business of the whole union centres.

Notwithstanding this state of things may, however, in the ordinary current of affairs, be sometimes a sufficient reason for hasty or partial investigation of the cases before them, yet, when a judicial tribunal of a state considers itself called upon to go beyond the ordinary and familiar sphere of its action, and to decide the very highest questions of international law — questions involving the peace and safety of the whole nation — in such cases, we say unhesitatingly, but with all respect, the country has a right to its most deliberate and mature judgment. The local business of the state, urgent as it may be to suitors under the state laws, must give place to what vitally concerns the whole nation; and, however much the court might be entitled to indulgence under such circumstances, yet, if a hasty and unsound judgment should happen to be made in such a case and lead to fatal consequences, the nation would not feel satisfied with the apology, that the court were too much pressed for time and by the ordinary current of business, to allow them to mature their opinion. But we proceed to the question.

The court, in entering upon this branch of the case, observe, that "the want of jurisdiction has not been put (by the counsel) upon the ground that McLeod was a foreigner." They, however, lay down the general position, that "an alien, in whatever manner he may have entered our territory, is, if he commit a crime, while here, amenable to our law." And several authorities are cited by the court in support of the rule.

Such general positions, without stating the various qualifications with which they are to be understood, are comparatively of little importance in deciding grave practical cases. In the present instance, the authorities cited, advance us but little towards a resolution of the main question. In the first, (Cowp. 208,) one Campbell, a natural born subject of Great Britain, purchased a plantation in the island of Grenada (then recently conquered by that power), and brought an action against the collector to recover back a sum of money paid by him as duties on sugars exported on his account — on the ground, that the duty had not been imposed by lawful authority; that is, the authority of the nation that made the conquest. But the question raised was, whether the king, of himself, had the power to change the

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existing laws of this land; and the court decided, that the king, by a proclamation, had precluded himself from the exercise of a legislative authority over the island. Surely, authorities like this, afford little aid in the case. The other authorities cited under this head, do undoubtedly sustain (Vattel, book ii., chap. 8, § 101, 102, and Story's Conflict of Laws, p. 518, and Locke on Civ. Gov. book, ii., ch. 2, § 9,) a general principle, which few persons would question — that foreigners are subject to the laws of the country in which they are. To this general principle, however, there are numerous qualifications; and when the court say, that an alien is amenable to our laws, in whatever manner he may have entered our territory, if he commit a crime here, and when they apply this rule to the present case, they assume, that a crime simply against the municipal laws of the state has been committed. But the very question here is, whether such a crime has been committed. That a homicide has been committed, is not disputed; and so it would have been, if a whole regiment of Queen Victoria's army, under the express orders of her majesty, had entered our territory, whether to destroy a steamboat, that was annoying them, in violation of our neutrality, or to surprise one of our forts, and had in the attempt killed an American citizen; but would such an act of hostility be a "crime" cognizable under the state laws of New York? That it would be a hostile violation of the national territory, we have no doubt; and one which the United States would have a right to consider as an act of war, or not, as they might think proper, and to demand, or waive satisfaction accordingly. But, that the state of New York would have a right to treat it as a mere violation of the state laws, without regard to the rights of the nation, we cannot believe to be the intent of the Federal constitution, which is the supreme law of the land for the great and powerful state of New York as well as for its little neighbors Rhode Island or Delaware.

Abstractedly speaking, the act of McLeod might be considered as an act (in technical language), against the peace and dignity of the state of New York; but by the circumstances of the case, the offence against the state was merged in that against the union. It was a case arising out of war, (as will presently be considered), and involving the principles of neutrality, which belong exclusively to the authorities of the nation. When the Caroline was burned, England was at war with a part of her Canadian subjects; the parties were actually in arms against each other, and the insurgents had taken possession of a British island. England, of course, would not call it war; her natural pride would not permit her to acknowledge this; she would call it rebellion, insurrection, riot, or any other crime, rather than war. But neutral nations are not to participate in that national pride; whenever they see one part of a nation in arms against the other, they must call it war, and observe with respect to them the laws of neutrality; they are not to consider whether it is a civil, a servile, or any other kind of war; they can only judge of the fact before their eyes, and,

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as the great publicist, Bynkershoek, justly says, "a neutral has nothing to do with the justice or injustice of the war; it is not for him to sit as a judge between his friends who are at war with each other."[1]

It will be recollected by all who are acquainted with our own history, that during the American revolution, the nations of Europe considered the colonies as being at war with Great Britain, though she treated us as rebels. Denmark, alone, undertook to judge of the nature of the contest, and restored to Great Britain prizes which Commodore Paul Jones had sent into Danish ports; but the United States considered the conduct of Denmark as a departure from the law of nations, and made claim upon the Danish government, who at last made reparation in damages for this violation of our belligerent rights. Other cases and authorities might be cited; we only wish, however, to call the attention of reflecting men to the true character of the present case, which, though sufficiently clear in itself under the law of nations, has been somewhat obscured by the excitement of the moment, and by a warm, and natural sensibility to the national honor.

But whether we consider the Canadian insurrection as a civil war, or as a rebellion, it was a contest in arms, in which we were *neutral.* The burning of the Caroline, effected under the authority of the local government of Canada, was an act of retaliation for an alleged previous violation, by our citizens, of our neutrality. The act, now assumed by the British government, was an act of hostility. It need not be argued, that it placed us absolutely in a state of war with Great Britain, as it was not followed by any act of a similar character, either on her part, or on ours; both nations were, and are, willing not to consider it as an interruption of the state of amity which, at least professedly, existed between us. But, that it was an act of hostility which we might have considered as war, if we had thought proper to do so, cannot be denied.

The court of New York, however, have taken a different view of this part of the case, and have expended a vast amount of learned research, to show what constitutes war. The thesis maintained by the court is — that "to warrant the destruction of property, or the taking of life, on the ground of public war, it must be what is called lawful war, by the law of nations; a thing which can never exist without the actual concurrence of the war making power. This, on the part of the United States, is congress, on the part of England, the queen."

Does this learned tribunal mean to be understood as affirming, that lawful hostilities cannot exist, until both parties commit some act of force upon each other, and thus stand (if we may so speak) before the common forum of civilized Europe, each one *rectus in curia*, as parties plaintiff and defendant would appear before the court of New York, in an action at common law for an assault and battery? If that is the doctrine intended to be laid down as the public law of Europe,

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[1] Bynkersh. Quæst. Jur. Publ. Book i, ch. 9.

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we must beg leave, with much submission, to dissent from it. But if the court mean to admit, that one "war making power" may make a lawful war, then the proposition amounts to nothing more than we maintain; for one power, the queen of Great Britain, has made lawful war by recognizing the hostile act (which we have above briefly considered) as having been committed by McLeod and his party, under her authority. On this point, we may add a remark of Lord Stowell, in the case of the Nayade, a Portuguese vessel. That great judge says — "It was argued, that there was nothing to show, that Portugal was at war with France, &c. In cases of this kind it is by no means necessary, that both countries should declare war. Whatever might be the prostration and submissive demeanor on one side, if France was unwilling to accept that submission, and persisted in attacking Portugal, it is sufficient."[1]

Will it be said, that this recognition or adoption of the hostile act of McLeod cannot relate back to the time when it was committed, and thus sanction it, as if committed originally under an express order of the British sovereign? There is a sufficient answer to this objection in the general principle of law, that a subsequent ratification is equivalent to an original authority. But we have a more precise answer, in the distinct opinions expressed upon this specific question by our own and British judges. That great jurist, who has done such lasting honor to his country, Mr. Justice Story, in the case of the *Emulous*, states the very case of a subject's committing hostilities without being originally authorized, and then uses this strong language in respect to a subsequent ratification: "Suppose he does [so commit hostilities]; I would ask, if the sovereign may not ratify his proceedings, and thus, by a retro-active operation, give validity to them? Of this there seems to me no legal doubt." The learned judge then commenting on one of the authorities cited, asks: "Is there any thing in Puffendorf [Book viii, ch. 6, § 21] to authorize the doctrine, that the subject so seizing property of the enemy, is guilty of a very enormous crime, of the odious crime of piracy? Or is there in this language any thing to show, that the sovereign may not adopt the acts of his subjects in such a case, and give them the effect of a full and perfect ratification?"[2]

In support of his own opinion, he refers to the well known case of *Thorshaven*, decided by Sir William Scott, who says, most emphatically — "Now there are instances innumerable, in which it has been held by this court, that an officer not immediately under the eye of government, may originate such expeditions, [hostile ones], subject to a responsibility; and, that the government, in the present instance, has approved of what was done, is demonstrated, &c. It is, therefore, as much an authorized capitulation, as if captain Baugh had gone out under special directions, to make the capture."[3]

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[1] 4 Rob. Adm. Rep. 251. [2] 1 Gallis. Rep. 568. [3] 1 Edw. Adm. Rep. 102.

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But we return to the question raised by the court, as to the constituent elements of lawful war.

The learned judge, who delivered the opinion of the court, says — that "so far were the two governments of England and the United States from being in a state of war when the Caroline was destroyed, that both were struggling to avoid such a turn of the excitement on the frontier, as might furnish the least occasion for war. So far from England fitting out a warlike expedition against the United States, or any public body, she utterly disavows any such object; while, on our side, we have inflicted legal punishment on the leaders of the expedition, of which Durfee made a part, on the ground, that England was then at peace. Whatever hostile acts she did, were aimed exclusively at private offenders; and, if there was a war in any sense, the parties were, England on one side, and her rebel subjects aided by citizens of our own, acting in their private capacities and contrary to the wishes of this government, on the other."

All this may be very true, as respects the declarations and conduct referred to; and it proves — what? That both parties did not choose to be considered in the posture which the learned judge defines as public war. But does it prove that England had not committed any hostile act, which might be a justifiable cause of war, if the United States had thought proper to do so? Taking the statement here made, she declared that she did not intend to make war or commit a warlike act; but, in point of fact, she did commit such an act; and that is sufficient for the argument.

The learned judge then defines, or describes particularly what he considers to be public war. He says — "I mean to include all national wars, whether general or partial, whether publicly declared or carried on by commissions, such as letters of marque, military orders, or any other authority emanating from the executive power of one country and directed against the power of another; whether the directions relate to reprisals, the seizure of towns, the capture or destruction of private or public ships, or the property of private men belonging to the adverse nation. I mean to exclude all hostility of any kind, not having for its avowed object, the exercise of some influence or control over the adverse nation as such."

The whole of this definition, or description of war, rests upon the supposition, that there are but two parties, by or upon whom hostile acts can be committed. The learned judge speaks of the "adverse nation," as in a petty trial at common law we should speak of an "adverse" party in a civil suit. But here, as in other parts of this case, we must apply the rule of logic — *distinguendum est*, a distinction must be made. It is not merely the directly belligerent parties who are affected by each other's hostile acts, but the neutral nations also, who happen to be their neighbors. Innumerable acts of hostility, ordinarily of a partial, limited and local character, may be committed, by each belligerent, upon its neutral neighbor, without being intended

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"to control the adverse nation," that is the neutral, which would be good cause of war, if the neutral should choose so to consider it; and of these acts, one of the most common is that which actually happened in the present case — a violation of the neutral territory. Now, if we understand the very narrow and limited definition of war, which is adopted by the court, that is, that we must exclude from it "all hostility of any kind, not having for its avowed object the exercise of some influence or control over the "adverse nation, as such" — that whole class of hostile acts, of a local or partial character, which are so constantly occurring, must be struck from the catalogue of acts of war, because they fall short of a general influence or control over the whole neutral nation, as such. But the neutral, in the cases supposed, is not an "adverse nation;" it commits no hostile act at all, but happens to be in the position of an innocent bystander in a private quarrel, who receives a blow without cause from one of two contending parties. And can it be said, in that case, that the party who inflicts the blow upon the unoffending bystander, does not commit an act of hostility, (if we may so term it,) which may be resented or not, as he thinks proper, by retaliatory measures on his part? Now a neutral nation is in a similar position in respect to belligerents; and it may patiently bear, or may boldly resent any hostile act, great or small, partial or general, as it thinks expedient. But the actual state of things between the two is, to all intents, a state of war. Every act of force by a government upon the territory of a foreign nation (unless fresh pursuit should be an exception), is war.

Nor is it merely as between belligerents and neutrals, that such acts of hostility, or violence, may be committed. In time of profound peace, outrages on nations and individuals of nations, are frequently occurring, which would not be war within the definition adopted by the court of New York, but which, in the common understanding of nations, and, according to the principles laid down by publicists and statesmen, would be war. A few well known cases, we think, will set this matter in its proper light, both as respects neutrals and others.

And we take the first case that occurs to us, as it is within our own time, and in the recollection of many persons now living. In the year 1798, when the French government fitted out their well known expedition to Egypt, being in want of transport ships, they seized upon more than an hundred neutral vessels, which happened to be then in French ports, and sent them off to Egypt with the French troops on board. Can there be a shadow of doubt, that this was a direct act of hostility, that it was a "warlike" act, that it was war, in short, upon the various neutral nations to which those vessels belonged, and that this forcible seizure was a good cause of war on the part of those neutrals? It is true, that those nations did not elect to make war; whether from not having strength to cope with France, or from pusillanimity, or any other motive, is immaterial; it does not alter the character of the act committed against them. Yet this hostile act

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was not committed for the purpose (in the language of the court) of exercising any "influence or control over the adverse nation as such;" the government of France were so far from intending to commit the act as against an "adverse nation," that they did not trouble themselves to consider to what nations the vessels belonged, whether friends or foes; and, therefore, according to the definition of war, as given by the court, here were no hostilities, no war.

In an earlier period of history, Oliver Cromwell, in the plenitude of his power, was told by one of his fanatical flatterers, that he was "a stone cut out of the mountains without hands, that would break the pride of the Spaniard;" and, accordingly, in a time of profound peace, and without any declaration or notice whatever to other nations, he equipped a squadron for the West Indies, which made an unprovoked and unsuccessful attack on Hispaniola; when, in order to atone as far as possible for this failure, his commanders in the squadron, dreading his displeasure, projected on the spot an attack upon the island of Jamaica, which, as it happened, surrendered to them without a blow — yet this could not be "war" within the definition of the court? The Spaniards, however, very justly considered it as such, and, in return, declared war against England, and made a general seizure of all English ships and goods within their reach. But, if they had been pusillanimous enough to submit to the outrage instead of declaring war, would the act committed by the English commanders have been any the less an act of war?

The case of the Spanish ships, captured by the English, in modern times, (1804,) was a similar act of war against Spain. Their attack on Copenhagen, in 1808, was of the same description.

In our own history, again, Spain, after shutting the port of New Orleans, contrary to treaty, subsequently marched armed men into our territory and seized our citizens; not for the purpose of acting upon the United States as an "adverse nation," but for local and partial objects. Yet there can be no doubt it was an act of war on her part, though we did not think fit to meet it with a declaration of war on ours.

Another class of cases, distinctly marked, is that of injuries committed by a nation upon an individual subject of another government. Need we cite an authority for this? we have a very high one from the state of New York itself. Mr. Chancellor Kent says — "An injury to an individual member of a state is a just cause of war, if redress be refused;" but, he adds, in the humane spirit of the public law of Europe, "a nation is not bound to go to war upon so slight a foundation; for it may of itself grant indemnity to the injured party."[1] Numerous cases of this description are to be found in the history of nations; and we do not now recollect one (doubtless there may be some) in

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[1] 1 Kent's Commentaries, 48, 4th edit.; where he cites Grotius and other authorities.

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which the violence upon the individual was committed by the subjects of the offending state, with the view (as the court expresses it) to exercise "influence or control over the adverse nation, as such," whose subject was thus outraged. But we need not multiply cases.

Can it be then, that under the well established usages of nations, the several classes of hostile acts we have mentioned (to say nothing of various others) are to be "excluded" from the idea of "war," as practically understood by all statesmen and publicists, and that we must narrow it down to the conceptions of a subtle special pleader, in an action of assault and battery at *nisi prius?* We cannot bring our minds to this view of the subject, after reviewing it deliberately and sincerely; but, after all our care, and with all possible deference for the official opinion, and all personal respect for the learned judge who delivered it, we feel ourselves compelled, in the brief but expressive formula of the great Ottoman law officer, to say to Mr. Justice Cowen, "Olmaz, it cannot be!" [1]

After the consideration we have given to this portion of the subject, it is needless to follow the court through their minute and somewhat prolix discussion of the various kinds of war — solemn, unsolemn, and mixed — distinctions to be found in all the earlier text writers, but which have long been of little utility in the resolution of practical questions. When, therefore, the court intimate that the hostile violation of the American territory, in the case of the Caroline, cannot be "tortured into a *war*," it is evidently a dispute about words. Whatever England may now choose to assert, after having adopted the act of McLeod as a national act, and however pacific the United States may choose to be in return, the original character of the hostile act, so far as relates to the liability of McLeod, is not changed. The learned judge proceeds to illustrate the case, by likening it (among others) to the acts of force committed by individuals upon their fellow subjects in violation of the municipal laws under which both parties live, and under which the military power is sometimes called out as a *posse comitatus* to aid the civil authorities; but the cases are not parallel. Here was an invasion, by one party, of the jurisdiction of the other — a neutral jurisdiction; and we have no disposition to dissent from the authorities cited by the court on the inviolability of a neutral territory; it lies, in fact, at the foundation of this case.

We acknowledge, however, that we were surprised at the remark of the learned judge, when he says, "there is nothing in this case, except a body of men, without color of authority, bearing muskets and doing the deed of arson and death; and that it is impossible even for diplomatic ingenuity to make it a case of legitimate war, or that it can plausibly claim to come within any law of war, public,

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[1] Jones on Bailments.

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private, or mixed." But we have already stated our views on this point, and forbear repeating them.

Nor are we less surprised at the strong statement of the "result" at which the court next arrive; that the provincial government of Canada attempted to exercise jurisdiction over our citizens; that, being convinced of the "delinquency" of the Caroline, they "sentenced her to be burned; an act, which all concerned knew would seriously endanger the lives of our citizens. The sentence was therefore equivalent to a judgment of death, and a body of soldiers were sent to do the office of executioners;" and again — that "the parties concerned, having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. If they have burned, it is arson; if a man should be killed, it would be murder."

Dismissing the rhetorical warmth of this statement, as lying beyond the hallowed precincts of the seat of justice (though too often admitted there), let us look merely at its legal and logical soundness.

It is asserted, that the Canadian authorities *knew* that the burning of the steamer Caroline would seriously endanger the lives of our citizens. On the contrary, we would respectfully ask, whether, legally speaking, the Canadian authorities were not bound to presume that no American citizen would, in violation of the neutrality of his country, be found on board of a vessel that was employed in thus annoying the neighboring possessions of a friendly nation; and, consequently, might they not reasonably, in law, presume that they would not endanger any American lives, by attempting to destroy a vessel thus employed, and which was the sole object of their expedition? But we repeat once more — they did commit an offence, and a very high one: the violation of our territory in a time of peace, by entering upon it without our consent, and there adding the further aggravation of committing the violence and homicide in question. This, however, having been done under the authority of their government, the individuals thus acting under a commission of their nation, cannot be condemned under the municipal laws as private offenders guilty of "arson" and "murder" on the land, any more than the subjects of a foreign nation, acting under a national commission at sea, can be held guilty of piracy. The rule of international law on this point is well laid down by that able and enlightened jurist, a New York jurist too, whom we have before cited: "An alien," says Mr. Chancellor Kent, "under the sanction of a national commission, cannot commit *piracy* while he pursues his authority. His acts may be hostile, and his nation responsible for them. They may amount to a lawful cause of war, but they are never to be regarded as piracy."[1]

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[1] 1 Kent's Comm. 188, 4th edit.

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Again; it is said that the parties concerned, having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. We must here once more remark, that, on logical principles, this argument is vicious, because, in the terms stated, it proves too much; if well-founded, then a foreign army entering a neutral territory under a commission from their sovereign, would be liable as private robbers and murderers. But the law of nations places such violations of right upon the ground of hostile acts — acts of war.

We are now brought to a consideration of the fact, that the British government have ratified the act, committed by McLeod, as a national act; or, as stated in the very marked language of the opinion, we are to inquire "whether England has placed the offenders above the law and beyond our jurisdiction, by ratifying and approving such a crime."

The court remark, that it is due to England, in the first place, to deny that it has been so ratified and approved; she has approved a public act of legitimate defence only.

Now it seems to us, that however necessary it might be for McLeod, if on a trial in the courts of his own government, to prove that he had not exceeded his authority, in order to justify himself to his employers, yet, in respect to ourselves, it is not necessary for us to inquire, whether it was an act of legitimate defence or not; what have we to do, as neutrals, with the character of the controversy between the government of England and her Canadian subjects? England has now ratified the act, whatever it was, and the government of the United States (not of the individual state of New York,) must judge of its character. Besides, the Secretary of State, in his able letter to Mr. Fox, takes no such distinction as his ground of argument; but explicitly says: "The government of the United States entertains no doubt, that after this avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not by the *principles of public law* and the *general usage* of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it." Whatever, therefore, might have been the true character of the act in question, the American government, without any refined distinctions on that point, has received the British statement of the transaction as given by the minister, and has acknowledged that the individuals concerned in that same transaction ought not to be held personally responsible.

We have not room to follow the court through the great mass of historical and other learning which is brought into this case from all parts of history, ancient and modern, as well as from law books, to establish various well-known principles; as, the inoperative character of laws beyond the territory of the nation making them; the general rule, that soldiers are not to be treated as criminals, when only obey-

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ing the lawful commands of their superiors; the limits of political and civil power; the law relating to spies, (which, by the way, is by common consent an excepted case); the relation of principal and agents, or accessories in acts of force, &c. All this, in our view, is unnecessary, as we think the case rests upon principles of public law, that are well settled, and need not be fortified by authorities like those which are arrayed in support of this part of the opinion.

The court ask, with much emphasis, and in a marked tone and phraseology, "Was it ever suggested by any one, before the case of McLeod arose, that the approval by a monarch should oust civil jurisdiction, or even so much as mitigate the criminal offence; nay, that the coalition of great power with great crime does not render it more dangerous, and therefore more worthy of punishment under every law by which the perpetrators can be reached?"

The whole effect of this broad and indefinite question, and the answer to it, will depend upon the sense in which certain terms are to be taken; the criminal offence is not defined — nor the jurisdiction — nor the character and powers of the tribunal whose jurisdiction is to be ousted — nor whether the approval is to be that of a "monarch" whose own laws are violated by his own subjects, or that of one, who authorizes his subjects to violate the laws of another nation by committing hostile acts, or making war upon it. It is obvious, therefore, that this question is not stated in a form susceptible of a definite answer, that would be of any utility in solving the main question before us. And when a question of this indefinite character is attempted to be illustrated by equivocal cases from general history — as that much vexed one of Mary, queen of Scots; and an intimation is made, (in guarded terms however,) that the pope had, over Mary, as his civil subject, that species of jurisdiction which would have authorized him to exonerate her by his formal approval of her alleged criminal act — we are unwilling to attempt to dispose of the question and its illustrations in a plain argument upon a question of law, lest we should not do it in such a mode, as would be deemed suitable to the occasion and the high tribunal whose decision we are considering.

The case of our border difficulties on the frontier of Maine, to which the court refer in a tone of animation somewhat beyond the usual even tenor of the judicial tribunals in our own quarter, is one of a more tangible character than some others cited; and the conduct of Great Britain in that quarter might, in a diplomatic negotiation, be very properly urged as an *argumentum ad hominem* to obtain our just rights. But if (as we assume) Great Britain was there in the wrong in point of law, and unjustly punished our citizens for exercising acts of civil authority in what the court consider as a "disputed" territory, still, in an American court of law, this injustice on her part would be no reason for our doing injustice to one of her subjects in another case. The fact of the territory being a "disputed" one, as stated by the court, would be a justification for many things on that frontier, for

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which Great Britain would have no apology on the well-defined and undisputed territory where the Caroline was destroyed; and, so far, even this practical case will not give us any essential aid in the present inquiry.

On the point of the recognition of the act of McLeod by his government, we apprehend there can be no room for a question under the law of nations, and as far as it is a matter for judicial consideration. We may, out of court, or in a diplomatic negotiation, suspect that this recognition on the part of the British government is an afterthought, and treat it accordingly; but not so in the actual posture of the case before the court.

The general principle applicable to such cases is perfectly well settled, and is laid down by Vattel in these terms, — after stating that individual citizens shall not be allowed to commit offences against other nations with impunity, — "But, if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern, and the injured party is to consider the *nation* as the real author of the injury, of which the citizen was perhaps only the instrument."[1]

Such is the general principle of public law; and when the author speaks of the right of the injured nation to hang spies and emissaries and kidnappers or man-stealers, if caught within its jurisdiction, he speaks of classes of offences, which are by common consent treated either as exceptions or qualified cases under the general rule, or as not having the character of *national* offences or injuries.

If we are right in the views we have thus far taken of this case, the remaining question will be, what effect the existing state of facts should have had upon the proceedings in the New York court. We have already said, that the moment the government of Great Britain adopted the hostile act as a national act, the jurisdiction of the *state* court ceased, and the case belonged to the courts of the United States, which have the jurisdiction of all cases arising under the constitution, the laws of the United States, treaties, &c. The present case is one of peace and war, subjects exclusively belonging to the general government. Unless questions of this nature are to be settled by the authority of the United States exclusively, it is manifest, that a single state may involve the nation in a war directly in contravention of the rights and interests of the other five-and-twenty states; if this should be conceded to each state, then we must also, on the other hand, concede the like power to make peace, which would lead to inextricable confusion. The *state* courts, manifestly, cannot take notice of, or act upon, the complaints of foreign governments. If the territory of a state has been invaded, or their rights violated by persons acting under a foreign authority, they cannot (except in the specific cases provided for in the constitution)

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[1] Vattel, book ii. ch. 6, sect. 74.

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undertake to do justice to themselves; but they must apply to their natural protector, the government of the United States. It would not be just to the individual states, to throw upon their judicial, legislative, or executive departments, the responsibility of cases that threaten to involve the nation in war; this responsibility should be entirely borne, and with firmness, by the power to which it belongs, — the general government.

If, then, the state court has not jurisdiction, a question arises, whether that fact should not have been shown, by a plea or suggestion, at an earlier stage of the cause. By no means; it may be shown at any time in cases of this description. In Pennsylvania, in the case of a foreign consul (*Manhart* v. *Soderstrom*), the point was expressly decided, that whenever the defect of jurisdiction is suggested, the court will quash the proceedings; it is not necessary that it should be by plea before general imparlance.[1]

Following out the mere matter of legal procedure, we should say, the supreme court of New York ought, according to their own practice, to have turned over the prisoner to the officers of the United States. In that court, the practice is thus stated by Woodworth J., in the case of *Exparte Smith* — "Detaining a prisoner by state authority, in order that he may be delivered over for prosecution to the United States, is by no means an unusual exercise of power. This court has repeatedly sanctioned such a proceeding, and, in one case, very lately."[2] This was also a proceeding on *habeas corpus*.

In reviewing our remarks upon this case, so vital to the safety of our country and to its reputation for justice with other nations, we perceive that we have unintentionally omitted some views which ought not to be wholly overlooked.

On the last point which we have considered, the point of jurisdiction, the learned judge observes, "In no view can the evidence for the prosecution or the defence be here examined independently of the question of the jurisdiction; and I entertain no doubt, that whenever an indictment for a murder committed within our territory is found, and the accused is arrested, these circumstances give complete jurisdiction."

Do the court mean to say, that if a foreign ambassador, or a foreign consul, should be indicted for murder in the state of New York, that the courts of that state would have "complete jurisdiction" of the case, notwithstanding the constitution of the United States expressly gives jurisdiction to the federal courts in all cases affecting those public functionaries? We put one other case, which in principle would stand before the court precisely as that of McLeod does. Suppose a foreigner was indicted for any offence under the state laws, and while the indictment was pending he should be appointed ambassador from his government to the United States; can there be

[1] 1 Binney's Reports, 138.

[2] 5 Cow. Rep. 273.

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any doubt, that this new state of the facts would forthwith take the case from the jurisdiction of the state court, and make it a matter exclusively for the national government? Can there be any doubt, too, that evidence of this new state of facts might be heard by the court "in a summary manner," instead of sending the ambassador to be tried by a state jury? The new state of facts in McLeod's case would, we apprehend, have the same effect.

In this connection we may add a remark upon the subject of submitting the evidence in the present case to a jury, as the court seem to consider the proper mode of procedure. What is the great fact in controversy, and by which the question of jurisdiction would be determined? It is, whether the act for which the prisoner stands indicted, was a private act committed by him without or beyond his authority, or was a public act of hostility — an act of war — done under the orders of his own government. Now, in what mode is this to be proved? Is it a common matter *in pais*, to be proved by witnesses, or an act of the government, to be proved by official evidence, of which the court would feel bound to take notice? Must the fact of the existence of war or peace, be proved before a jury by witnesses, or by the acts of the government? An astute special pleader, before a petty court of sessions, in such a case, would perhaps say, the existence of *war* is indeed provable by the act of congress declaring it, of which, as a public law, the court would be bound to take notice. If this technical notion should suffice, then, on the other hand, we would ask, how is the termination of a war and the existence of *peace*, to be proved? Here the President of the United States (with the senate) is authorized to make peace, by treaty, which he announces by proclamation. But, says the pleader, how do you prove the treaty and proclamation of the President? We answer, just as we should prove that a foreign ambassador was accredited to our government, or a foreign consul acknowledged, and a thousand other official acts; that is, by official certificates from the proper departments of government, with or without the great seal of state, as the particular case may require. The court, in our judgment, would feel as much bound to take notice of these public acts of the government, and receive this evidence of them, as they would of public statutes, in a summary hearing.

Now, in the present case, what is the evidence that would have been produced to the court, to prove the existence of a state of hostilities, or "a transaction of a public character," planned and executed under the authority of McLeod's own government, and which, on principles of international law, would exempt him from personal liability as a criminal? That evidence would be, the declaration of our own government, attested by the proper certifying officer to a fact of that kind; in this case, we presume, it would be the secretary of state, Mr. Webster; who, in his official instructions to Mr. Crittenden, the attorney-general of the United States, informs that law offi-

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cer, that he will be furnished with "authentic evidence of the recognition, by the British government, of the destruction of the Caroline as an act of public force done by national authority."

Of such evidence as this, we apprehend, the court would feel bound to take notice. Indeed, some of the authorities cited by the learned judge indicate this to be the proper and conclusive species of evidence in such cases. In the case of *The Pelican,* before the court of Appeals, Sir William Grant lays down the rule, that "it always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which courts of justice cannot decide."[1]

The same doctrine was held by Lord Ellenborough in the case of *Blackburn et al.* v. *Thompson;* where he says: "If the state recognises any place as not being in the relation of hostility to this country, *that is obligatory* on courts of justice."[2] He also cites a previous case from 1 Campb. 429, decided on the same principle. The same learned judge, on a hearing of *Blackstone et al.* v. *Thompson,* before the whole court of king's bench, expressly agreed with Sir William Grant in the case of *The Pelican,* and added in emphatic language — "when the crown has decided upon the relation of peace or war, in which another country stands to this, *there is an end of the question.*" He observes further, very justly, that "it would be unsafe for courts of justice to take upon them, without that authority, to decide upon those relations."[3]

Now we would respectfully ask, what fact in the case of McLeod required the intervention of a jury before the state court? His defence, in truth, was more matter of law than of fact; that is, whether he had lawful authority. Suppose the case had been submitted to a jury before a court of competent jurisdiction, and the fact made to appear, that the act complained of on the part of the prisoner was, as our own government acknowledge, a hostile act performed under the authority of the British government. The court would, as we understand the public law of all christendom, be obliged to instruct the jury, that the crime charged had not been committed, and that they must acquit the prisoner. And if bound so to instruct a jury on the trial, why should they not discharge upon the like evidence, in a summary hearing, under their *habeas corpus* act?

Now, as to the mere technical mode of discharge, whether on habeas corpus, or otherwise, even in *England,* we may here cite the language of the secretary of state, Mr. Webster, (in his masterly letter to the British minister,) which we had intended to notice in another part of our remarks: "If," says that great lawyer and statesman, "an indictment, like that which has been found against Alexander

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[1] 1 Edw. Adm. Rep., Appendix D, p. 4.

[2] 3 Campb. Rep. 61.

[3] 15 East's Rep. 81.

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McLeod, and under circumstances like those which belong to his case, were pending against an individual in one of the courts of England, there is no doubt that the law officer of the crown might enter a *nolle prosequi* — *or*, that the prisoner might cause himself to be brought up on habeas corpus, and discharged, if his ground of discharge should be adjudged sufficient — *or*, that he might prove the same facts and insist on the same defence or exemption on his trial."[1] Of these three modes of discharging the prisoner, the first would be at the election of the government, and the two last at the election of the prisoner; and Mr. Webster suggests no difficulty in the way of discharging him on habeas corpus even before an English court.

In respect to the question of jurisdiction, we ought not to omit remarking, that the government of the United States, through their secretary of state, have — doubtless from motives of delicacy towards an important member of the Union, or for other reasons of weight — avoided denying that the state court had jurisdiction of the case, and have been equally reserved as to claiming jurisdiction of it for the federal courts. The secretary merely observes, in his letter to Mr. Fox, that the rights of McLeod, "whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this government;" and he assures Mr. Fox, that the New York court "may be safely relied upon for the just and impartial administration of the law in this as well as in other cases." Notwithstanding this cautious language in his letter to a foreign minister, however, the secretary in his instructions to Mr. Crittenden, attorney-general of the United States, has, with some emphasis, positively directed that, in case the prisoner's defence should be overruled by the state court, "the proper steps be taken, immediately, for removing the cause by writ of error to the supreme court of the United States."

Now, however expedient it might be, under the existing circumstances, and in a case involving "state rights" (which has too often been but another name for state pride), that the officers of the general government should exercise the greatest delicacy towards a powerful and influential state, commanding forty or more votes in the political questions of the country, yet we — as private citizens, unfettered by the responsibilities of public offices, and not so circumstanced as to feel the influence of the "*civium ardor prava jubentium*," or the "*vultus instantis tyranni*" — may be allowed to treat this subject as disconnected from all those political or other considerations, which might affect the decision of great public questions at certain junctures; we may treat it, on strict principle, as a pure question of *right*, between an individual state, on the one side, and the whole nation on the other.

Considering it, then, in this point of view, we do not see that the

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[1] Mr. Webster's Letter to Mr. Fox, of April 24, 1841.

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public officers, who administer the government, could lawfully relinquish to any individual state, which should be unreasonable enough to require it, the exercise of those rights which belong to the states jointly, in their collective capacity — in other words, to the *nation.* And it seems to be as much the duty of the Executive of the Union, to assure the nation, that he will neither make nor permit any arrangement or proceedings, "the effect of which might be to compromit, in the least degree, the rights, dignity or honor" of the *United States*, as it was of the governor of New York, to give the like assurances to his constituents in respect to the rights, dignity and honor of his state.[1] The six-and-twenty states, as a nation, have their *rights*, as well as each particular state of the confederacy.

The eminent men, who are called to fill the high offices of the nation, are placed there in order to guard our national rights, as well as to discharge national duties; and the deliberate abandonment of the one would be no less a violation of their trust, than the culpable neglect of the other. If the nation, by its general government, cannot be permitted to exercise its legitimate rights in all cases, but especially in respect to its foreign relations, we shall be once more enveloped in the mists of "nullification," which, we had hoped, were long ago dispelled by the light of that giant intellect of the north, whose beaming rays shot through that Egyptian darkness to the utmost verge of our horizon. The more powerful the state, too, the greater should be its forbearance and magnanimity; as, in proportion to its power, is the danger of its causing a dissolution of the Union.

Notwithstanding, therefore, the acquiescence of the general government, that the trial of McLeod should go on in a state court, we feel constrained to adhere to our original opinion, (expressed long before the government had intimated its own views to the public,) that the New York court had no longer jurisdiction of the case, after the hostile act of the prisoner was adopted by his government. Upon strict technical grounds, then, it might have been argued, that they ought to dismiss the cause for defect of jurisdiction. If, however, they felt any reluctance at assuming that responsibility, then, we think, they ought to have acted no farther than (as we have seen has been practised) to turn it over to the competent United States' court, where the whole matter would be under the control of the general government, on whom the responsibility ought to rest, and who, we doubt not, would firmly have discharged the high duty thus incumbent on them.

But our limits admonish us to bring these remarks to a close. The incalculable importance of this great case, as it regards the vital question of peace or war (to say nothing of our juridical reputation abroad), has drawn us into a longer discussion than we had anticipated.

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[1] Message of Governor Seward to the New York Assembly.

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But the subject swells under our contemplation, the more time we have to mark its bearings upon the present prosperity and the future fate of our beloved country. In truth, no single question has arisen since the establishment of the federal government, which has appeared to us to be fraught with more dangers, if it should, in the final resort, be erroneously decided upon a misapplication of the principles of international law, and in a forum, which, in our opinion, is not recognized by that law, nor by our own constitution, as competent.

In discussing this subject, we have endeavored to divest the case of all considerations purely political or temporary, and to treat it, rigorously, as a judicial question, to be settled by a judicial tribunal — not upon flexible principles of time-serving expediency, nor the fleeting emotions of a fervid and high-toned patriotism, whose very ardor and purity expose it only the more to be misdirected by the arts of designing men — but as a question to be settled by those eternal principles of *justice*, by which alone our happy republic can hope to sustain itself; that rigorous justice, of which one of the wisest men and purest patriots of another great republic (long since extinguished from among the free nations of the earth) says with equal truth and force — "*non modo falsum illud esse, sine injuria non posse, sed hoc verissimum esse, sine* SUMMA JUSTITIA *rempublicam geri nullo modo posse.*" [1]

District Court of the United States, Massachusetts, August 6, 1841, *at Boston.*

United States *v.* Oliver.

Under the circumstances of this case, it was held, that the defendant in breaking open a letter, deposited in the post office, had not violated the act of congress of 1825, chapter 275, § 21.

Whether anonymous letters were intended to be protected by that act, — *quære.*

This was a complaint against the defendant, as postmaster of Lynn, for opening a letter, which contained only scrawls and incoherent nonsense, without signature, and was addressed to one Barker, of Lynn, who, it appeared, lived in that place. The letter was dropped into the Lynn post office. It appeared, that the prisoner had been informed that many letters of this description had been in the post office, and that this bore the same appearance and hand-writing; that he thereupon opened it, and when Barker called at the office, he de-

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[1] Cic. de Republica, lib. ii. 44. Edit. Maii.

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livered it to him, saying that he had taken the responsibility of opening it.

Dexter, district attorney, stated that the complaint was founded upon the 21st section of the post office act of 1825, which makes it criminal for any person employed in any of the departments of the post office establishment, to open any letters "with which he shall be entrusted, or which shall have come to his possession, and which are intended to be conveyed by post." The allegation in the complaint was, that the defendant, being postmaster, had opened a letter which had come *to his possession* and was *intended to be conveyed by post.*

Ward, for the defendant, contended that the words "intended to be conveyed by post," in the 21st section, were to have some meaning; that they qualify what precedes, and show that there were some letters contemplated to come into the post office establishment, not to be conveyed by post; which could be no other than box letters, so called, that is, letters to be delivered in the place where they were lodged. He cited the 36th section, which provides that "for every letter lodged at any post office, not to be carried by post, but to be delivered at the place, where it is so lodged, the post master shall receive one cent of the person to whom it shall be delivered," and he contended that box letters were here expressly described as letters *not to be carried by post.* He further contended, that this was the only provision in the act for box letters being received into the post office; that no postage was imposed on them; that the 13th section, which prescribes the rates of postage, does not extend to them, and that the one cent received by the post master, under the 36th section, goes to his own use alone. He insisted further, that there was no evil intent in this case.

Dexter replied, that he did not contend there was any bad intention on the part of the prisoner; but he insisted that such intent was not necessary; that by the 21st section, the opening a letter was made criminal without reference to the intent or design; that opening a letter with intent to pry into business or secrets, or obstruct correspondence, was a distinct offence, so made by the 22d section, which he cited, and which makes it criminal, if any person "shall open any letter or packet which shall have been in a post office or in custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets." As to the other point, he argued that box letters came within the mischief intended to be guarded against in the 21st section, and ought, therefore, to come within the remedy and the sanction; that great evils would arise, if they were not thus included: and that they might be deemed letters intended to be conveyed by post, although the 36th section describes them as letters, not to be carried by post, because there was a distinction between *conveyed* by post and *carried* by post.

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SPRAGUE J. delivered his opinion very briefly, observing that the complaint was founded wholly upon the 21st section. No offence under the 22d section was charged, or presented for his consideration. The complaint alleged, that the letter in question was intended to be conveyed by post: this allegation followed the language of the statute, and was admitted to be essential to constitute the offence charged. It would seem, that the language was intended, as some qualification of the terms which preceded it, and contemplated two classes of letters as coming to the possession of the post master; one to be conveyed by post, and the other not to be so conveyed. What letters were embraced in the latter class? The same statute in the 36th section said, that letters to be delivered in the place where they were lodged, were letters "not to be carried by post." Thus the law itself defined and described certain letters as not to be carried by post; but it was insisted, that there was a distinction between the words "carried" and "conveyed," and that box letters were to be *conveyed* by post, although not to be *carried* by post within the meaning of the law. The whole question, then, presented for the consideration of the court, was, whether there was such a distinction, between *conveyed* by post, and *carried* by post, as to be the foundation of a crime; for it was only on this distinction, that the complaint was attempted to be maintained. He thought, as the law itself had placed box letters in the class *not to be carried by post,* it would be refining too much to consider them still as belonging to the class *to be conveyed by post,* that he could not build up a crime upon a distinction so nice and critical, and he must, therefore, discharge the defendant.

He suggested further, that a doubt might arise, whether such a missive as this, being mere scrawls and incoherent nonsense, without signature, would be within the protection of the penalties of the law, it being really no communication, but a fraud upon the person to whom addressed and upon the post office department, tending to prejudice the government. But he suggested this point only as a matter of inquiry, upon which he had formed no opinion.

Supreme Judicial Court, Maine, June Term, 1841, *at Bangor.*

ROBERTS *v.* MARSTON.

Construction of a written contract.

THIS was assumpsit on certain notes of hand. For a portion of the amount claimed, the defendant offered to be defaulted. In relation to the balance, he relied upon the following receipt in payment, viz;

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"Received of George F. Marston, this day, a warranty deed of two parcels of land situate on Union street, for which I agree and promise to pay or allow him the sum of four thousand dollars, with interest from this date, on the demands I now hold against him, when he shall have cleared the incumbrances on said deeded property above-mentioned, which incumbrances are to be cleared before the first of July next. Bangor, December 20, 1836. Amos M. Roberts."

At the time of the conveyance and when the receipt was given, the land was heavily incumbered by mortgages. These were not discharged until a day or two before the trial of the action, at the October term, 1839. At the trial, the plaintiff tendered to the defendant a deed of the premises, and contended, that the receipt being conditional, and the condition not having been complied with, the receipt was void. The defendant, on the contrary, contended, that the clearing off of the incumbrances was not a condition precedent, but a part of the contract, for the non-performance of which he was liable in damages. This question of construction was submitted to the court by agreement.

Rogers for the plaintiff.

McCrillis for the defendant.

Weston C. J. delivered the opinion of the court, to the effect, that the defendant was entitled to have the amount of the receipt allowed, after deducting such sum from the amount specified in it, as the jury might find the plaintiff damnified by a non-performance of the agreement, according to the letter of it.

French *v.* Camp and another.

The public have the same right to travel on the ice of a navigable river as a highway, that they have to the waters of the river.

The public having appropriated a tract on the ice of such a river for a road or travelled way, any person who wantonly or carelessly obstructs the same, or cuts a hole therein, is liable for any damages, which his act may occasion to any individual passing in such track.

This was a special action of the case brought to recover the value of a horse belonging to the plaintiffs, which was alleged to have been drowned by means of the carelessness or fault of the defendants. During the winter of the year 1837, a road had been travelled on the ice from Bangor to Eddington, over navigable waters, which had been used by travellers generally, who had occasion to pass in that direction. Such a road had been maintained for a long term of years previously, during the winter months, and while the ice was of sufficient strength, though the location of the path varied at different times between the two *termini*. At the time mentioned, in 1837, and after the road had become well defined by the travel upon it, the defend-

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ants cut a hole for the purpose of taking the ice away for summer use, which extended so near the road as to encroach upon its limits. The plaintiff, during the night, and in the exercise of a reasonable degree of caution, while travelling the road, was accidentally precipitated into the hole thus cut, and his horse was drowned. To recover damages for the loss, this action was brought.

A verdict having been returned for the plaintiff under this state of facts by the instructions of the court, the defendant excepted; and the case was argued at the June term, 1840, by *John Appleton*, for the defendant, and by *McCrillis*, for the plaintiff.

WESTON C. J. delivered the opinion of the court at this term, to the effect, that the waters of the Penobscot River are of common right as a highway for the public, while in a free or unfrozen state, and equally so, while in a congealed state; that the public having appropriated a portion or tract of the surface for a travelled path, the defendant had no right to interfere with the rights which the public had acquired by the previous appropriation, however good a right he might have to take ice from other places on the river. It appearing in this case, that the plaintiff was in the exercise of a reasonable degree of care and caution in travelling where he did, and that the defendant was guilty of a culpable carelessness in cutting where he did, knowing of the previous appropriation by the public, he was liable for whatever damages that carelessness had occasioned to the plaintiff.

Judgment on the verdict.

BUSSEY *v.* LUCE.

Where a demandant claims under a deed with exceptions, the *onus probandi* is on him to show, that the demanded premises are not within the exceptions.

THIS was a writ of entry in which the demandant claimed a parcel of land in Hermon. To support his action, he read a deed of the whole town of Hermon, dated October 16, 1804, in which was this exception, namely: "excepting out of this conveyance one hundred acres to each settler within said township, meaning to except from this conveyance the lots of the settlers within the aforegranted township, as confirmed to the said settlers by the honorable, the general court." The demandant having closed his case, the tenant moved that he should be nonsuit on the ground, that, as the deed introduced contained exceptions, it devolved on the demandant to show that his claim did not come within them. No evidence was introduced by either party on this point, and *Emery J.* ordered a nonsuit with the agreement, "that if upon these facts the plaintiff is entitled to maintain his action the nonsuit should be taken off, otherwise the nonsuit to stand."

The action was tried at the October term, 1839, and was argued at the June term, 1840.

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Rogers and *A. W. Paine*, for the demandant, contended, that the *onus probandi* was on the tenant because he had the affirmative of the issue; because it was for the interest of the tenant to prove the facts relied upon; and because the facts of confirmation were peculiarly within his knowledge if they existed.

John Appleton for the tenant.

Weston C. J. delivered the opinion of the court, to the effect, that the demandant must prove his title before he could recover, that having introduced no other evidence than the deed, without showing the demanded premises to be not within the exceptions, he had failed to show any seisin of them and therefore had failed to support his action.

Nonsuit confirmed.

Bussey *v.* Grant.

This case was brought to recover another portion of the same tract of land, a part of which was demanded in the above action. In addition to the deed introduced in the former case the demandant read the land resolves of the commonwealth of Massachusetts, dated June 25, 1789, defining the term "settler" and also the resolves of 1797, passed for the purpose of quieting settlers in the township of Hermon. By the provisions of the first resolve, a "settler" is defined to be one "who settled on the lot prior to 1st January, 1784"—"who went on for the purpose of cultivating the lot and making it the place of his actual abode," "and actually resided on said lot by himself or some person under him, and cleared fit for mowing and tillage at least one acre, and built a dwelling house thereon and continues to reside thereon." By the latter resolves it is provided, "that there is hereby released to each of the settlers in the township" of Hermon, "who settled on said township before January 1, 1784, to their heirs and assigns, 100 acres, on condition that each of them pay to the treasurer of the commonwealth $15,00," &c. The demandant also exhibited the plan of "settlers'" lots made by Delano in 1797, as run out for settlers, which plan show the demanded premises not within the bonds of any lot run out on the same.

The tenant, thereupon, introduced evidence to show, that the premises demanded were actually within the bounds of a settler's lot as run out for one Perkins, upon the face of the earth; but no evidence was introduced to show, that any of the acts of confirmation were ever performed by the settler or any one else in relation to the lot, nor did the tenant introduce any evidence to connect herself with the settler, but read a deed from one Pomroy to her husband, dated in 1821.

Hereupon the demandant requested the court to instruct the jury that to bring the Perkins lot within the exception, it must appear that

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he was a settler within the terms of the resolve, and that his title had been confirmed to him by the commonwealth; that if he was a settler and entitled as such to a deed from the commonwealth, if his title was not confirmed to him, his lot was not within the exception. These instructions the judge refused, but instructed the jury that if Perkins was in the *occupation* of said lot when Delano made the plan in 1797, and that Delano made a survey upon the face of the earth corresponding to the limits claimed by the tenant in 1797, they would return a verdict for her. The jury found a verdict for the tenant, and the demandant excepted.

Rogers and *A. W. Paine*, for the demandant, contended, that the *onus probandi* was on the tenant to prove herself within the exception, and that she or her predecessors had complied with the provisions of the settler's resolve; that the instruction was wrong in fixing the year 1797, as the time when the settler should prove herself on the land, instead of 1784; that mere "occupation" was not sufficient, but that she should have proved the other requirements of the resolve; that the definition of settler, as fixed by the resolve of 1789, was applicable to the resolve of 1797, and to that under which the demandant claimed. They cited *Lambert* v. *Carr*, (9 Mass. 190). This case distinctly settles the law that the word "settlers" in all subsequent resolves should be taken with the definition as prescribed by the resolve of 1789.

John Appleton for the tenant.

Weston C. J. delivered the opinion of the court, to the effect that the demandant had failed to prove his seisin of the demanded premises, inasmuch as he had not proved them not to be within the exception in the deed, and that inasmuch as the resolve in favor of Gen. Knox, granting the township to the demandant's grantor, contained a provision, that "the *settlers* who had not been already quieted shall hereafter be quieted in such manner as the general court shall direct."[1] The lots of individuals in *occupation* of land at the time of the resolve being passed, were excepted from the operation of the deed to the demandant, whether confirmed to the settler or not.[2]

Judgment on the verdict.

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[1] No resolve of this kind was proved or offered in the case, nor alluded to in argument. Nor any evidence introduced to prove the tenant a "settler" under its provisions. Reporter.

[2] How shall a party prove negatively that the lot was not within the exception, when no evidence exists on the subject, no acts of confirmation ever having been performed? Reporter.

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DIGEST OF AMERICAN CASES.

Selections from 7 McLean's (U. S. 7th Circuit) Reports.

BOND.

To constitute a bond at common law, it must be sealed by wax, wafer, or some tenacious substance; but in this country, except in two or three states, a scrawl has been substituted for a seal. *United States* v. *Stephenson and another*, 462.

2. A bond taken under an act of Congress is not governed by the law of the state where executed, but by the law of the United States. *Ib.*

CHANCERY.

Chancery will decree a contract to be rescinded, where a good title cannot be made, or where delays have occurred in making the title, and the land has become less valuable. *McKay* v. *Carrington*, 59.

2. Chancery will not decree damages on a failure to make a good title; but where the title cannot be made, it will decree a recision of the contract, the return of the purchase money and interest; and where there are outstanding negotiable notes, will also decree that they shall be delivered up. *Ib.*

3. A decree in Virginia for land in Kentucky cannot affect the title. *Carrington's heirs* v. *Brents and another*, 175.

4. A decree in Kentucky for the conveyance of land in Ohio cannot operate on the land. *Watts and another* v. *Waddle and another*, 202.

5. Courts of chancery will not interfere by injunction to prevent a threatened wrong, unless the danger is imminent, and the injury is irremediable in any other form. *Spooner* v. *McConnell and another*, 338.

6. The right set up by a complainant, as a citizen of the United States, to navigate certain waters, is an abstract right, and such an one as chancery cannot protect from violation. *Ib.*

7. Chancery does not deal with abstractions or contingencies, but with practical rights, and to prevent impending wrongs. *Ib.*

CONTRACT.

A contract to convey a tract of land so soon as a suit then pending for the title shall be decided, gives to the party that agrees to convey all the time necessary to close the litigation in all the forms it may assume. *Watts and another* v. *Waddle and another*, 202.

CORPORATION.

A corporation can exercise no powers but those which are specially given to it. *Lessee of Knowles* v. *Beatty*, 43.

2. A power to impose a tax for certain objects, and to meet "all other necessary expenses of the company," does not authorize the corporation in order to levy a tax, to pay a tax to the state. *Ib.*

3. The necessary expenses are those incurred by the corporation in the exercise of its granted powers. *Ib.*

DECREE.

A decree which purports to divest the legal title from one in whom it is not vested, can have no effect on the title. *Lessee of Harmer's heirs* v. *Gwynne*, 48.

EVIDENCE.

An instrument of thirty years' standing, not impeached, need not be proved by the subscribing witness. *Hinde and another* v. *Vattier and another*, 115.

2. An instrument of writing more than forty years old is not required to be proved with the same strictness as

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one of modern date, unless there be facts and circumstances proved which create doubts as to its genuineness. *Waltons and heirs of Payne* v. *Coulson*. 124.

3. Bank notes, alleged to be enclosed in a letter stolen from the mail, need not be proved by a person who has seen the president and cashier write. *United States* v. *Keen*, 429.

4. Any one who deals in such notes, as cashiers of banks, &c., may prove their genuineness. *Ib.*

5. A check drawn on the bank and which circulates as money, may be proved in the same way. *Ib.*

6. Where the original corners and lines are established, they control courses and distances. But courses and distances govern where there are no established objects to control them. *Nelson's Lessee* v. *Hall and another*, 518.

7. Where in taking the acknowledgment of a deed, the justice omitted to state his official character, parol proof of his being a justice is admissible. *Shult's Lessee* v. *Moore*, 520.

8. The upsetting of a stage is *prima facie* evidence of negligence; and a passenger who has been injured need show nothing more to sustain his action. *McKinney* v. *Neil*, 540.

9. The proprietor is not responsible for casualties which could not be foreseen nor guarded against. *Ib.*

10. But he is liable for the smallest degree of negligence, want of care, or want of skill in the driver. *Ib.*

11. Want of skill in the driver, being a material fact in the case, may be proved as any other fact. *Ib.*

EXECUTION.

A law which regulates the issuing of executions on judgments previously rendered, affects the remedy and not the contract. *Bank of the United States* v. *Longworth*, 40.

EXECUTORS AND ADMINISTRATORS.

An executor who is empowered by the will to sell and convey the real estate of his testator, "in such mode as in his judgment shall be best, for the interest of the estate," cannot delegate to another the power to sell. *Pearson* v. *Jamison*, 199.

FEDERAL GOVERNMENT.

Under the power to regulate commerce with the Indian tribes, congress have power to prohibit all intercourse with them, except under a license. *United States* v. *Cisna*, 257.

INDORSER AND INDORSEE.

Notice left with a fellow boarder of the indorser with a request to hand it to him, sufficient. *Bank United States* v. *Hatch*, 92.

2. The indorser of a negotiable note which was made and assigned in Ohio, and was payable there, is liable, at the suit of the indorsee, in the state of Indiana, on proof of demand of payment of the maker, when the note became due, and notice to the indorser. *Burrows, Hall & Co.* v. *Hannegan*, 315.

3. The law of Indiana which requires a suit against the maker before recourse can be had against the indorser, does not govern the case. *Ib.*

POLICY OF INSURANCE.

Where fire is one of the enumerated risks in a policy on a steamboat, &c., a loss by fire will charge the underwriters, though occasioned by the negligence of the officers or crew. *Waters* v. *The Merchants' Louisville Insurance Company*, 275.

2. If the negligence be so gross as to authorize the presumption of fraud, which would constitute barratry, the underwriters are not liable, unless the policy expressly insures against barratry. *Ib.*

3. A policy against fire on land will, in the event of loss, hold the underwriters liable, though the fire was the result of negligence by servants and others.

POSSESSION.

Possession under a deed extends to the whole tract, if there be no adverse possession. *Ellicott & Meredith* v. *Pearl*, 214.

2. A tenant put into the possession by the grantee without definite boundaries, will be held to be in possession to the extent of the tract. *Ib.*

3. Possession without claim of title is limited to the actual occupancy. *Ib.*

4. To constitute possession there must be such an occupancy by exercising acts of ownership over the land, enjoying the profits, &c. as to give notice to the public and all concerned of the claim. *Lessee of Ewing* v. *Burnet*, 265.

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INTELLIGENCE AND MISCELLANY.

THE POST OFFICE LAW AND JUDGE SPRAGUE'S DECISION. The decision of Judge Sprague, in the case of the *United States* v. *Oliver*, which may be found on page 197 of our present number, has excited much comment. Perhaps the learned judge might well have declined the responsibility of making a decision in the case on a preliminary examination, and sent the defendant to the higher court, a *prima facie* case having been made out against him. We have received the following communication on the subject, in which the decision is ably defended: —

There has been much animadversion on this case in the newspapers, and we think with little regard to the terms of the statute, or the general principles on which rest the proper administration of the law, and the safety of the citizen. The safety of every citizen depends on the great rule, that courts of law shall administer the statutes as the legislature has enacted them; otherwise the varying opinions, the whims or tyranny of judges would mete the measure of every man's justice, and the statutes would be no restraint on judicial officers, and no protection to the accused; every man's "property, liberty and life" would be at the mercy of judge-made law, — unknown, till its sentence was incurred and announced for execution. The principle is as well established in law as in humanity, that a penal statute shall be construed strictly, and that the court shall not, by construction, extend the operation of the act beyond the limits which the legislature have fixed by its letter. The animadversions to which we have alluded, adopt two assumptions. The first is, that the acquittal of the postmaster resulted from a nice verbal distinction and refinement, adopted by the court; but the fact is, that it resulted from the refusal of the court to adopt such a distinction, on which the complaint rested, and which would have extended the operation of the statute beyond its words, according to their ordinary meaning, and their use in every other section of the statute in which they occur.

The complaint rested only on the distinction taken between "*carried*" and "*conveyed*." In ordinary usage these two words mean the same thing, and in the 1st, 2d, 4th, 5th, 6th, 10th, 13th, 27th and 30th sections of the statute they are used in their common acceptation, and as synonymous, and this the derivation of the words authorizes; so that between the two words, there is no ordinary, legal or derivative distinction, and the dictionary defines each by the other. Was the judge to originate the distinction, and, by a verbal refinement between "carried" and "conveyed" extend a penal statute beyond its often repeated terms, and make an offence by construction? How far may a judge go in deflecting language from its common and ordinary meaning, and from the meaning every where else attached to it by the legislature? May he, by construction, stretch the act to every case that he may suppose to come within the mischief? If so, what security has any man against condemnation for an act, which no language of the law, in its ordinary meaning, has described as an offence? Every citizen is secured by the constitution against *ex post facto* laws of the legislature, but what is to secure him from these *ex post facto* laws of the court. His only security is in confining the courts to the fair and usual meaning of

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language, except where the legislature itself has plainly indicated that it is used in a different sense: and if a case occur, of which the mischief is not within the act, the remedy must be applied by the legislature alone.

On these rules rests the wisest judicial administration of the land. Some time since, congress imposed a duty on "loaf sugar;" to evade the duty, crushed sugar was imported, which had not the form of loaf sugar, but in every other respect, was the same article. The question was brought before the United States court, whether crushed sugar was subject to the duty; here was a case manifestly within the policy of the statute, and the mischief it was intended to prevent, and, moreover, of manifest and mere evasion of the law, seeking to defraud the government of its proper revenue, and to prevent the protection extended to sugar refiners; yet the court did not feel at liberty to depart from the usual meaning of the words "loaf sugar" used in the statute, nor by construction to extend it beyond its letter to a case clearly within its policy, and thus crushed sugar was held to be not within the act: yet who, in that well known case, censured the court because they did not depart from the established rules of legal construction, to cover the clear mischief of that particular case.

The second assumption is, that, by the decision of the district court, box letters are excluded from the protection of the post office act; but all that the court decided, was, that box letters were not within the words and penalties of the 21st section of the act, which is confined by express terms to "*letters intended to be conveyed by post.*" But box letters are within the terms and the protection and penalties of the 22d section, which extends to all letters, which have been in any post office, whether intended to be conveyed by post or not, and which imposes a penalty, differing from that in the 21st section, on all persons opening such letters. The 22d section requires, to constitute the offence, a design to obstruct the correspondence, or pry into the secrets or business of another; and the facts in this case negatived such design: the 21st section, therefore, was the only one on which the complaint could be founded, and as the circumstances of the case made its judicial consideration most proper, the manner of its presentment fulfilled all that was due to the law and to the accused.

It has been most singularly contended, that the decision excludes from the protection of the act "all letters which have reached their destination." Now the decision is confined to box letters, and no others are within the 36th section, or its description of "letters lodged to be delivered" and "not to be carried by post;" all letters put into a post office, as letters intended to be conveyed by post, are of that class and name, and as such, would come to the possession of the postmaster, and be within the 21st section. The whole extent of the decision is merely this, that as the statute distinguishes between letters intended, and those not intended to be conveyed by post, the penalty confined by the terms of the statute to one class, cannot be extended to the other, by adopting a nice distinction and over refinement of terms, countenanced neither by common or legislative use. L.

HILLIARD ON SALES. Perhaps we ought to be ashamed to say, that we have never yet found an opportunity to give a careful examination to Mr. Hilliard's "Abridgment of the American Law of Real Property." Of that work, therefore, we can only inform such of our readers as may be in like condition with ourselves, that Chancellor Kent, in the fourth edition of his Commentaries, Vol. II., page 635, *note*, says, "I take this occasion to observe, that this work is one of great labor and intrinsic value." From an examination of the Treatise on the Law of Sales of Personal Property, published recently, we are disposed to believe it merits the same commendation. It is similar *in plan* to the author's former work, and contains a very full and well arranged digest of the decisions, English and American, on an important title of the law. We are confident that the profession will find that this book will enable them, better than any other that has yet been published, to find what has been adjudged, recently and of old, on the subject of which it treats. M.

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MONTHLY LIST OF INSOLVENTS.

Name	Occupation
Boston.	
Brooks, Franklin,	Trader.
Call, Abraham,	Tailors.
Call, A. Augustus.	Copartners.
Cushing, Abel, Jr.	Merchant.
Churchill, William,	Fish dealer.
Dexter, George J.	Police Officer.
Currier, William,	Tailor.
Harwood, George W.	Trader.
Homer, Gilman,	Pile drivers.
Morris, Robert R.	Copartners.
Knight, Edward,	Trader.
Learned, Henry,	Merch. Clerk.
Meder, Samuel A.	Grocer.
Rogers, John W. H.	Painter.
Skinner, Isaac B.	Merch. tailor.
Stone, Elisha W.	Merchants.
Smith, Willard M.	Copartners.
Tewksbury, William, Jr.	
Charlestown.	
Littlefield, James,	Brickmaker.
Danvers.	
Lord, Caleb,	Victualler.
Enfield.	
Downing, Frederic.	
Hanson.	
Perry, Isaiah S.	Traders.
Josselyn, Elbridge, (of Lowell).	Copartners.
Ipswich.	
Jewett, John,	Trader.
Lee.	
Smith, Edward,	Gentleman.
Lowell.	
Josselyn, Elbridge,	Traders.
Perry, Isaiah S. (of Hanson).	Copartners.
Fuller, Porter,	Laborer.
Sawyer, Samuel,	Physician.
Marblehead.	
Stevens, Benjamin,	Baker.
Milbury.	
Sweetser, George,	Carpenter.
New Bedford.	
Hewit, Lewis S.	Bakers.
Pope, Isaiah P.	Copartners.
Russell, Holder.	
New Marlborough.	
McAlpin, James.	
Nantucket.	
Heaton, Tertius,	Trader.
Townsend.	
Brooks, Abner,	Cooper.
Westborough.	
Phillips, Daniel, Jr.	
West Stockbridge.	
Boynton, Henry B.	Traders.
Boynton, Charles B.	Copartners.
Woburn.	
Newhall, Alfred A.	Cordwainer.
Worcester.	
Shaw, William M.	Paper hanger.
Tead, Nathaniel,	Hatter.

TO READERS AND CORRESPONDENTS.

A large portion of our present number is devoted to an examination of the McLeod case. The importance of the subject and the singular position of the whole controversy render such an examination desirable, and we hope the one we have given will be acceptable to our readers. The English papers, received by late arrivals, comment upon the decision of the supreme court of New York with considerable asperity. They are particularly severe upon the manner and style of the opinion of the court, and remark that it is drawn up in great haste, and presents the loose and slovenly appearance of a school-boy production, rather than the legal determination of a dignified judicial tribunal.

We are obliged to defer several articles which were prepared for the present number. Among them, are opinions by Mr. Justice Story, Mr. Chief Justice Gibson, and several decisions by the state courts in Massachusetts and Maine.

In the last decision we received from Pennsylvania, the *name of the case* was not given.

Our New England readers will be glad to learn, that L. S. Cushing, Esq., has prepared a second edition of his Treatise on the Trustee Process, revised and adapted to the new legislation of Massachusetts and Maine.

Little and Brown, of Boston, have in press the first volume of a new collection of American Criminal Trials.

We shall probably reprint the new Bankrupt Bill in our next number.

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THE LAW REPORTER.

OCTOBER, 1841.

REMARKABLE TRIALS. — No. IV.

HIGH TREASON — CASE OF JACOB LEISLER.

The accession of James II. to the throne of England, in 1685, was regarded with the liveliest satisfaction by the people of New York, who had reason to expect important benefits from one whom they had regarded as their friend and patron. But they soon found that the king had entirely forgotten, or violated without hesitation, the promises he had made under the titles of York and Albany. Their disappointment was the greater, as it soon became apparent that James was determined to make the religion of Rome predominant throughout all his dominions. His bigotry prompted him to deliver up the Indians of the five nations to the influence of the French jesuits, and the French authorities in Canada undertook with great zeal to chastise, or debauch by intrigue, the tribes who had preferred the English alliance to their own.

Dongan, the governor of New York, himself a Roman catholic, resisted the intrusion of the French priests into the settlements of the Indians, and, having incurred the displeasure of his royal master, through the repeated complaints of the court of France, he was ordered to deliver up his charge to Sir Edmund Andros, the governor of Massachusetts. New York was thus subjected to the rule of its ancient tyrant, and the people were mortified at the annexation of the province to the government of New England.

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In the midst of these discontents, intelligence was received of the invasion of England by the prince of Orange, and of the accession of William and Mary to the throne. Notwithstanding the government of Andros had been terminated by a successful insurrection at Boston, the local authorities of New York indicated a hesitation to comply with the general revolution. Nicholson, the lieutenant governor, refused to proclaim William and Mary, and even despatched a letter to governor Bradstreet, at Boston, commanding the instant release of Andros, and the suppression of the *insurrectionary rabble*, who had presumed to put him in confinement. A large party broke out into open discontent at this state of things, and found a chief in Jacob Leisler, a merchant of respectable standing, and a zealous friend of the protestant cause, who had formerly suffered imprisonment by the order of Andros for opposing one of his illegal acts while governor of New York.

The immediate occasion of the revolt was a report in May, 1689, that the papists intended to attack and massacre the people while at church in the fort, and declare for James II. The people assembled in a tumultuous manner, seized upon the fort, which the five captains of the trainbands agreed to keep, each in his turn. A committee of safety was chosen for the immediate government of the province, who signed an agreement to adhere to the prince of Orange, and, with their lives, to support the protestant religion. The captains of militia formed a part of this committee, and Leisler[1] was regarded as the principal in point of age, standing, and mercantile credit. Their declaration, published to the world, avowed their purposes. "As soon as the bearer of orders from the prince of Orange shall let us see his power, then without delay we do intend to obey, not the orders only, but also the bearer thereof."

The times demanded a leader who possessed the knowledge, address, and firmness of a veteran statesman. Jacob Leisler had none of these. A simple burgher of New York, his education and knowledge of the world were not such as to fit him for the trying emergencies in which he was placed. In assuming power, he rested chiefly for his support upon the less educated classes of the Dutch; English dissenters were not heartily his friends. The large Dutch landholders, many of the English merchants, the friends of the English church, the cabal that had grown up round the royal governors, were his wary and unrelenting opponents. But his greatest weakness was in himself. Too restless to obey, and too passionate to command; as a presby-

[1] Hutchinson relates, that a short time before this open revolt, one of Leisler's ships arrived in New York with wines, on which the duties amounted to one hundred pounds, which he refused to pay, "the collector being a papist, and there being no legal authority to receive it." Soon after, he excited the people on the east end of Long Island to march to New York to obtain possession of the fort to prevent its being delivered up to foreigners. When within twelve miles of the city, the lieutenant governor induced them to return to their homes.

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terian he was averse to the church of England; as a man of middling fortunes to the aristocracy; while, as a Dutchman, and a calvinist, he was an enthusiast for William of Orange.[1]

Massachusetts and Connecticut gave countenance to his measures, and his authority was soon generally acknowledged by the middle and lower classes. Nicholson, the lieutenant governor, fled to England, and Courtlandt, the mayor of the city, Colonel Bayard, and others of his council, "gentlemen of figure," unable to brook the ascendancy of a man, "mean in his abilities, and inferior in his degree," retired to Albany and seized the fort there, declaring that they held it for William and Mary, but would maintain no connexion with Leisler. Each party now professed allegiance to the same sovereign, and denounced the other as rebels. Leisler sent Milborne, his son-in-law, to Albany to demand the surrender of the fort, which was refused. Afterwards letters were received from England, addressed to Nicholson, or, in his absence, to "such as, for the time being, take care for preserving the peace and administering the law" in New York. After some slight hesitation on the part of the messenger, occasioned by the attempts of the party at Albany to obtain possession of the despatches, they were delivered to Leisler. They contained a commission to Nicholson, "to do every thing appertaining to the office of lieutenant governor, according to the laws and customs of New York until further orders." Nicholson having left the province, Leisler considered the commission as directed to himself, and esteemed his authority to have received the royal sanction. By advice of the committee of safety, he now assumed the title of lieutenant governor. To add strength to his party, a convention was summoned of deputies from all the towns to which his influence extended, and various regulations were adopted for the temporary government of the province.

Bayard, a member of the Albany convention, being found in New York, was arrested and imprisoned for high misdemeanors, and for certain libellous writings, containing "execrable lies and pernicious falsehoods." The convention at Albany was dissolved; the members took refuge in the neighboring colonies, and there was soon no open and organized opposition to Leisler's authority. But success was more dangerous to the popular chief than adversity. His vindictive rashness, his want of experience, and more than all, the failure of some of his important measures of government, and the imposition of taxes, were rendering him unpopular with the people. "Destitute of equanimity, his failure was inevitable." The king had received Leisler's messenger in a flattering manner; but Nicholson, who had arrived in England, contrived to poison the royal ear against the man who first raised the standard of the revolution in New York, and Leisler vainly waited for any express confirmation of his power, or thanks for his efforts in the cause of his sovereign.

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[1] Bancroft's History of the United States, iii. 51.

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Sloughter was appointed governor in 1689, but remained in England a considerable time afterwards. Meanwhile, Ingolsby, who bore a commission as captain, arrived in New York, in January, 1691, in the ship Beaver. He announced the appointment of Sloughter as governor, and called for a surrender of the fort. Leisler demanded to see his commission, or order from the ministry or governor; he refused submission to a man who bore no letters or orders from England, and issued a proclamation that on the arrival of the governor, the government should be cheerfully surrendered up to him. Ingolsby issued a counter proclamation, and besieged the fort. Thus the aristocratic party, the determined and wary enemies of Leisler, obtained a leader in an officer of the king.

On the arrival of the governor, in March, 1691, he sent Ingolsby to demand the surrender of the fort. Leisler's fears for his safety, or his love of power, overcame his prudence, and he refused to obey, thus giving his enemies a pretence for his destruction, which otherwise they would have vainly sought in all his acts. A second demand was made, but Leisler knew that his enemies had obtained the ear of the governor, and, in the effort of folly and despair to secure his own safety, he still hesitated, but sent messengers to the governor, who were immediately seized as rebels. Leisler now abandoned the fort, and was seized and thrown into prison, together with his son-in-law and several of his adherents.

The prisoners were immediately brought to trial before a special court of oyer and terminer. Six of the inferior insurgents were convicted of high treason, and were subsequently reprieved. Leisler and Milborne denied to the governor the power to institute a tribunal for judging his predecessor, and vainly appealed to the king. The trials proceeded before a tribunal, erected for the purpose of giving the sanctions of the law to the determinations of power. Joseph Dudley,[1] the chief justice, had been expelled from Boston by the same general revolution to which Leisler owed his elevation. How could the latter expect a favorable appreciation of his conduct from a tribunal, erected by his enemies, and occupied by an exasperated antagonist? Refusing to plead to the charge against him, he was convicted by the jury, and was condemned to death with Milbourne as a rebel and a traitor.

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[1] He was a native of Massachusetts, and held several offices of trust there. He was a judge at the time of the revolution in 1689, when he was imprisoned, and was sent to England with Andros. In the following year he was appointed chief justice of New York. He was subsequently lieutenant governor of the isle of Wight, and a member of parliament. He returned to Boston in 1702, as governor of Massachusetts. No citizen of New England enjoyed so many public honors and offices. He was a learned man, and, in private life was amiable, dignified, and elegant in his manners. His conduct at the trial of Leisler is a blot on his character, and was the ground of severe charges against him in England. He died in Roxbury, Massachusetts, in 1720, at the age of 70.

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The governor hesitated to destroy the men, who first raised the standard of William of Orange and protestantism. "Certainly never greater villains lived," he wrote; but he "resolved to wait for the royal pleasure, if by any other means than hanging he could keep the country quiet." But the enemies of Leisler were bent on his death. They invited Sloughter to a feast, and, when his reason was drowned in his cups, he was prevailed on to sign the death warrant; before he recovered his senses, the prisoners were executed.

On the sixteenth of May, 1691, amidst a drenching rain, Leisler, with his son-in-law, Milbourne, was led to the gallows. Parting with his wife Alice, and his numerous family, he met his death with fortitude, and as became a christian. At the place of execution, after praise to God, he expressed his sense of his dying state, and submitted himself before a just God with humility and hope. He avowed, that, at the request of a committee, chosen by the major part of the inhabitants of the province, he had taken upon him, "to the great grief of relations to be left behind," weighty matters of state, "requiring a more wise, cunning, and powerful pilot to govern;" an undertaking for which his motives were the protestant interest, and the establishment of the government of William and Mary. It was true, he said, that in this endeavor for the public good, several enormities had been committed against his will. He had longed to see a governor sent, to put a period to the disorders existing; some of which, on his part, were committed through ignorance, some through jealous fear, some through misinformation and misconstruction, and some through rashness or passion. For all his offences, he asked pardon of God, and of all persons offended. His enemies he forgave, and prayed that all malice might be buried in the grave.

He enjoined upon his friends to forget any injury done to him. He prayed for the good of the province, and, as his last words, declared, that, as to the matter for which he was condemned, his purpose was for the good of his fellow creatures, according to the understanding and ability which he possessed, by preventing popery and upholding the government of William and Mary. He concluded a prayer for all in authority, by one for comfort for his own afflicted family, and he asked for them the charity of all, and their prayers for himself.

Being asked, by the sheriff "if he was ready," he said "yes," and requested that his corpse might be delivered to his wife, and, as his family had been educated as christians, he hoped they would act as such. Turning to Milbourne,[1] he exclaimed, "why must you die? you have been but as a servant, doing my will; and, as I am a dying

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[1] Milbourne had not the patience and submission of his father-in-law. Seeing Livingston, one of his enemies, in the crowd, he exclaimed: "you have caused my death; but, before God's tribunal, I will implead you for the same." Being asked whether he would not bless the king and queen, he answered: "it is for the king and queen I die, and for the protestant religion."

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man, I declare before God and the world, that what I have done, was for king William and queen Mary, the defence of the protestant religion, and the good of the country. Having again professed his reliance on God, he signified his readiness to depart, and his sufferings were soon ended.

The populace, overawed by the soldiers, were dreadfully agitated by this painful spectacle. The shrieks of fainting women were terrible to hear; and the torrents of rain added to the gloom and horror of the scene. When the prisoner was dead, his garments were cut in pieces by the crowd, and his hair was divided as the precious relics of a martyr. At the same hour, and in the same town, the members of the council and the judges were revelling in beastly triumph, and with them the governor, insensible at his cups, was delayed until the execution was over!

Thus perished Jacob Leisler, a victim to party malignity. The first to raise the standard of William and Mary, he was the first to suffer as a traitor. The appeal to the king, which had been denied him during his life, was prosecuted after his death by his son. It was held that the forms of law had not been broken in the condemnation, but his estate was restored to his family, and an act of parliament, vainly resisted by the judge who condemned him to die, did justice to his memory by reversing the attainder. His violence and incompetency were forgotten in sympathy for the injustice of his death. His friends afterwards formed a powerful and ultimately a successful party; and one of his principal enemies was himself condemned, by a court erected for the occasion, as a rebel and a traitor.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania, May Term, 1841.

Bayard *v.* Shunk and Bowman.

A *bona fide* payment in the notes of a broken bank, discharges the debt.

Therefore, where a debtor had innocently paid such notes in satisfaction of a *fieri facias* in the sheriff's hands, it was held in an amicable *scire facias quare executio non*, that the plaintiff was not entitled to have a second execution.

This writ of error to the common pleas of Dauphin county, brought up a judgment on a case stated, which disclosed the following facts. The plaintiff obtained judgment against the defendants for a thousand dollars, and issued a *fieri facias* to November term, 1840, which was put into the sheriff's hands and levied on the stock at their furnace. On the 25th of September, in the same year, they conveyed

their iron works, including the stock, to one Hickox, who, on the 14th of October, paid the amount of the execution into the sheriff's hands, in notes of the Commercial Bank of Millington (Delaware), and took a receipt in full of the debt, interest, and costs. On the 15th of October, the plaintiff's attorney, having inquired into the value of the notes, received them from the sheriff, and gave him an acquittance. The cashier of the Millington bank absconded with all its effects on the 12th of October; and on the next day its failure was publicly known to the inhabitants of the place. Its notes, however, continued to pass current at Harrisburg till the 19th. As soon as its failure was known to the plaintiff, he tendered the notes to Hickox and the defendants, who refused to receive them;—and on these facts the court below gave judgment for the defendants.

The cause was argued here by *Foster* and *McCormick* for the plaintiff; and by *Raun*, and *Johnson*, Attorney General, for the defendants.

Gibson C. J. Cases in which the bills or notes of a third person were transferred for a debt, are not to the purpose; and most of those which have been cited are of that stamp. When the parties to such a transaction are silent as to terms, the rules of interpretation in regard to it are few and simple. If the securities are transferred for a debt contracted at the time, the presumption is, that they are received in satisfaction of it; but if for a precedent debt, it is that they are received as collateral security for it: and in either case, it may be rebutted by direct or circumstantial evidence. But by the conventional rules of business, a transfer of bank notes, though they are of the same mould and obligation between the original parties, is regulated by peculiar principles and stands on a different footing. They are lent by the banks as cash; they are paid away by the borrower as cash; and the language of Lord Mansfield in *Miller* v. *Race*, (1 Burr. 452), was not too strong when he said, "they are not goods, nor securities, nor documents for debts; but are treated as money, as cash, in the ordinary course and transactions of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other coin that is used in common payments as money or cash." If such were the legal character of bank notes in England, where there was but one bank, how emphatically must it be so here, where they have supplanted coin for every purpose but that of small change, and where they have excluded it from circulation almost entirely. It is true, as was remarked in *Young* v. *Adams*, (6 Mass. R. 182), that our bank notes are private contracts without a public sanction like that which gives operation to the lawful money of the country; but it is also true that they pass for cash, both here and in England, not by force of any such sanction, but by general

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consent, induced by their great convenience if not by the absolute necessities of mankind. *Miller* v. *Race* is a leading decision, which has never been doubted in England or (except in a case presently to be noticed) in America; and it goes far to rule the point before us; for if the wheel of commerce is to be stopped or turned backwards in order to repair accidents to it from occasional impurities of the medium which keeps it in motion, except those which — few and far between — are occasioned by forgery, bank notes must cease to be a part of the currency, or the business of the world must stand still. The weight of authority bearing directly on the point, is decisively in favor of the position, that *bona fide* payment in the notes of a broken bank discharges the debt. Though *Camidge* v. *Allenby*, (6 B. & C. 373; S. C. 13 Eng. C. L. R. 202), was a case of payment, not in bank notes, but in the cash notes of a banker who had failed a few hours before, it was held that, if they were to be considered as *cash*, the debt would have to be considered as discharged; but that if the debtor was at liberty to treat them as negotiable paper merely, he was bound to use due diligence in procuring payment of them; and that in either aspect the same result was inevitable. Such securities, however, though formerly called goldsmith's notes, have not been treated as cash by the merchants or the courts. Strictly speaking, they are ordinary promissory notes; for none but the notes of the bank of England are considered bank notes in that country. The judges, however, seem to have hesitated in that case as to their precise character; but they distinctly decided that *bona fide* payment in notes that have received the qualities of money from the conventional laws of trade, is absolute satisfaction notwithstanding the previous failure of the drawer. In America we have a decision directly to the same effect in *Scruggs* v. *Gass*, (8 Yerger, 175), in which the supreme court of Tennessee held that payment in the notes of a bank which had failed, discharged the debt; and in *Young* v. *Adams*, already quoted, we have a decree of the supreme court of Massachusetts to the same purport.

In contrast with these, stands *Lightbody* v. *Ontario Bank*, decided by the supreme court of New York, (11 Wend. 1,) and affirmed by the court of errors (13 Wend. 101). The judges and senator who delivered opinions in that case, seem not to have agreed in their intermediate positions, though they arrived at the same conclusion. The chief justice, who delivered the opinion of the supreme court, seems to have thought that a bank note stands on the footing of any other promissory note; that as he who parts with what is valuable ought, on principles of natural justice, to receive value for it in return, a vendor is not bound by an agreement to accept promissory notes in payment should they have become bad before the transaction; and that payment in the notes of an insolvent bank is no better than payment in counterfeit coin. It is obvious that this involves a contradiction; for to confound bank notes with ordinary promissory

notes, would subject a debtor who had paid them away, to the risk of the bank's subsequent solvency. In the court of errors, the chancellor, having premised that a state is not at liberty to coin money or make any thing but gold or silver a legal tender, and consequently that the practice of receiving bank notes as money is a conventional regulation and not a legal one, concluded by saying, that where the loss has already happened by the failure of the bank, there is no implied agreement that the receiver of the notes shall bear it; and that if he were called on to express his understanding of the transaction at the time, he would say what natural justice says, that the risk of previous failure in the value of the medium must be borne by the party paying. Senator Van Schaik also insisted much on the natural justice of the principle, and affirmed that no case in the books authorizes an inference that bank notes are considered as money except on the universally implied condition that the banks which issued them are able to redeem them at the time of the transfer. In *Miller* v. *Race*, however, Lord Mansfield asserted that they are money without any condition or qualification whatever; and *Camedge* v. *Allenby* as well as *Scruggs* v. *Gass*, affirms that they may retain the character of money after the bank's actual failure. To assume that solvency of the bank at the time of the transfer is an inherent condition of it, is to assume the whole ground of the argument. All concurred however in asserting that the medium of payment must turn out to have been what the debtor offered it for at the time of payment. How does that consist with the equitable principle that there must in every case be, not only a motive for the interference of the law, but that it must be stronger than any to be found on the other side; else the equity being equal and the balance inclining to neither side, things must be left to stand as they are (Fonbl. b. i. ch. v. § 3, and ch. iv. § 25); in other words, that the law interferes not to shift a loss from one innocent party to another who is equally innocent and a stranger to the cause of it.

The self-evident justice of this is a proof that it is a principle not only of equity but of the common law. We need go no further in search of authority for it than *Miller* v. *Race*, in which one who had received a stolen bank note for a full consideration in the course of his business, was not compelled to restore it. It was intimated in the *Ontario Bank* v. *Lightbody*, that there was a preponderance of equity in that case, not on the side of him who had lost the note, but on the side of him who had *last* given value for it. Why last? The maxim *prior in tempore, potior in jure*, prevails indifferently between prior and subsequent purchasers of a legal title or an equitable one. It is for that reason that the owner of a stolen horse can reclaim him of a purchaser from the thief; and were not the field of commerce market overt for every thing which performs the office of money in it, the owner of a stolen note might follow it into the hands of a *bona fide* holder of it; and it was that principle, instead of any consider-

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ation of the relative equities, which ruled the cause in *Miller* v. *Race*. But a more forcible illustration of the principle before us than any of the preceding, were the case indisputable law, might be had in *Levy* v. *Bank of the United States* (4 Dall. 345; S. C. 1 Binney, 27), in which the placing of even a forged check to the credit of a depositor as cash — a transaction really not within the protection of any conventional rule of trade — was held to conclude the bank; and to these may be added the entire range of those cases in which the purchaser of an article from a dealer, has been bound to bear a loss from a defect in the quality of it. And for the reason that the law refuses to interfere between parties mutually innocent, it refuses also to interfere between parties mutually culpable; as in actions for negligence. The rule of the admiralty in such a case being the rule of the civil law, apportions the loss; but it has no place in any other court.

What then is there in the case before us to take it out of this great principle of the common law? The position of the judges in New York is, that every one who parts with his property, is entitled to expect the value of it in coin. Doubtless he is. He may exact payment in jewels, if such be the bargain. But when he has accepted without reserve what the conventional laws of the country declare to be cash, his claim to any thing else is at an end. Bills of exchange and promissory notes enter not into the business of commerce as money; but it impresses even these with qualities which belong not to ordinary securities. The holder of a bill or note, who has taken it in the ordinary course, can recover from the drawer without regard to consideration betwixt the original parties; and if a man cannot part with his property except subject to an inherent right to have the worth of it at all events, why should not the drawer of a note or bill be at liberty to show want of consideration against an endorsee on the principle that no one can pledge his responsibility without having received the consideration he expected for it? Or why, on the supposed moral and public considerations that have been invoked in the discussion of this principle, should the vendee of a chattel be bound to pay for it though it turn out to be inferior in quality to what he expected it to be? It is because it would stop the wheels of commerce, were a series of such transactions successively unraveled to trace the defect to the author of it; and dealers must therefore take the risk of it for the premium of the expected profit. And may not dealers, as well as insurers, take the risk of an event which may have already happened? The creditor, in fact does take the risk of the bank's solvency, when he makes its notes his own without reserve. The assertion that it is always an original and a subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away; can be conceded no further than regards its genuineness. That every receiver of a genuine note supposes it to be equal to coin, is disproved by daily

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experience which shows that bank paper circulates by the consent of communities at its nominal value when it is notoriously below it. But why hold the payer responsible only for a failure of the bank declared before the time of the payment, and not for insolvency ending in an open failure afterwards? As a bank may be actually insolvent before it chooses to let the world know it, we must carry his responsibility further back than the period of failure, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse with the seeds of a mortal disease in him, might refuse payment of the price, though the animal's vigor and usefulness were still unimpaired; and were we to divest a bank note of the analogous principle which makes it pass for cash, a receiver of it might treat the payment as a nullity, by showing that the bank was actually, though not ostensibly, insolvent at the time of the transaction. It is no solution of the difficulty to say the receiver might instantly convert such a note into coin by presenting it at the counter for payment. To do that, might require a journey from Boston to New Orleans, and the bank might have stopped in the mean time; or it might have suspended its payments from motives of policy and with a certainty of being able to pay the last shilling; and who could determine whether it might not virtually do so? This distinction between previous and subsequent failure evinced by stopping payment, is an arbitrary and an impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper merely, imposing on the transferee no more than ordinary mercantile responsibility in regard to demand of payment and notice of dishonor: there is no middle ground. But to treat a bank note as an ordinary promissory note, would introduce confusion and endless litigation. The inconvenience of having a chain of disputes between successive receivers of it, would more than counterbalance the good done by hindering a crafty man from putting off his worthless note to an unsuspecting creditor. No human contrivance can prevent the accomplishment of secret fraud; and rules for the suppression of petty mischiefs have usually introduced greater ones.

The case of a counterfeit bank note, is entirely different. The conventional laws of trade extend to it only to prohibit the circulation of it; and they leave it, in all beside, to the rule of the common as well as civil law, which requires a thing parted with for a price to have an actual or a potential existence, (2 Kent, 468,) and a forged note, wanting as it does, the quality of legitimate being, is a non-entity. It is no more a bank note, than a dead horse is a living one; and what is without existence at the time, cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not a legitimate existence, though it be little worth, or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the maker's insolvency; and it remains a pro-

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mise to pay, though the promissor's ability to perform be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable to pay its note holders and depositors; and even where there is nothing left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which every thing like effects, and even the wreck of the bank itself disappeared in a few hours. But independent of that, the difference between forgery and insolvency in relation to the transfer of a bank note is as distinctly marked as is the difference betwixt title and quality in relation to the sale of a chattel.

What then becomes of the principle that a man shall not have parted with his property until he shall have had value, or rather what he expected, for it? Like many others of the same school, it would be too refined for the transactions of our times, even did a semblance of justice lie at the root of it. But nothing devised by human sagacity can do equal and exact justice in the apprehension of all men. The best that can be done is, in any case, no more than an approximation to it; and when the incidental risks of a business are so disposed of as to consist with general convenience, no injustice will, in the end, be done to those by whom they are borne. Commerce is a system of dealing in which risk, as well as labor and capital, is to be compensated. Nothing can be more exactly balanced, however, than the equities of parties to a payment in a medium whose worthlessness was unsuspected by either of them. The difference between them is not the tithe of a hair or any other infinitesimal quantity that can be imagined; and in a case so circumstanced, the law allows a loss from mutual mistake to rest where it has fallen rather than remove it from the shoulders of one innocent man to the shoulders of another equally so. The civil law principle of equality, however practicable in an age when the operations of commerce were simple, slow, and deliberate, would be entirely unfit for the rapid transactions of modern times: it would put an end to them altogether. No man can withhold his admiration of the civil law as a fabric of wisdom for its day, or deny that it has contributed largely to the best parts of modern jurisprudence; but all its materials of superior value have already been worked up in the construction of our own more commodious edifice, and if the cultivation of an acquaintance with it is to beget a desire to substitute its dogmas for the maxims of the common law — the accumulated wisdom of a thousand years' experience — it were better that our jurists should die innocent of a knowledge of it. This longing after its peculiar doctrines began with Mr. Verplank's commentary on the decision of the Supreme Court of the United States in *Laidlow* v. *Organ*, (2 Wheaton, 178,) and it was subsequently indulged by the supreme court of his own state, so far as to sap the foundation of its own sound decision in *Seixas* v. *Wood*, (2 Caines' Rep. 48). In *Laidlow* v. *Organ*, however, where the

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purchaser had refused to disclose his information that the article had risen in the market, there was room for at least a pretence of inequality in the circumstances of the parties; but where they have acted, as in our case, in equal ignorance and with equal good faith, even that pretence, flimsy as it was, is wanting, and the law, on principles of convenience as well as justice, refuses to interfere between them. It is, therefore, unnecessary to insist on the provisions of our statute of 1836, which enacts that, "it shall be lawful for the officer charged with the execution of any writ of *fieri facias*, when he can find no other real or personal estate of the defendant, to seize and take the amount to be levied by such writ, of any current gold, silver, or copper coin, belonging to the defendant, in satisfaction thereof: or he may take the amount aforesaid, of any bank notes or current bills, for the payment of money issued by any monied corporation at the par value of such notes." At least for purposes of seizure, then, bank notes, with us, are money; and had the sheriff returned that he had seized the notes in this instance as the defendant's property, instead of having seized the property itself, it would not have been pretended that the debt was undischarged. But though he returned the facts specially, the notes were received as cash by the plaintiff's attorney, after which, on no principle whatever could the transaction be thrown open. The plaintiff's case is an unfortunate one; but we could not relieve him of his burthen without placing it on the shoulders of those who would be equally unfortunate.

Judgment affirmed.

Superior Court of Cincinnati, September, 1841.

Strader and another *v.* Dugan.

The Law of River Navigation.

This was an action of trespass, brought to recover damages for so navigating the steamboat Danube, that she forcibly ran into and sunk the steamboat MacFarland. The plaintiffs were the owners of the MacFarland, and the defendant was pilot at the wheel of the Danube, at the time of the injury. At a former trial of this case, the plaintiffs obtained a verdict, but a new trial was granted, because the pilot at the wheel of the MacFarland, had been admitted to testify for the plaintiffs, without a release. The second trial, owing to the great number of witnesses, occupied six days.

The principal facts in the case were as follows: the collision took place about 1 o'clock in the morning of the 17th of June, 1839, after the moon had set, but when it was light enough for navigation, at a place in the Mississippi river, between Tennessee and Arkansas,

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called Walnut Bend, which is nearly in the shape of a horse-shoe. The Danube was descending at the rate of twelve or fifteen miles per hour, and the MacFarland ascending at the rate of six or eight. The collision took place about one mile below the head of the upper Bordeaux Chute, and the stage of water was such, that there was from seven to twelve feet in the chute, which is more than a middling stage. The Danube, with her bow, struck the MacFarland on her larboard side, just front of the cook house, nearly at right angles, and with such force as to cut her nearly one third through. She immediately backed out about her length, and then came up to take off the passengers and crew from the MacFarland, a few of whom, had, in the meantime, jumped into the river, and were drowned. Just as the Danube came up, the cabin separated from the hull of the MacFarland, and the hull sank. The time between the collision and sinking, was variously estimated at from one to five minutes. The width of the river at the place of collision, is about one mile, but a bar puts out from the Tennessee side, about two thirds of this width. The remaining one third, from the edge of the bar to the Arkansas shore, is deep water. The entire bend is from six to eight miles in length, and the bar from three to four miles. The main channel is about one hundred yards from the Arkansas shore. The current of the river in the bend, at that stage of water, is about three and a half miles per hour, and its direction is in a curve parallel with the bend. The two boats were seen by each other, at the distance of three miles or more, but it was proved, that no pilot in the night can determine with certainty, the position of another boat in the bend, at a distance of more than one mile, and probably not so far. When the two boats were within about one hundred yards of each other, and it had become nearly or quite impossible to avoid a collision, the big bells were rung, each hallooed to the other, and each boat stopped her engines, which were double. Which stopped first, was not clearly established, and there was some dispute as to whether either had stopped at all, but the weight of testimony was as above stated; and the Danube had probably prepared to back at the instant of collision. While she was taking off the passengers, her mate threw the lead, and found four fathoms, but soon after, the cry was "no bottom," the line being five fathoms in length. Outside of the bar, at that stage, the water was more than six fathoms. Some time after the collision, when the river had fallen sufficiently, the wreck was found to be lying near the outer edge of the bar, about one third of the width of the river from the Arkansas shore, with her head up stream, and in a direction parallel with the edge of the bar. At very low water, there was not more than four or five feet on the outside of the wreck.

Thus far there was not so much conflict in the testimony, as to leave any reasonable doubt. But, upon other points, there was very great contradiction.

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The plaintiffs insisted that there were *two rules* of river navigation, established as well by the general usage of pilots, as by their own intrinsic reason, a departure from either of which, without sufficient cause, would evince such negligence or want of skill, as to make the boat so departing, liable, if harm should follow. The first rule related to the *place* of the ascending and descending boats, and the second to their *conduct* on the approach of danger. As to the place, they held the rule to be, that in passing through a bend, the descending boat should keep the main channel of the river, in order to avail herself of the full force of the current; and the ascending boat should keep up round the point or bar, in as shallow water as is compatible with easy steering, say three or four fathoms, in order to avoid the force of the current, and, at the same time, shorten the distance. If boats could always observe this rule, there would be no danger of collision. But as each may have occasion to depart from this usual place for business purposes, and thus create a danger of collision, there is need of another rule to regulate the conduct of boats when such danger exists. This second rule they held to be, that whenever the position of the ascending boat is such as to render collision in the least degree probable, or when the descending boat is in doubt as to the actual position and course of the ascending boat, it is the duty of the descending boat to stop her engine at a safe distance, and float with the current, until the danger is past, or the doubt resolved, thus leaving the ascending boat to do the dodging, or, in other words, to take which side she chooses. If both boats should stop under these circumstances, the difficulty would remain the same. If both should attempt to avoid the difficulty by changing their course, as there cannot be on the river the same rule as on the road, of keeping to the right, they might both take the same course, and thus increase the danger, as we often see exemplified by persons on the side-walk. Hence the necessity that one should stop and the other go on; and the reason why the descending boat should be the one to stop her engine is, that her steam is usually not so high as that of the other, and instead of losing ground, as the other would, she still has the benefit of the current. The defendant, while he admitted that it would be well if such rules were established, denied that there was any such general usage among pilots, either as to place or conduct, that a departure therefrom, would render the boat so departing, liable for the consequences. On the subject of these rules, a great number of pilots were examined on each side.

In this view, it became material to determine as nearly as possible, the place of collision. The pilot of the MacFarland, and several other witnesses testified, that she was coming up in the usual place, near the edge of the bar, and that the Danube left the bend and came over to her, she heading to the bar as the Danube approached; and that the collision, in fact, took place on the outer edge of the bar. The plaintiffs insisted, that independently of this testimony, there

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were *two facts* which made this conclusion inevitable. One was the sounding immediately after the collision, when the depth was only four fathoms. The other was the place of the wreck when first seen. If the impetus of the Danube would have a tendency to drive the MacFarland farther on the bar, this was fully counteracted by the tendency of the current away from the bar. Consequently the wreck must lie, with respect to the bar, in a line nearly parallel with the place of collision. But, on the other hand, several witnesses on the Danube, swore that the MacFarland was not coming up round the bar, but close in the bend; that the Danube, seeing this, put out a little from the bend, so as to be from 150 to 200 yards from the Arkansas shore; that she kept this course until the two boats were within about 100 yards of each other, when of a sudden, the MacFarland left the bend shore, and came out almost directly across the bow of the Danube; and that the collision took place within 200 or 300 yards of the Arkansas shore. The plaintiffs insisted that this testimony was utterly irreconcilable with the two facts before mentioned, and hence concluded that these witnesses were entirely mistaken with respect to the position of the two boats. This very mistake of the pilot, evinced such a want of attention or skill, as would fix the liability upon the Danube. But even if it were not a mistake, and if the boats did come together where the defendant claimed, still the Danube was in fault for not having stopped her engine at a greater distance. It was conceded, however, that if the MacFarland was in the bend, and suddenly changed her course, which would otherwise have been safe, and attempted to cross the track of the Danube, the latter, not having reason to apprehend danger, was not in fault for not sooner stopping.

Much testimony was offered respecting the chute. To ascend through it, would cut off five or six miles. But nearly all the witnesses agreed, that the main river was the safest; that the chute was narrow, crooked, and full of logs and snags; that it was more dangerous by night than day; and that when there was only seven feet water, it was more dangerous than when there was twelve. The testimony as to the depth was conflicting. It ranged from seven to fifteen feet. But the plaintiffs insisted that under no circumstances, could they be required to deviate from the main river, because it was the safest; and if loss should arise in consequence of such deviation, the insurance would be forfeited; and still less could they be required to ascend this chute in the night, and at this questionable stage of water.

The plaintiffs did not attempt to assail the character of the pilot of the Danube, except by showing that he was comparatively a young pilot. But the defendants did assail the character of the pilot of the MacFarland, as to his qualifications. Though one of the oldest, and formerly one of the best pilots on the river, they endeavored to prove that his sight was impaired, that he was not cool and collected in times of danger, and that he left the wheel in this case, sooner than he should

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have done, and was too thoughtful of his own safety. But on most, if not all these points, the weight of testimony was in his favor; and the plaintiffs insisted that were it otherwise, his want of qualification would not excuse the Danube, unless the loss happened in consequence thereof.

Wright and *Walker*, for the plaintiffs.
Storer and *Fox*, for the defendant.

The COURT charged the jury very fully upon all the points discussed by the counsel. The issue submitted to them was, whether the plaintiffs lost their boat by reason of the negligent or unskilful navigation of the Danube. If the loss occurred through the fault of the MacFarland, or if it was a case of mixed or mutual fault, or if it was mere misfortune, without fault, on either side, the plaintiffs could not recover. If the rules of navigation, contended for by the plaintiffs, had been proved to have been established by the general conduct and usage of pilots, or if these rules, though not so established, were the clear dictates of prudence, in either case departure from these rules would evince such a want of care or skill, as would subject the boat, so departing, to the damages thereby occasioned, the measure of which would be the value of the property destroyed — in this case agreed to be twenty thousand dollars. The jury need take no time to consider whether the MacFarland should have ascended through the chute, for, under no circumstances, can a boat be required to adopt the more perilous course. The character of the pilots was no further in issue than as throwing light upon the question, which boat was in fault.

The jury, after an absence of about an hour, returned with a verdict for the plaintiffs, for twenty thousand dollars.

Court of Common Pleas, Massachusetts, January Term, 1841, *at Boston.*

PHIPPS *v.* DAVIS AND OTHERS.

Where the mortgagor of personal property removed from the town where the mortgage was duly recorded, it was held, that it was not necessary for the mortgage to be again recorded in the town to which the mortgagor removed.

THIS was an action of replevin, commenced in Middlesex. The replevied articles were mortgaged to the plaintiff by Joseph W. Bruce, who owned the property and lived in Framingham. The mortgage was dated February 29, 1840, and was recorded on the same day in the clerk's office of that town. A few weeks afterwards, Bruce removed his residence to Newton; took the property with him to that

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place, with the knowledge and assent of the plaintiff, and there made a *bona fide* sale of it to the defendant, of whom the plaintiff demanded it, claiming it by virtue of the mortgage, for condition broken. The demand not being complied with, this action was brought. The mortgage was not recorded in Newton. The Revised Statutes, ch. 74, § 5, require, that mortgages of personal property shall be recorded in the town where the mortgagor resides. The question here was, whether, after the removal of the mortgagor from Framingham to Newton, it was necessary to the validity of the mortgage, that it should be recorded in Newton.

The case was submitted to the whole court upon the above facts, and was argued at this term in Boston, by

Adams, of Framingham, for the plaintiff; and by

Bigelow, of Boston, for the defendants.

The Court, were of opinion, that a new record was not necessary; that if the mortgage was duly recorded in the town, where the mortgagor resided at the time it was given, such record was sufficient, as against all persons, notwithstanding the mortgagor subsequently changed his place of residence. Judgment for the plaintiff.

Court of Common Pleas, Massachusetts, July Term, 1841, *at Boston.*

Green *v.* Williams.

Liability of Postmasters.

This was an action on the case, brought to charge the defendant, as postmaster of New Bedford, with the loss of a letter containing forty-four dollars. The declaration alleged, that the defendant on the 12th day of April, 1840, was postmaster of New Bedford, and as such, was bound to keep, sort, mail, &c., all letters, &c. That on said 12th day of April, a letter containing two bills of $20 each, and two of $2 each, directed to the plaintiff, to the care of Rev. E. T. Taylor, Boston, was put into said office, into the defendant's care, &c., to be kept, mailed, &c. That the defendant, as such postmaster, was bound to keep, assort, mark, mail, &c., said letter; but did not, &c., but carelessly, &c., neglected so to do, whereby, &c.

The following facts were proved. An unsealed letter, containing bills, as described in the declaration, and directed as there set forth, was taken to the post-office at New Bedford, on said 12th of April, shown to the defendant's assistant, and his attention called to the bills. It did not appear, positively, that his attention was called to the exact number of the bills, but the witness swore that he showed the

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bills to the assistant, and told him the amount of the money. The letter was then sealed in the assistant's presence, given to him, and by him put upon the shelf with other letters. The assistant, who was called by the plaintiff, admitted having taken such a letter, and that there was money in it, (about $40,) but did not recollect that his attention was called to the fact of its being in four bills. The defendant and his assistant marked the postage of the letters together. This letter should have been marked with quadruple postage; and it was proved, by the post bills from Washington, that no letter of quadruple or any one of tripple postage, left the New Bedford office for Boston on that or the next day. This letter was directed to the plaintiff, to the care of Rev. E. T. Taylor, Boston. The plaintiff was out of the country at the time, but had told Mr. Taylor that the letter would be sent to his charge about the time in question. At this time, there was but one mail a day between New Bedford and Boston, which was not opened on the way, the keys being kept only at those two offices. All Mr. Taylor's letters, and all directed to his care, were, at that time, and had been, for eight years, taken to him by the carrier, and he never took, nor did any of his family take, a letter from the office. The New Bedford mail then arrived at about noon, and the carrier always waited for that mail to be distributed, and as soon as that was done, he left the office immediately with those letters which came to his charge. It was well known in the office, that the letters went by the carrier. The carrier always charged the postage of every letter which came to any one for whom he carried, before leaving the office. On this day there was no charge made by him of any letter to Mr. T. It was proved that all letters to Mr. T. were put immediately into the carrier's bag, and by him then charged to Mr. Taylor, and not put into any box, or place for inquiry and delivery. It was admitted, that the latter never came into the possession of Mr. Taylor.

R. H. Dana, Jr., for the plaintiff, did not contend, that the defendant could be charged merely from the fact that the letter was given into his possession and never reached its place of destination; but the plaintiff felt bound to satisfy, upon reasonable grounds of presumptive evidence, that the letter did not leave the New Bedford office at the proper time and manner. Although the postmaster general, being head of a branch of public police, is not liable either in this country or in Great Britain, for the negligence or delinquency of deputy postmasters or clerks, yet these deputies are themselves liable for any official negligence or other misconduct. Story's Bailm. 302; 2 Kent. Comm. 610; *Rowning* v. *Goodchild*, (3 Wils. 443); *Stock* v. *Harris*, (5 Burr. 2709.)

A postmaster, although not liable as a common carrier, is yet a bailee for hire, not of mere custody and houseroom, like a warehouseman, but of care and labor, to wit; in marking, mailing and delivering letters. He has a public office, to which no opposition is allowed, and as such officer, holds himself but as possessing a high degree of

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skill, and is bound to great care and diligence, and liable for a want of the same. If the plaintiff proves a loss of the letter, and makes out reasonably, by presumptions or otherwise, a case of default in the New Bedford office, then the burden of proof is on the defendant, as bailee for him of care and labor, to show that the letter was lost otherwise than by any negligence or other default of his own. *Platt* v. *Hibbard*, (7 Cowen, 500, note a); *Beardlee* v. *Richardson*, (9 Wend. 271); *Schmidt* v. *Blood*, (11 Wend. 25.) The delivery of the letter to the assistant, was a delivery to the defendant; or, at least, the letter must be presumed to have come into the defendant's possession in the course of the business of the office.

J. H. Clifford for the defendant. A postmaster, though liable for his own negligence, is not liable for the negligence or misconduct of his assistants. *Sane* v. *Colton*, (1 Ld. Raym. 646; S. C. 12 Mod. 482); *Whitfield* v. *Despencer*, (Cowp. 754); *Dunlap* v. *Monroe*, (7 Cr. 242); *Schroyer* v. *Lynch*, (2 Law Rep. 229); Story's Bailm. 301. He is a public officer, and his assistants are also public officers, their appointments being subject to the approval of the postmaster general, and they giving bonds to the government for their official conduct. Being a public officer responsible to the government, and constantly charged as a part of his necessary duty, with things of great value, he is only answerable for fraud or gross negligence, which is *dolo proximus*. Any other rule would make the office untenable. In this case, the plaintiff must not only show the loss of the letter, and that it was lost in the New Bedford post office, but must bring the negligence or misconduct home to the defendant personally. He also argued upon the facts of the case, that unless the exact contents of a letter were made known to the defendant, an underrating of the postage might naturally take place.

Dana, in reply. The English cases cited for the defendant are all instances of attempts to charge the postmaster general, *virtuti officii*, with the misconduct of his deputies in the local offices, without any charge or evidence of default in the general office. The case in 7 Cr. 242, does not decide, that a postmaster is not liable for the acts of his assistants, but simply rules a point of pleading that under a complaint against a postmaster for his own negligence, evidence cannot be introduced of the theft or misconduct of an assistant. Chief Justice Marshall says expressly, that the question of liability was not raised at all, but a very different question, and a merely technical one of the law of pleading. The case in 2 Law Rep. is one in which it was sought to charge a postmaster for thefts committed by his clerk; and the court say, that although a postmaster is liable for negligence or want of skill in his assistant, he is not so for his secret embezzlements or open criminal acts. This is an old principle in the law of master and servant. In that case all the evidence was of theft committed by the clerk, and it did not appear that the postmaster was implicated or was in any way negligent. In the case at bar there is no charge

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and no evidence on either side of negligence or misconduct of the assistant; and this question is not raised. The plaintiff's ground is, that if the jury are reasonably satisfied that the loss of the letter must have arisen from a failure in the discharge of the duties of the New Bedford office, and there is nothing to implicate any assistant or clerk, then the burden is on the postmaster to show that the loss happened otherwise than by his own negligence or default. If there had been evidence from either side to affect any subordinate in the office (perhaps even with mere negligence) then the party implicated would be the proper defendant, and the postmaster might not be answerable for such default, unless there was evidence or ground for belief that it was attended with negligence on his own part.

Williams C. J. charged the jury, that the rule for the performance of a postmaster's duty is ordinary diligence. He is bound to that and liable for a want of it. They might presume that the letter in question, after being put into the assistant's charge, came into the care of the defendant, in the course of the business of the office as testified to by the assistant. The plaintiff was bound to satisfy them not only that it was more likely that the letter was lost at New Bedford than elsewhere; but that it actually did miscarry there; or, that its failure was, without any reasonable doubt, to be attributed to that office. He did not rule anything upon the general liability of the postmaster for the acts of his assistants; but left the jury to presume in this case, if they thought the evidence of the course of business in the office would support it, that the letter came into the defendant's possession; and then called their attention to facts, charging them that they must find for the defendant unless satisfied that the letter miscarried at New Bedford. He then commented upon the evidence, told the jury to weigh the probabilities and possibilities of its loss elsewhere as well as there; and suggested, that unless the exact number of bills was brought home to the knowledge of the person marking the letter, the single fact of no letter's leaving the office, would not, of itself prove that the letter in question did not go and was not charged with triple postage on the waybill. An underrating of the letter would not make the defendant liable, but the waybill and the whole chain of facts must satisfy them that the loss occurred at New Bedford.

Verdict for the defendant.

Boynton and another *v.* Senter.

Where a defendant gave judgment to the plaintiff by default, in the middle of the term, the court would not refuse judgment until the last day of the term, on the application of a stranger.

In this case, the goods of the defendant had been attached on *mesne process*, upon a writ returnable at the present July term. The de-

fendant appeared by counsel, and gave judgment to the plaintiff upon the sixteenth day of the term. A creditor of the defendant filed a petition, that judgment should not be granted before the last day of the term, in order that the petitioner might then force the defendant to become an insolvent debtor under the provisions of the law of 1838. The petition stated, that the appearance of the defendant in said action was for the purpose of giving the plaintiff judgment before the last day of the term, with intent to prefer him, and was the consequence of collusion between the plaintiff and defendant. The petitioner, urged his motion, on the ground that the court had power to control their records and proceedings, and might refuse to render a judgment in a defaulted action at the first term, upon any day other than the last day of the term, as might seem just and proper to the court, although the parties might assent. That where the rendering a judgment upon a day other than the last day, would aid parties in defeating the intent of a statute, and injure third persons, the court would hold such a judgment not a just and proper one. That the law of 1838, seemed to regard the last day of the term as the day of rendering judgment, as any other day would render necessary one of the methods of compulsory insolvency, prescribed in the 19th section of said law.

The point was argued before the chief justice, at chambers, by

Homer for the petitioner, and by
H. H. Fuller for the plaintiff.

Williams C. J. This is an application to the discretion of the court. Upon general principles, the court have power to control their records and proceedings, and to render judgment or refuse to render judgment on any day of the term. This is usually done by the consent of the parties to the suit. Here a stranger to the suit comes in, and asks the court to interpose and refuse judgment, to which the parties have assented, in order to enable him to dissolve the attachment. If this application should be granted, I do not see, but that the court must hereafter refuse to render judgment before the last day of the return term, in all cases where an attachment has been made. If such refusal is necessary in order to carry into effect the insolvent law, I think such a provision should be made by the legislature. They have made no such provision, and I do not think the court in this case, would, on the whole, be justified in interposing. Let judgment be entered according to the former order.

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Supreme Judicial Court, Maine, June Term, 1841, *at Bangor.*

ANONYMOUS.

Under the Revised Statutes of Maine, executions may be renewed at any time within three years after the return day, notwithstanding the time limited by the old statutes under which they were issued, has expired.

By the provisions of the 105th section of ch. 115 of the Revised Statutes of Maine, "an *alias* or *pluries* execution may be issued within three years next after the day on which the last preceding execution was returnable." At the request of the clerk, the opinion of the full court was given to the effect, that this provision embraces executions which expired under the old statute at any time previous to the Revised Statutes going into effect, which executions may be renewed in the same manner as those issued on judgments rendered under the Revised Statutes, notwithstanding the provisions of the repealing act.

BAXTER *v.* BRADBURY.

In covenant broken for damages for breach of the covenant of seisin in a deed of warranty, nominal damages alone are recoverable if a good title is shown in the plaintiff at the trial, though he had no title at the time the action was commenced.

THIS was covenant broken on the covenants in a deed of warranty of a parcel of real estate. At the time of making the deed, the defendant had no title to the premises described in the deed, nor did he procure any prior to the commencement of the suit. Since that time, however, and prior to the trial, a valid title was obtained, and the deed was offered in evidence at the trial in mitigation of damages. The defendant was thereupon defaulted, judgment to be rendered for such damages as the full court might adjudge upon the law.

The case was argued at the June term, 1840, by *Sanborn* for the plaintiff, and by *John Appleton* for the defendant.

WESTON C. J. delivered the opinion of the court, that the usual measure of damages for a breach of the covenant of seisin is the consideration money and interest. This rule of damages is not however inflexible, but such facts as may control them will be admitted in evidence. In the present case, as the title obtained by the defendant enured by estoppel to the benefit of the plaintiff and thus rendered the title good in him, nominal damages alone have been sustained, and none others should be recovered.

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WHIPPLE v. GILPATRICK.

No demand is necessary in order to sustain an action for property sold on conditions which have not been complied with, though the action be brought against a *bona fide* purchaser, without notice, from the original vendee.

THIS was trover for a horse. The plaintiff formerly owned the horse and sold him to one Webber, on condition that he should pay for the same in the months of April, May and June then next, and that the horse should not be Webber's unless paid for. Webber subsequently sold the horse *bona fide* to the defendant, without notice of the real title, and the plaintiff in July finding it in his possession, claiming it as his own, sued out this writ without any previous demand. The only question raised, was as to the necessity of such a demand.

SHEPLEY J. at the trial, instructed the jury that no demand was necessary, and a verdict was rendered for the plaintiff.

The case was argued at this term by *Washburn* for the plaintiff, and by *John Appleton* for defendant.

EMERY J. delivered the opinion of the court, affirming the ruling of the judge at the trial. Judgment on the verdict.

Municipal Court of the city of Boston, June Term, 1841.

COMMONWEALTH v. FARLEY.

To authorize the court to quash an indictment on motion, the defect must be apparent on the record. If it arises from an imperfect description of the offence, it should be such, that even if the proof should sustain the allegations, the judgment would still be erroneous.

The Revised Statutes of Massachusetts have not altered the offence of perjury at the common law; and in every case of perjury committed in a judicial oath, or at the common law, materiality is still an element of the offence.

Where the materiality of the evidence is averred in the indictment, and there is nothing in the record which contradicts it, the indictment cannot be quashed for insufficiency.

If the evidence offered at a trial, is applicable to any one of the counts of an indictment, and tends to prove or disprove the issue in whole or in part; it cannot be rejected.

If a party in a suit, civil or criminal, undertakes to recite the tenor of a record, which must be *in totidem verbis*, the omission or alteration of a single word, so as to make it to mean something different from the original, is fatal, and it cannot, for that cause, be read in evidence.

As an application for the review of an action is addressed to the discretion of the court, they may hear any evidence which will tend to enlighten their discretion, and grant it on any terms which they shall deem reasonable.

S. D. Parker, attorney for Suffolk, for the commonwealth.

Fletcher and *Bartlett*, for the defendant.

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Circuit Court of the United States, Massachusetts, May Term, 1841, at Boston.

NEW YORK STATE MARINE INSURANCE COMPANY

v.

PROTECTION INSURANCE COMPANY.

Reinsurers may make the same defence and take the same objections, which might be asserted by the original insurers in a suit upon the first policy.

The party reassured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the costs and expenses which he has reasonably and necessarily incurred in order to protect himself and entitle him to a recovery over against the reinsurers. *A fortiori*, in a case where the reinsurers have notice that a suit has been commenced, and that they will be looked to for the costs and expenses, and make no objection.

But the costs and expenses must be incurred in good faith, and not wantonly and unnecessarily in a plain case of loss, where there is no reasonable ground of defence.

Whether notice to the reinsurers, of the commencement of a suit against the first insurers, is indispensable, *quære*.

ASSUMPSIT on a policy of reinsurance by the defendants for the plaintiffs, "lost or not lost, four thousand dollars on the brig *Evelina*, at and from her port or place of loading in Massachusetts, to Amsterdam, and at and from thence to New York." The parties agreed to a statement of facts for the opinion of the Court as follows:

During the voyage insured from Massachusetts to Amsterdam, the vessel sustained damage by perils of the seas, and put into St. Thomas in distress. She was there repaired with funds procured on bottomry, and proceeded to Amsterdam, where she was attached and sold by the holders of the bottomry bond. The owners claimed of their insurers (the present plaintiffs) a total loss, which they refused to pay, and a suit was instituted in New York, in which the owners recovered only a partial loss. The plaintiffs then claimed of their reinsurers, the present defendants, the amount they were obliged to pay to the owners by reason of the judgments recovered in New York, and also the expenses of costs and counsel fees incurred by them in defending the suit. The defendants denied their liability to pay anything under their policy, and a suit was commenced upon it. Afterwards a compromise was made of all the matters in dispute, except the liability of the defendants, as reinsurers, to indemnify the plaintiffs for the expenses incurred by them in defending the original suit, which were as follow:

Costs recovered against New York State Marine Insurance Company . .	$612 75	
Counsel fees paid by them . .	300 00	
Their own costs incurred in the suit .	99 99	—$1012 74.

If, in this statement, the Court shall be of opinion, that the plaintiffs

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are entitled to recover, the defendants are to be defaulted and judgment rendered for the plaintiffs for one half of said amount, with interest and costs. Otherwise, the plaintiffs to become nonsuit.

The cause was argued by *F. C. Loring* for the plaintiffs; and by *Rand* and *Fiske* for the defendants.

Story J. The only question which is submitted by the parties for the consideration of the court is, whether the plaintiffs are bound to pay any part or proportion of the costs and expenses of the suit, brought on the original policy against the plaintiffs, including the fees of attorneys and counsel in the cause. It does not appear to me to be a question, under all the facts, of any intrinsic difficulty. This is a case of reassurance, and nothing is clearer, upon principle and authority, than that, in such a case, the reassurers are entitled to make the same defence and to take the same objections, which might be asserted by the original insurers in a suit upon the first policy. The consequence would seem to be, that, as no voluntary payment by the original insurers would be binding or obligatory upon the reassurers, they are compellable to resist the payment, and to require the proper proofs of loss from the assured in a regular suit against them, so as to protect themselves by a *bona fide* judgment to the amount of the recovery against them under their reassurance. It was to avoid this inconvenience and delay, as well as peril, that the French policies of reassurance, as mentioned by Emerigon and Pothier, usually contain a clause allowing and authorizing the original insurers to make, *bona fide*, a voluntary settlement and adjustment of the loss, which should be binding upon the reassurers.[1] This, of course, puts the whole matter within the exercise of the sound discretion of the party reassured, whether to contest or to admit the claim of the first assured. But, independently of such a clause, it is clear, by the French law, that the original assurers must, in a suit brought against the reassurers, establish the same facts as would entitle the assured to recover upon the original policy.[2]

It seems to me, that upon the principles of the common law, under the like circumstances, the party reassured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the costs and expenses which he has reasonably and necessarily incurred in order to protect himself, and entitle him to a recovery over against the reassurers. I think that is the fair interpretation of the text of Roccus, although it is certainly somewhat indeterminate and general in its expression. *Iste secundus assecurator tenetur pro assecuratione facta a primo, et ad solvendum omne totum quod primus assecurator*

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[1] See 1 Emerigon Assur. ch. 11, § 9; Pothier D'Assurance, n. 50.; 2 Valin Com. liv. 3, tit. 6, art. 20, pp. 65, 66, 67. [2] Ibid.

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solverit.[1] The case of the ship La Tres-Sainte Trinité, cited by Emerigon,[2] is strongly in point. But it appears to me, that the doctrine must be taken with all its appropriate qualifications. The contestation of the suit by the original assurers, must be just and reasonable; the expenses must be fairly and reasonably incurred; the conduct of the original assurers must be *bona fide* and in the exercise of a sound discretion. Now, it is precisely in this view, that the consideration of notice of the suit becomes most important, even if it be not (as I am not prepared to say that it is) indispensable. If notice of a suit, threatened or pending upon the original policy, be given to the reassurers, they have a fair opportunity to exercise an election, whether to contest or to admit the claim.[3] It is their duty to act upon such notice when given, within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party reassured to compromise or settle it, they must be deemed to require that it should be carried on, and then, by just implication, they are held to indemnify the party reassured against the costs and expenses necessarily and reasonably incurred in defending the suit. If they decline to interfere at all, or are silent, they have no right afterwards to insist, that the costs and expenses of the suit ought not to be borne by them, as they are exclusively, under such circumstances, incurred solely for the benefit of the reassurers, and are indispensable for the protection of the party reassured. But expenses and costs wantonly and unnecessarily incurred by the party reassured in a plain case of loss, where there is no reasonable ground of defence, or where the reassurers do not sanction the contestation either expressly or by implication, can never constitute a just charge against the latter. This was the doctrine held by the supreme court of New York in *Hastie v. Depuyster*, (3 Caines R. 190); and I entirely accede to its authority, as conformable to the true principles of law in analogous cases.

In the present case, the deposition of Mr. Cook, taken since the statement of facts was agreed upon, is perfectly conclusive upon this point. The defendants not only had full notice of the suit; but were also informed, that they would be looked to for reimbursement of the costs and expenses of the suit. They made no objection; and interposed no offer of payment. Under such circumstances, they must be taken to have approved the resistance of the plaintiffs to the claim, and to have authorized the defence to be made; and, therefore, as there is not the slightest pretence, that the whole defence was not conducted with entire good faith, and sound discretion, they must pay their proportion of the costs and expenses, including the fees of the attorneys and counsel employed in the defence.

Judgment will be entered accordingly for the amount, as soon as it is ascertained.

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[1] Roccus De Ass. n. 12. [2] 1 Emerigon, ch 11, § 9.

[3] See *Ambre v. Carrington*, (7 Cranch, 308).

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Supreme Court of Pennsylvania, May Term, 1841.

THE TRUSTEES OF THE ENGLISH PRESBYTERIAN CONGREGATION IN THE BOROUGH OF YORK *v.* JAMES JOHNSON, SAMUEL SMALL, PHILIP A. SMALL, JACOB EMMET, JOHN EVANS AND WILLIAM R. MORRIS.

It is not an implied condition of a grant in trust for an unincorporated congregation by the style of "The Society of English Presbyterians and their successors in and near the town of York," that it shall remain connected with any particular church judicatory.

Therefore ruled, that when the general assembly of the presbyterian church in the United States was divided into two distinct fragments, each declaring itself to be the true general assembly, the persons composing the majority of this congregation did not forfeit their interest in the trust by refusing to acknowledge the authority of either of the conflicting judicatories.

THE record of this ejectment was removed by writ of error from the common pleas of York county into this court, where the errors assigned were argued by *Mason* and *Hambly* for the plaintiff, and by *Myer* and *Chapin* for the defendants. The nature of the title, the facts of the case, and the resulting points of law are fully stated in the opinion of the court, which (Huston and Kenedy, Justices, dissenting) was delivered by

GIBSON C. J. This ejectment is brought in the name of the corporation by a minority of the congregation, who, having withdrawn from its stated worship in the church building, insist that the majority have forfeited their corporate rights by dissolving the connexion of the congregation with the presbytery of Carlisle, and the primitive general assembly ; and to understand the grounds on which they have placed the controversy, it is necessary to state the case with its circumstances.

The congregation was formed in 1762 ; for it was proved at the trial that ministerial supplies were furnished it in that year by the presbytery of Donnegal, and subsequently by the presbytery of Carlisle under whose care it remained till the late convulsion of the presbyterian body induced it, while disclaiming all intention to become an independent church, to decline for the present, the jurisdiction of the conflicting judicatories. Its pulpit seems not to have been regularly filled till the installation of the Reverend Doctor Cathcart, in 1793. Such were its origin and ecclesiastical relations. The property in contest was conveyed by John Penn, Sen. and John Penn, Jr., late proprietaries of the province of Pennsylvania, to George Irwin, William Scott, and Archibald McClean "in trust for, and for a site for a house of *religious worship*, and a burial place for the said religious society of English presbyterians and their successors in, and near the said town of York ; and in confidence that they the said George Irwin, William Scott, and Archibald McClean, or the survivor of

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them, their or his heirs and assigns, shall and will permit and suffer the said lot or piece of ground with the premises and the buildings thereon, to be from time to time, and at all times thereafter, at the disposal and under the care, regulation, and management, of the same religious society and their successors in and near the town of York aforesaid; and for no other use, intent or purpose whatever." The church seems to have been built shortly afterwards, but it was not finished before the installation of Doctor Cathcart. The congregation obtained a patent of incorporation, in 1813, by the style of "the trustees of the English *presbyterian* congregation in the borough of York," but the legal title of the original trustees has not been conveyed to it, and the corporation is now, what the congregation were before, the party beneficially entitled. It will be perceived therefore, that the minority attempt to use the corporate name in order to oust the majority for an alleged forfeiture of their corporate rights, incurred, as it is supposed, by an application of the property to uses differing from those which the founders prescribed.

By the common law, he who gives the first possessions to a corporation is the founder of it, and entitled to the rights which the foundership gives (Viner's Abr. tit. Corporations H. 1). These consist in visitation, and correction of any misapplication of his bounty to purposes foreign to its original destination. What then was the purpose prescribed by the Messrs. Penn? It was no more than to carry out the generous policy of their ancestor, the founder of the province, who though rigidly attached to the principles of the society of Friends, was bigoted to no particular sect, but munificent to all, and who left each to apply his gifts to such pious uses as it might think fit. That his descendants followed his example in this instance, is shown by the terms of the trust which prescribed no form of doctrine or discipline, the beneficiary being described as the English presbyterian congregation, evidently to individuate it; and that subjection to a particular assembly, was not a condition of the grant, is proved by the fact that there was at that time no such assembly in America. The conveyance was executed in 1785; and the general assembly of the American presbyterian church, was constituted by the synod of New York and Philadelphia in 1788. It may be said that this congregation was connected with the elements of which the general assembly was formed, and that it is bound to conform to those subsequent changes to which its representatives in the synod assented. But were the founders, or the subject of their bounty, bound by terms to which the founders did not originally assent? The original terms could not be altered even with their own consent; for that they are as incompetent as any one else to add to, or take away from them was ruled in *Phillips* v. *Bury*, (Skin. 513) in which it was agreed that the founder, having given statutes to a college, cannot alter them unless he has reserved a right to do so. As tests of sectarian denomination and character, therefore, the divisions that have since taken place about the constitu-

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tion of the general assembly must be laid out of the case. The founders foresaw them not; and had they foreseen them, they would have left them to be dealt with by the congregation at its pleasure. The members of the congregation who erected the building, may be thought to have had a separate interest of their own in the purpose to which it was to be dedicated; but even they cannot be said to have erected it with a view to a particular union, for though it was not finished till after the assembly was constituted, it was begun, and the pecuniary responsibilities incident to the plan, were contracted previously. But by the common law, even subsequent contributors have no other right of direction than that which the founder has prescribed; for they come in and give their money on a basis already established, and they can neither add to it nor take anything from it. If then the Messrs. Penn, necessarily gave the ground in contest subject to the direction of a majority bearing the name of presbyterians, subsequent contributors with particular views, could not change the destination of it. But though no standard of discipline or faith be prescribed in the conveyance or charter of incorporation, I entirely concur in what Lord Eldon said in the *Attorney General* v. *Pearson*, (3 Merivale's Rep. 353) that "when a house is created for religious worship, and it cannot be discovered what was the nature of the worship intended by it, it must be implied from the usage of the congregation; and that it is the duty of the court to administer the trust in such a manner as best to establish the usage, considering it as a matter of implied contract with the congregation." I understand by this, that contemporaneous usage is evidence of an implied contract betwixt the founder and the congregation, and consequently of the purpose intended by him; but when, as here, neither the usage nor the purpose could possibly have existed at the time material to the question, subsequent usage cannot add to that which he intended. I agree with him also, "that when the members of a congregation become dissentient among themselves, it is not in the power of individuals to say we have changed our opinions, and you who assemble in this place for the purpose of hearing the *doctrines* and joining in the *worship* prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alterations which have taken place in our opinions." With all this and much more, I promptly agree when predicated of a congregation adhering as nearly as it can to the principles of its original faith, and not, as in that case, swerving from the tenets of trinitarianism and embracing the hostile tenets of unitarianism. I concede also, that subjection to a particular judicatory may be made a fundamental condition of a grant, as it expressly was in *Duncan* v. *The Ninth Presbyterian Congregation*, in which the trust was declared to be for "such congregation of persons as shall belong to the present reformed synod to which the Reverend Robert Annan's church in Spruce street belongs" — a case which was ultimately settled by the parties, but in which I differed from some of my brethren who

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thought the congregation had not lost its property in the trust by putting off its distinctive character and merging itself in the mass of the presbyterian church. That was a strong case; but it is altogether unlike the present, in which no such condition was expressed or implied. Even without an express condition, it might be a breach of the compact of association for the majority of a congregation to go over to a sect of a different denomination, though it were different only in name. For instance, the majority of a congregation of seceders, could not carry the church property into the presbyterian connection, though these two sects have the same standards and plan of government. But this principle is inapplicable to a change of connection as regards different parts of the same denomination or sect.

Now since the foundation of this congregation, an event has happened which the founders did not contemplate, and which would not have been provided for had it been foreseen. This was no less than a dismemberment of the presbyterian body, not indeed by disorganization of it or an entire reduction of it to its primitive elements, but by an excision, constitutional though it was, of whole synods with their presbyteries and congregations. There was not merely a secession of particles, leaving the original mass entire, but the original mass was split into two fragments of nearly equal magnitude; and though it was held by this court in *The Commonwealth* v. *Green*, (5 Whart. Rep. 531), that the party which happened to be in office by means of its numerical superiority at the time of the division, was that which was entitled to represent it and perform the functions of the original body, it was not because the minority were thought to be any thing else than presbyterians, but because a popular body is known only by its government or head. That they differed from the majority in doctrine or discipline, was not pretended, though it was alleged that they did not maintain the scriptural warrant of ruling elders. But the difference in this respect had been tolerated if not sanctioned by the assembly itself which, with full knowledge of it, had allowed the heterodox synods to grow up as part of the church; and it could not therefore have been viewed as radical or essential. We were called on however to pass, not on a question of heresy, for we would have been incompetent to decide it, but on the regularity of the meeting at which the trustees were chosen. I mention this to show that we did not determine that the excision was expurgation and not division. Indeed, the measure would seem to have been as decisively revolutionary, as would be an exclusion of particular states from the federal union for the adoption of an anti-republican form of government. The excluded synods, gathering to themselves the disaffected in other quarters of the church, formed themselves into a distinct body governed by a supreme judicatory, so like its fellow as to pass for its twin brother, and even to lay claim to the succession. That the old school party succeeded to the privileges and property of the assembly was not because it was more presbyterian than the other, but

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because it was stronger; for had it been the weaker it would have been the party excluded, and the new school party, exercising the government as it then had done, would have succeeded in its stead, and thus the doctrine pressed upon us would have made title to church property the sport of accident.

Before the American revolution, the church of England in America, as it was called, was annexed to the diocese of the bishop of London; and it will scarce be pretended that after its separation from it as a natural, but not inevitable consequence of our political independence, a single American parishioner might have recovered the church with its parsonage and glebe when there was any, from his dissentient brethren by insisting on a continuance of the ancient connection. Public opinion would not have borne it. Yet every episcopal congregation in America had been founded on the basis of that connection, and our independence in other matters had raised no unanswerable objection to its permanence, especially, after the bishop of London had procured an act of parliament to dispense with engagements by the American episcopal clergy that would have interfered with their political allegiance. It is true that the separation was effected with the assent of the mother church; but it was the parishioner here, and not the church abroad, whose consent was necessary to a dissolution of his ecclesiastical relation in order to impair his civil rights. Besides, the consent of the mother church was only formal, and given to the separation as to a measure which she could not prevent. She indeed conferred the episcopate and thus secured a continuance of the apostolic succession to the American episcopal church; but that might have been had from the nonjuring bishops in Scotland, as it was by Doctor Seabury, or from the Danish episcopal church, which indeed offered it on terms of signing the thirty-nine articles of the church of England, with the exception of their political parts. Had the offer been accepted, there would have been an adverse withdrawal of ecclesiastical allegiance—in principle the very case before us—and it will not be pretended that the majority of an episcopal congregation here would not have been at liberty, in that event, to form a connection with an independent episcopal church government without forfeiting the interest of each in their church property.

The revolution led to no severance of the presbyterian church in America from the church of Scotland, for there had been neither connection nor correspondence between them, and no illustration of the principle proposed can be had from that quarter; but might not one of these very congregations which were severed from the primitive general assembly here, have formed a new connection when driven from the old one, without forfeiting its interest in the church; or could a strictly orthodox minority strip them of it by organizing themselves as a congregation, on strictly presbyterian principles, and regaining the former connection? To cut off the dissenters in the first instance,

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and to confiscate their property for what was declared to be a heresy for the first time, would be an act of power, not of justice. It will not be denied that they were presbyterian in doctrine and discipline, or, that if they were not, they had been received as such into the bosom of the church; and what is the difference betwixt such a congregation and the one before us? It is that the one was turned out of the connection, and that the other withdrew from it voluntarily; but the minority of the one has as much right as the minority of the other to seize the church property for a violation of conditions, supposed to be implied by the act of association. It will not do to say the assembly sanctioned the separation in the one case and not in the other; for the assembly had no power over the civil rights of the parties, and could not impair them. Nor did it mean to impair them. On the contrary, it allowed what it considered to be the sound parts of those congregations to attach themselves to the nearest orthodox presbytery. This was done, most assuredly not to enable them to despoil their congregation brethren; but had they attempted to do so, it is hazarding little to say they would have been disappointed.

In a case like the present, it may be demanded, to what is the minority of a dissentient congregation to appeal? It might be replied, that for the contingency of revolution, it made no provision in its articles of association, and the law makes none; but that to the justice and forbearance of the majority of an association whose very object is to deal justly, love mercy, and walk humbly, it is to be supposed that the minority cannot appeal in vain. Nor has such an appeal in any instance been unsuccessful. The schism which a few years since shook the Methodist church to its centre, is heard of no more; and perhaps this happy termination of it has been effected in a great measure by the good sense of the parties in following the advice of this court in the *Methodist Church* v. *Remington*, (1 Watts, 227,) "to part in peace, having settled their claims to the property on the basis of mutual and liberal concession." And the same thing has been done with like effect by the original presbyterian congregation in Carlisle.

In conclusion, we are of opinion that no particular presbyterian connection was prescribed by the founders, or established by the charter; and that if such connection had been prescribed, there has been no adhesion to a connection essentially different, and that the breaking up of the original presbyterian confederation, has released this congregation from the duty of adhering to any particular part of it in exclusion of another. Instead of examining each specific error, it has been thought better to examine the principles on which the title depends; and though the jury here were inaccurately instructed that an action could not be maintained by the corporation on its equitable title, yet as other principles in the cause are decisive against its right to recover, the record is free from any error which could do the party an injury. Judgment affirmed.

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DIGEST OF ENGLISH CASES.

Selections from 9 Dowling's Practice Cases, parts 2 and 3; 2 Scott's New Reports, part 1; 1 Manning and Granger, part 4; 6 Bingham's New Cases, part 3; 9 Carrington and Payne, part 4.

ARBITRATION.

1. By an agreement of reference to arbitrators, with power to appoint an umpire, it was stipulated that the umpire should make his award within two calendar months *after* his appointment. He was appointed on the 29th June: and the time for making his award was afterwards enlarged by consent for three months. He made his award on the 29th November: *Held*, in time. (9 B. & C. 134, 603.) *In re Higham and Jessop*, 9 D. P. C. 203.

2. On trespass, the defendant pleaded not guilty, and a justification. The cause was referred by order of nisi prius, and the arbitrator awarded, that "as the defendant had not proved his plea, the verdict for the plaintiff ought to stand:" and then stated several reasons for his opinion, which were not satisfactory: *Held*, that the adjudication was sufficient, and that the sufficiency of the reasons assigned by the arbitrator could not be taken into consideration. *Archer* v. *Owen*, 9 D. P. C. 341.

3. Where an action on the case, and all matters in difference, being referred to an arbitrator, he awarded damages for an injury caused by the defendant to the plaintiff's property, by acts done on the adjacent property, and then (having the power to direct the mode of enjoying the property for the future) awarded that the parties should respectively enjoy the property as heretofore: *Held*, that the award was not final. *Ross* v. *Clifton*, 9 D. P. C. 356.

4. A cause and all matters in dispute were referred to the decision of two merchants and a barrister; the arbitrators met, and two of them agreed, on the merits, to find in favor of the plaintiff; but the lay arbitrators agreed to leave a point of law which had arisen, to the decision of the barrister. The latter decided that point in favor of the plaintiff, and executed the award at Birmingham, in accordance with his own opinions. On the next day, the award was executed in London by one of the lay arbitrators, also in favor of the plaintiff: *Held*, that the award was bad, as being a decision by one arbitrator, pursuant to a power delegated to him by the other arbitrators, they having no authority so to delegate. *Little* v. *Newton*, 9 D. P. C. 437.

BILLS AND NOTES.

1. The defendant, when on the eve of departure to join the army of Don Pedro in Portugal, obtained from the plaintiff, an agent of Don Pedro, the loan of his acceptance for 40*l*., payable forty days after date: *Held*, that these facts established an implied contract on the part of the defendant to indemnify the plaintiff against being called on to pay the bill at maturity.

Held also, that the statute of limitations began to run from the time of the payment of the bill by the plaintiff, not from the time when it became due. (9 Ad. & E. 633.) *Reynolds* v. *Doyle*, 2 Scott's N. R. 45.

2. A declaration on a banker's cheque, which had been refused payment, by way of excuse for the want of notice to the drawers, alleged that the drawees had not, at the time the cheque was drawn, and from thence to the time of its presentment, any effects of the

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drawer in their hands, nor had the drawer sustained any damage by reason of his not having had notice of the non-payment. *Held* good on general demurrer. (1 T. R. 405; 2 T. R. 317; 3 Campb. 334; 7 East, 359.) *Kemble* v. *Mills*, 2 Scott's N. R. 121; 9 D. P. C. 446.

3. In an action by the payee against the maker of a promissory note, although it is not competent to the defendant to controvert, or to vary by parol, the contract appearing on the face of the note, he may show that there was no consideration, or that the consideration has failed. (1 C. M. & R. 703; 1 M. & W. 212.) *Abbot* v. *Hendricks*, 2 Scott's N. R. 183.

4. Debt lies on a bill of exchange by an indorsee against his immediate indorser. (3 Price, 253; 2 Salk. 22.) *Watkins* v. *Wake*, 9 D. P. C. 242.

CONSTABLE.

In trespass against a constable for taking the plaintiff into custody on a charge of felony, under a warrant which described him by a wrong christian name: *Held*, that the warrant afforded no protection to the defendant, although the plaintiff was the person really intended to be taken, and therefore that the plaintiff was entitled to recover, without having demanded a copy and perusal of the warrant, under the 24 Geo. 2, c. 44. s. 6. (1 B. & Ald. 647; 4 M. & Sel. 360; 1 Bing. 424; 2 C. M. & R. 196.) *Hoye* v. *Bush*, 2 Scott's N. R. 86.

EVIDENCE.

1. Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter, cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor and assignee. *Flinn* v. *Calow*, 1 M. & G. 589.

2. In an action on the case for false representations on the sale of a ship, whereby she was classed lower in Lloyd's books than she would if she had been built of the materials described: *Held*, that although the sale took place under a written contract, minutely setting forth the build and dimensions of the vessel, (but omitting all mention of the materials,) the plaintiff was at liberty to give in evidence verbal statements and declarations made by the defendant touching the ship, pending the negotiation for the purchase, and before the written contract was entered into, amounting to a warranty that her frame was of a particular description of timber.

Such representations having been made by an agent without any express authority from the defendant, it was held that the judge was warranted in leaving it to the jury to infer from the subsequent conduct of the defendant — e. g. from his not having repudiated the warranty when apprised of it — that he was privy or impliedly assented to the misrepresentations of the agent. *Wright* v. *Crookes*, 1 Scott's N. R. 685.

INSURANCE.

A French law provides that "the vessel which shall have fished, either in the Pacific by doubling Cape Horn, or by passing through the Straits of Magellan, or to the south of Cape Horn, at sixty-two degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishery one half at least of its burthen, or if it can prove a navigation of sixteen months at the least:" *Held*, first, that a vessel which had caught fish to the amount of half its burthen in the Atlantic, then doubled Cape Horn and fished without success, and was lost within sixteen months after setting sail, had not complied with the conditions of the law, so as to be entitled to the bounty: and secondly, that the practice of the French government to allow the bounty under such circumstances was a mere matter of expectation, and did not constitute a vested interest which could be the subject of insurance. (2 N. R. 321; 11 East, 434.) *Devaux* v. *Steele*, 6 Bing. N. C. 358.

LARCENY.

1. A. was treating B. at a public house, and put down a sovereign, desiring the landlady to give him change: she could not do so, and B. said he would go out and get change. A. said, "You will not come back with the change." B. replied, "Never fear." A. allowed B. to take up the sovereign,

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and B. never returned either with it or the change: *Held*, no larceny, as A., having permitted the sovereign to be taken away for the purpose of being changed, could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it. *Reg.* v. *Thomas*, 9 C. & P. 741.

2. A landlord went to his tenant, who had removed all his goods, to demand rent amounting to 12*l*. 10*s*., taking with him a receipt ready written and signed. The tenant paid to him 2*l*., and asked to look at the receipt, which was given to him; he refused to return it, or to pay the remainder of the rent. The landlord swore that he never intended finally to part with the receipt unless on payment of all the rent: *Held*, a larceny, if the jury were of opinion that the tenant intended by fraud to obtain possession of the receipt; and that the fact of the part payment of the rent made no difference. *Reg.* v. *Rodway*, 9 C. & P. 784.

LIBEL.

In an action for a libel published in a newspaper, the plaintiff was allowed to give in evidence a repetition of the libellous matter in a paper published after the commencement of the action, for the purpose of showing the animus: and in leaving the case to the jury, the judge told them to look at the two paragraphs, and to give the plaintiff such damages as they should think him entitled to under the circumstances: *Held*, that the direction was right. *Barwell* v. *Adkins*, 2 Scott's N. R. 11.

LIEN.

B. bought, on account of the plaintiff, and with his money, certain exchequer bills, which he deposited in a box that he kept at his bankers' himself retaining the key. Whenever it became necessary to receive the interest on the bills, and to renew them, B. was in the habit of taking them out of the box, and giving them to the bankers for that purpose, and the new bills were afterwards handed over to B. and locked up by him in the box, the interest received being passed to the credit of his account. The bills themselves were never entered to his account. *Held*, that the bankers had not, as against the plaintiff, a lien on the bills for advances made by them to B. while the bills remained in their hands in the manner before mentioned. *Brandao* v. *Barnett*, 2 Scott's N. R. 96.

MASTER AND SERVANT.

A van was standing at A.'s door, from which his goods were being unloaded, and his gig was standing behind. B.'s carriage came up, and there not being room to pass, B.'s coachman got down, and laid hold of the van-horse's head; this caused the van to move, and thereby a packing case fell out of the van on the shafts of the gig, and broke them: *Held*, that B. was not liable for this injury, as the coachman was not acting in his employ at the time. *Lamb* v. *Palk*, 9 C. & P. 629.

PARTNERSHIP.

To a count in assumpsit on a bill of exchange against three partners, one of them pleaded that the bill was accepted by the other two in the name of the firm, without his knowledge or consent, for a debt due from them before he became a member of the firm: *Held*, that this plea was not sustained by evidence that the bill was accepted in discharge of a debt which arose partly before and partly after that partner joined the firm. *Wilson* v. *Lewis*, 2 Scott's N. R. 115.

PROCHEIN AMY.

The wife of a minor, who was in India, having committed adultery, his father procured himself to be appointed his prochein amy, and commenced an action for crim. con. without the son's knowledge or authority: *Held*, that he was entitled to do so, and that the judgment in that action would be a bar to any proceedings for the same cause of action by the son when of age. For a prochein amy is a guardian appointed by the court, who may sue without any authority from the infant. (1 Eq. Ca. Abr. 72; F. N. B. 26; Cro. Jac. 640.) *Morgan* v. *Thorne*, 9 D. P. C. 226.

RAPE.

In order to constitute the complete offence of rape it is not necessary that the hymen should have been ruptured. (1 East, P. C. 438. The case of R. v. Gammon, 5 C. & P. 321, is not law.) *Reg.* v. *Hughes*, 9 C. & P. 752.

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INTELLIGENCE AND MISCELLANY.

LEGISLATION IN ILLINOIS. A special session of the legislature of this state was convoked by the proclamation of the governor, to commence two weeks earlier than the regular session in December last. The embarrassed state of the finances and the accruing interest on the state debt, falling due in January last, to be provided for, were the causes requiring this measure. On the Saturday evening prior to the day of regular convention, the two houses adjourned *sine die*, having accomplished little or nothing towards the objects for which they were convened. On Monday morning, they re-assembled "in course." The proceedings of Saturday elicited much discussion, and no slight degree of feeling in the two political parties, was manifested, it being supposed that it was a *ruse* of the dominant party to compel the State Bank to a resumption of specie payments under the act of January 31, 1840. Whatever may have been the design, if any particular design there was, the bank and its branches resumed on Monday, continued specie payments for a few days, and again suspended. The order from the mother bank was accompanied by another, forbidding the further receipt of the state auditor's warrants, on which advances had been made for the accommodation of the holders.

The regular session was adjourned about the first of March last. A large number of statutes were enacted, a great proportion of which, were of a private nature. Among the more important, are those adverted to under the following heads.

Conveyances. It is enacted "that all deeds, mortgages, conveyances, powers of attorney, or other instruments in writing, of, or concerning any lands, or real estate within this state, which have, or may hereafter be made and executed, without this state, and within the United States, and which may hereafter be acknowledged and proved in conformity with the laws and usage of the state, territory or district, in which any of such conveyances or instruments have been, or shall hereafter be made and executed, shall be recorded or registered in the respective counties in this state, in which the lands, tenements or hereditaments, affected by any such conveyances or instruments, may be situate; and all conveyances or instruments thus acknowledged or proved, are hereby declared effectual and valid in law, to all intents and purposes, as though the same acknowledgments had been taken, or proof of execution made, within this state, and in pursuance of the laws thereof; *Provided*, that the clerk of any court of record within such state, territory or district, shall, under his hand and the seal of such court, certify that such instrument is acknowledged, or proved in conformity with the laws of the state, territory or district, in which it is so acknowledged or proved, and all deeds, mortgages, conveyances, powers of attorney, or other instruments in writing, of, or concerning any lands or real estate within this state, which have been heretofore recorded in the respective counties in which the lands or real estate, described in, or affected by such deeds, mortgages, conveyances, powers of attorney, or other instruments in writing, is situate, are hereby declared to be good and effectual, as notices to subsequent purchasers or mortgagees."

As this act is one of great importance to persons interested in Illinois lands, it is copied, *verbatim et literatim*, from the statute book. A similar law was passed in 1822, and continued in force until the statute of 1827. The passage of this act will facilitate the settlement of land titles, and obviate the necessity of a recurrence to chancery process, to perfect title papers. Titles in the "Military Tract," are very much involved, and will require, either the exercise of an

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extensive spirit of compromise, or a very general resort to litigation, before they will be settled.

Elections. All white male inhabitants above the age of twenty-one years, who have resided in the state six months, next preceding any election held in this state, may enjoy the right of an elector, *whether such elector has been naturalized or not.* If any one is suspected to be deficient in the qualifications of age and residence, or either, by any judge of election, or if his vote is challenged by any elector, who has previously voted at such election, it is made the duty of the judges to tender the oath of the facts of qualification to such person, and further, that he has not voted at such election.

Judiciary. The Judiciary system has been re-organized, the *old* circuit court being abolished, and five judges added to the supreme bench, making nine at the present time. The state was then divided into nine judicial circuits, a judge of the supreme court assigned to each circuit, and the old circuit system revived, *minus* the prior appendage of circuit judges. This movement, in its features and general result, bore no slight resemblance to that in Maine, a year or two since, being, in effect, nothing more or less, than the removal of certain judges, in some way or other obnoxious, and the transfer to the *new* court, of the unobjectionable.

Judgments and Executions. By prior statutes, a redemption, in cases of sales of real estate on execution, of one year to the debtor, and fifteen months to the judgment creditor, is allowed. An amendment now requires the latter, after the expiration of the year, to sue out execution on his judgment, place it in the hands of the officer, and redeem from the first sale by paying the necessary amount into the hands of the officer. The officer is then required to make a certificate of redemption, file the same in the recorder's office of the county in which the land is situated, advertise and expose the land for sale, as heretofore provided. At the sale, the amount paid for redemption, is to be deemed and taken, as a bid by the plaintiff in the execution, and if no one bids a greater sum, the land is struck off to him, and a deed executed to him by the officer forthwith, barring all further right of redemption. If a higher sum is bid, and the land struck off to such bidder, the excess is applied to the execution under which the redemption shall have been made as a credit, and a certificate of purchase executed to the new purchaser for a deed in sixty days. In case of a redemption from this sale, the officer is bound to proceed in like manner, while there shall be a judgment creditor disposed to redeem as before provided. After the lapse of any sixty days without redemption, a deed follows.

All certificates under this act, and the act to which it is an amendment, are, by this act, made assignable, so as to vest all the rights by virtue thereof in the assignee. A further act prescribes that no estate, personal or real, shall be sold on execution, unless first appraised by three householders, one chosen by the plaintiff, one by the defendant, and a third by the officer; or in case of neglect or refusal of the plaintiff, or defendant, or either of them, so to elect, the officer selects. These appraisers are required "fairly and impartially," to value the property, "having reference to its *cash* value." No sale can be made, unless two thirds of the appraisal is bid, but the process must be gone over, so long as the creditor may desire. There is this proviso, however; the plaintiff may elect on what property he will have his execution levied, except the land on which the defendant resides, and his personal property, which shall be last taken on execution. In cases where execution issues from a court not of record, the plaintiff may elect on what personal property he will have the same levied, excepting and reserving to the defendant, such an amount and quantity of property as is now exempt from execution by the laws of this state. This act applies to all sales of mortgaged property, whether the foreclosure be by judgment at law, or decree in chancery, and extends only to judgments rendered prior, and to be rendered on any contract or cause of action accruing prior to May 1, 1841. This is usually termed the "*stay* law."

License of Foreign Insurance Company Agencies. No agency of a foreign insurance company, can be maintained in this state, except by license obtained on the payment of two hundred dollars annually. Every infraction revokes a forfeiture of five hundred dollars.

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Schools. Provision has been made for the organization and maintenance of common schools, by statutory enactments, protecting and preserving school lands, prescribing the mode of electing school commissioners and defining their duties, the selling and disposing of the lands, the loaning of the school fund, &c., &c. The new statute is quite *lengthy* in its details, and does not here admit of a proper analysis. Suffice it to say, that ample provision seems to have been made for these "bulwarks of the nation."

Seminaries of Learning. Acts were passed, incorporating eight academies, one college, one seminary, and two universities.

Death of General Bogardus. The death of this venerable and distinguished member of the New York bar, in his 70th year, occurred recently at his residence in that city. He commenced the practice of law in New York nearly fifty years ago, — having passed a long and laborious clerkship of seven years in the office of the late General Hughes. He accepted a command during the last war, and his courage and military skill have always been properly appreciated by his fellow citizens. "The war ended, General Bogardus returned to his accustomed position in civil life, and its enjoyments, so far as his professional employments admitted of relaxation. But his attention to his clients was unremitted, unsparing and severe to himself. He was several times, both before and after the war, chosen to representative situations in the city and state councils. But his pleasures and his anxieties called him to the courts, and to his professional pursuits, to which he sacrificed his ease, his domestic comforts, and finally his health and life. As he advanced in years he became more and more devoted to his clients, and their varied and perplexing concerns, and took a more frequent stand in the highest judicial tribunals. Often and earnestly was the advice given to him by his friends to retire, at least for a time, that his constitution might regain its natural spring and energy. But he as steadily and perseveringly declined, until at last, at the advanced age of seventy years, the ordinary limit of human life, he yielded up his earthly honors and his spirit together. All allusion is purposely omitted to his more private and endearing relations of husband and father, in which, however, he was altogether exemplary and indulgent; and also to his opinions and feelings on the greatest concern of human life, namely, that unchanging state upon which he has now entered. It is known of him that upon subjects of that nature he was tender, and serious, and altogether tolerant and forbearing concerning the systems and belief of others. His regard for the sacred scriptures and religious institutions was steady and conscientious. It has not been the intention of the writer, nor is it in his power, under the circumstances of the moment, to give a full or connected biography of the subject of these remarks, but only a hasty sketch; and in connection with that design it is proper to state, that the last public act of his life was calculated greatly to accelerate the progress of disease then commenced. Reference is had to the funeral obsequies of General Harrison, late president of the United States, in New York, in April last, on which occasion General Bogardus acted as the chief marshal, by appointment of the committee of arrangements. He was much the most interesting character in the procession that took place. His feeble condition of health was known to his friends, but unacknowledged by himself, and during that entire day, and notwithstanding the prevalence of a violent storm of rain and snow, he remained exposed, to the last, attending to the duties undertaken by him, and no doubt thereby shortened his valuable life."

Law against Railing and Scolding. In examining the records of the general court of Massachusetts recently, we noticed the following law, made in 1672: Whereas there is no express punishment (by any law hitherto established) affixed to the evil practice of sundry persons by exorbitency of the tongue in railing and scolding; It is therefore ordered, that all such persons convicted before any court or magistrate, that hath proper cognizance of the case, for railing or scolding, shall be gagged or set in a ducking stool and dipped over head and ears three times in some convenient place of fresh or salt water, as the court or magistrate shall judge meet.

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MONTHLY LIST OF INSOLVENTS.

Name	Occupation
Boston.	
Austin, Henry,	Housewright.
Alker, Thomas,	Stable keeper.
Bartlett, William,	Merchant.
Birdsall, Edward M.,	Housewright.
Churchill, William,	Fish dealer.
Hastings, Joseph S.,	Crockery ware dealer.
Heilge, Charles F.,	Confectioner.
Lyford, Thomas,	Trader.
Oakes, William H.,	Trader.
Oliver, Ebenezer,	Shoe dealer.
Saunders, Edwd. W., (M. S. Brooks & Co.)	Leather dealer.
Seymour, Thos. H.,	Master mariner.
Becket.	
Tillotson, Saml., Jr.,	Yeoman.
Bradford.	
Dresser, Leonard P.,	Cordwainer.
Cambridge.	
Warner, John S.,	Husbandman.
Edgartown.	
Vincent, Harrison,	Yeoman.
Fairhaven.	
Parker, Sylvanus T.,	Boat builder.
Groton.	
Perham, Charles O., Smith, Ephraim, (of Lowell,)	Stone masons.
Lee.	
Allen, Joseph B.	
Lowell.	
Fuller, Porter,	Laborer.
Putnam, Maria,	Single woman.
Russell, David P.	
Smith, Ephraim, Perham, Charles O., (of Groton,)	Stone masons.
Lynn.	
Mansfield, William,	Bricklayer.
New Bedford.	
Dexter, Thomas S.,	Mariner.
Salem.	
Sumner, James S.,	Morocco dresser
Standish.	
Ford, Joel C.,	Yeoman.
Washington.	
Chaffee, Nathan M.,	Yeoman.
Woburn.	
Fox, Warren,	Tanner.
Stearns, Charles B.	

TO READERS AND CORRESPONDENTS.

The first article in the present number, containing an account of the case of Jacob Leisler, who was tried and condemned in New York for high treason, in 1691, is taken from the first volume of the work on American Trials, to which we referred last month, as being in press. The plan of that work is a union of the elaborate State Trials of Howell, and the sprightly Causes Célèbres of France, the cases being thrown into a narrative form and illustrated by all the facts relating to the subject, which occurred previously and subsequent to the trials. The work, being intended for popular reading, will be divested of the technical forms of legal proceedings as far as is consistent with just statements of the cases; the object will be to present histories of the trials rather than the trials themselves. The volume now in the press, relating to trials which occurred before the American revolution, will soon be published.

The article in our last number respecting the case of Alexander McLeod has, we are glad to know, been favorably received by the profession. In accordance with the wishes of several distinguished jurists and statesmen, the article has been reprinted in a separate form, with the addition of notes and further illustrations by the author.

The last number of the Law Library contained the conclusion of Shelford on Marriage and Divorce. We learn that it will be followed by Cross on the Law of Lien and Stoppage in Transitu, and by a recent work on the Bankrupt Law of England, with the recent law of congress on that subject.

We intended to have reprinted, in the present number, the new Bankrupt Bill; but its very general publication in the newspapers renders this course undesirable for the present, more especially as some amendments may be made in the law before it goes into operation.

We have received the Catalogue of the Law Library of Harvard University, recently published. It makes a handsome volume of more than two hundred pages.

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THE LAW REPORTER.

NOVEMBER, 1841.

REMARKABLE TRIALS. — No. V.

MURDER — CASE OF ABRAHAM THORNTON.

In May, 1817, a workman residing in Birmingham, England, in passing along a footpath near the workhouse of Erdington, discovered on the side of a pit in the field, a bonnet, a pair of shoes and a bundle of clothing. One shoe was covered with blood, and in going down from the pit about thirty yards, he observed blood on the ground in the form of a triangle, zigzag, for about two yards, and also a large quantity of blood near a bush. Upon his information search was immediately made in the pit, and a body was discovered which was recognised as that of Mary Ashford, a smart and pretty country girl of twenty years, who had been living as a servant with her uncle. Upon an examination of the body by a surgeon, it appeared that the deceased had been violated immediately previous to her death. It was his opinion that her death was occasioned by drowning. It also appeared that she had the menses upon her, and it was apparent that they came on in a moment unexpected to herself. An investigation was immediately made as to the history of the deceased on the day previous to her death, and, from a statement of Hannah Cox, it appeared that the deceased came to a Mrs. Butler's, on May 26th, the day previous, on her way to Birmingham market. She had with her a bundle containing a clean white frock, a white spencer, and a pair of white stockings. She returned from

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Birmingham about six o'clock on the evening of the same day, changed her dress, leaving the clothes she took off, and then went with Hannah Cox to a dance at Tyburn. They left the dancing room at 12 o'clock, accompanied by two men — Benjamin Carter and Abraham Thornton — and proceeded together for some distance, when they separated, and Carter and Cox proceeded alone, leaving Thornton and the deceased together. Hannah Cox went home and went to bed. She said that in the morning, about *half past four o'clock*, the deceased came into her room, in the same dress which she had on the night before; her dress was not disordered; she appeared very calm, and in good spirits; she changed her dress, put on her pink frock which she had on the morning before, her scarlet spencer and black stockings, but retained her shoes; she lapped her boots up in her pocket handkerchief, and put the rest of her dress and some marketing things in a napkin. In about a quarter of an hour she left and was seen by two men who said it was *then* only about a quarter past four o'clock. At half past six o'clock, her violated body was found in the condition above mentioned.

Under these circumstances, Abraham Thornton, who was the person last seen with the deceased, was suspected of her murder, and, on his arrest, other suspicious circumstances came to light, which were considered inconsistent with his innocence. Upon his examination, he stated that upon separating from Benjamin Carter and Hannah Cox, he and the deceased went on as far as one Freeman's; they then turned to the right, and went along a lane till they came to a gate and stile, on the right hand side of the road; they then went over the stile, and into the next piece, along the foot-road; they continued along the foot-road four or five fields, but he could not exactly tell how many. He and Mary Ashford then returned the same road; when they came to the gate and stile they first got over, they stood there ten minutes or a quarter of an hour, talking; it might be then about three o'clock; whilst they stood there a man came by. He and Mary Ashford stayed at the stile a quarter of an hour afterwards; they then went straight up to Freeman's again, crossed the road, and went on towards Erdington, till he came to a grass field on the right hand side the road, within about one hundred yards of one Greensall's; Mary Ashford walked on, and he never saw her after; she was nearly opposite to Greensall's.

Thornton was committed for trial, and was tried at Warwick in August, 1817. The evidence against him was entirely circumstantial, but the circumstances were quite corroborative and conclusive, and were affected only in a single particular — that of *time*.

The situation of the pit where the body was found, and the condition of the body were described by the following witnesses: —

George Jackson. — I live in Hurst-street, Birmingham; I was going beyond Penn's Mills to work; I came by the workhouse of Erdington; I turned out of Bell lane into the footpath leading to Penn's; going along I came to a pit; I

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observed, when I came near, a bonnet, a pair of shoes, and a bundle, close by the top of the slope that goes into the pit; I saw one shoe was all blood; then I went towards Penn's Mills to get assistance; going down from the pit, about thirty yards it might be from it, I observed blood, a triangle, zig-zag, for about two yards; I went a little further, and saw a lake of blood by the side of a bush; I saw more to the left on some grass.

William Lavell. — I went up to the pit in consequence of what I heard from Jackson; footpath through the harrowed field; went along it going from the pit towards Erdington; observed first the footsteps of a man to my right hand; a dry pit at the corner of that field to the right; the footsteps were turning up to that corner; I went further up along the footpath towards Erdington; in about eight yards distance I discovered footsteps of a woman to my right; I traced the footsteps of both from those two spots; they got together in about fifteen yards, bearing to the hedge; they were both of them running by the sinking in of the ground and the stride; traced the footsteps of both the man and woman running together to the corner where the dry pit was; there I observed them doubling backwards and forwards, dodging about.

I traced them on to the grass at the corner of the piece by the dry pit, at the right hand corner; then the footsteps went towards a water pit in the harrowed field; I traced them to that pit on the harrowed ground; they appeared there to be walking; sometimes the woman's feet off, and sometimes on; in one place both off together, and on the grass; traced them down to that water pit; I could trace them no further, the woman's, but the man's I did to the hard road; she was on the grass nearest the pit; appeared walking on together.

I then traced the footsteps of a man the contrary way from the footpath; appeared running on the harrowed ground; no other footsteps that way; I traced them three-parts across the field towards the dry pit; then they turned to the left as I was pursuing the track; then I traced across the footpath and tò the gate at the far corner; crossed the footpath in the middle of the field, footsteps of a man running quite to the cross corner; no woman's steps; I could trace them no further than to that gate; it was clover; the footsteps went along no regular road, but it would make a shorter cut.

I went with Joseph Bird with the prisoner's shoes first; took both; they were right and left shoes; and the man's footsteps appeared to be made with right and left shoes; we tried the shoes on the footsteps; we tried them with a dozen footsteps, I suppose, in different parts; those shoes exactly fitted those footsteps on both sides the footway; I have no doubt the footsteps were made by those shoes; we tried them with the footsteps that turned off the footpath, about eight yards from the woman's, and where they were running together, and where the doubling was; in all those parts they agreed; some nails were out of the side of one shoe; we observed two nails; footstep over a bit of a short stick, which threw the foot up; saw mark of two nails; we tried the shoe with that footstep; two prints of the nails in the trace; small nails in the shoe; we could hardly trace them.

Went with Mary Ashford's shoe afterwards with Bird; compared it with the woman's footsteps that turned off the path to the right; and where they appeared running, and where the doubling was, and where walking; the shoes agreed with the footsteps; no doubt the footsteps were made by those shoes; I saw one footstep, appeared to be the foot of a man near the slope, near the edge; none down the slope; it appeared to be the left foot sideways; inclined towards the slope; I did not compare the shoe with that; I saw the bundle by the side of the pit; a pair of shoes and a bonnet; those shoes I compared with the woman's footsteps; where the blood was, was about forty yards off the pit; I saw some nearer, about fourteen yards nearer the pit; I traced it for fourteen yards; a train of blood; across the path on the clover towards the pit where the body was found, no footsteps; about a foot from the footpath; the dew was on the clover then; it came to drops at last; when it first came to the clover a regular run.

Upon his cross-examination, he said — I began to trace the steps about seven o'clock; about one on the same day it might be, I compared the steps with the

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man's shoes; I covered with boards two tracks of the man's and one of the woman's before the rain; from the depth and strides only I considered them running or walking; one hundred and forty yards from the footpath to the dry pit; near the same length to the other; blood forty yards off the pit was in the same close where the body was found; one footstep close to the declivity; I observed that footstep as soon as I got there first; I did not observe marks of blood in the harrowed field; no footsteps of any sort where I traced the blood fourteen yards; a footpath by; the track of blood crossed the path, but went in a straight line towards the pit.

Joseph Bird. — I went to the pit; found Lavell there; I accompanied him into the harrowed field to trace the footsteps; took the prisoner's and deceased's shoes for comparing them with the footsteps; footsteps of a man on the right going towards the dry pit; farther on from the footpath saw woman's steps to the right; a few yards up they came in contact; went towards the dry pit; they appeared to me as if two persons had been dodging there; they appeared to me to be the footmarks of persons running; the length of the strides is one thing; straight in the toe of the woman's, as if raised; the man's very deep; the heels very deep, as the appearance of a heavy man running.[1]

At the corner they went down the hedge side towards the pit at the bottom of the harrowed field; there they seemed to be walking; the strides were shorter, the impressions not so deep; I saw them down to the pit; the woman was sometimes on the grass, sometimes on the ploughed field.

Afterwards traced the footsteps of a man up the field; when near the dry pit went straight across the footpath to the further corner gate, footsteps of a man only running; I compared the prisoner's shoes with these last footsteps, they exactly corresponded; both sides the footpath, and compared them with those of the man where he turned out before he joined the woman, and after he had joined her; they all corresponded; I compared them first with the right footstep; right and left shoes; I kneeled down to blow the dirt out, and see if any nail marks; I observed two; across the foot near the small, a bit of rotten wood had the outside of the right side a little up; the impression of that side not so deep as the other; I observed two nail marks on that side; nailed round the toe; then a space; then nailed again on the outside; the two first nearest the toe after passing the space; I marked the first nail mark; kneeled down; it exactly corresponded with the shoe; I saw at the same time the second corresponded; it may be half an inch between. I compared the woman's shoes, they exactly corresponded, — in different places; corresponded in every instance exactly, where the running was; leather of the shoe was rather raised in places by being wet; they corresponded; the shoes were not exactly there alike; the impressions varied accordingly; I applied the shoes to the impressions both to the man and the woman; I have no doubt the impressions were made by those shoes; we made these examinations on the 27th; the man's about one o'clock, the woman's about ten or eleven the same day.

Joseph Webster. — I live at Penn's; the mills belong to me; saw the body when just brought to the edge of the water; I observed a considerable quantity of blood forty yards off the pit; a round space of blood as much as I could cover with my extended hand; the impression of a human figure on the grass on that spot; the arms and legs appeared to have been extended quite out; a very small quantity of blood was about the centre of the human figure, and the other at the feet; I observed what I considered to be the mark of knees, toes, and large shoes; I judge them to be marks made by the same person; the lake of blood was much coagulated; that was the part at the feet; I traced the blood for ten yards from that spot towards the pit.[2] By the stile farther from

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[1] Thornton was a stout athletic man.

[2] It was the impression on the spot that the girl fainted during the violation, and that the violator, alarmed for his safety, and unwilling to run away or expose her and himself in that state, carried her in his arms and threw her into the pond. The traces of blood without her footsteps were adduced as proof.

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the pit, in a continuance of the footpath, an impression as if one person had sat down on the other side of the stile, just in the next field, the other way from the harrowed field; I returned in about an hour.

In the harrowed field I perceived the traces of a man's and woman's foot; Bird showed them me; I sent for the woman's shoes, and compared them with the marks; they perfectly corresponded; not a doubt they were made by those shoes; they were stained with blood outside the shoe, but inside the foot; afterwards I went to Lavell's to examine the body; the spencer was taken off, and there was on each arm what appeared to me the grasp of a man's hand; I went to Mrs. Butler's on the morning of the 27th to examine her (Mrs. Butler's) clock; I compared it with my watch; hers was forty-one minutes faster than mine; I saw the clothes on the body when taken out of the water; the hind part, the seat of the gown, in a very dirty state; blood was on the gown.

Fanny Lavell. — Body of the deceased was brought to my house; I undressed her; no blood on the black stockings; only one thin petticoat — dimity; no flannel on, so that the blood on it would easily communicate to the rest of the dress.

Thomas Dale. — This was the bundle of things delivered to me; spencer appears quite clean; a good deal of blood about this gown; stockings bloody almost all the way; she had no cloth on, or preparation for the state she was in.

Mary Smith. — I assisted in examining the body, about half-past ten that morning; the body was not cold; marks of fingers appeared on each arm. I examined the lower parts of her body, they were in a very bloody state; whether it was a monthly evacuation or blood from violence, I cannot tell; she had no cloth on.

It also appeared in evidence, that the prisoner danced with Mary Ashford at Tyburn. He asked a witness who she was, and said he had formerly had connexion with her sister and "would with her or die by it." The prisoner was somewhat intoxicated when he left the dancing room. It also appeared, that when his person was examined, after his arrest, his clothes were bloody, and he owned that he had connexion with the girl on the evening of her death, but knew nothing about the murder.

It thus appeared, that the prisoner parted from Mary Ashford before she returned to Mrs. Butler's, and there was no direct evidence that he ever again met her. But when did the connexion, which the prisoner acknowledged he had with the deceased, take place? Was it before her return to Mrs. Butler's, or afterwards? If before, then the prisoner's story might be true, that he did not meet her afterwards. It was essential to his innocence that this fact should appear. Her appearance, however, on her return to Mrs. Butler's rendered it quite improbable that the connexion had then taken place. On the other hand, it appeared that the stockings which she took off at Mrs. Butler's and put in her bundle were bloody, while those which she had on after her death were not bloody at all. The dress also which she took off at Mrs. Butler's was found to be very bloody.

But what made strongest in favor of the prisoner and undoubtedly caused the jury to acquit him, was the proof of an *alibi*, which appeared to the judge quite conclusive. It was clear by the testimony of three witnesses, that when Mary Ashford left Mrs. Butler's, it was at least a quarter past four o'clock (Hannah Cox made it almost five

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o'clock) and the place where the body was found was at a considerable distance from there. Now it was proved by several witnesses, that they saw the prisoner a mile and a half from the pit where the body was found, at *half past four, or a quarter to five o'clock.*

This was considered by Mr. Justice Holroyd, who tried the prisoner, as clear proof of an *alibi*, and the jury returned a verdict of not guilty after a few moments consultation.

This trial caused immense excitement at the time of its occurrence, and the result of it was much declaimed against by all classes of the community, so fixed was the opinion that Thornton was the murderer of the unfortunate woman. So great was the clamor, that Edward Holroyd, a son of the judge, published the trial, accompanied by observations and an exact plan. He made several hypotheses in regard to the death of Mary Ashford, one of which was that she committed suicide, upon reflecting on the consequences of what had passed. Another was, that her death was by accident. Upon this point he remarks as follows: —

"But although her probable self-destruction cannot be urged as a ground for the acquittal of Thornton, yet another conjecture as to the cause of her death is worthy of consideration, arising from the placing of the bundle on the pit bank, close to the footpath side, in her way home to her uncle's, and from the taking off of her shoes. In the bundle were her half boots, the only part of her daily dress she had not resumed. One of her dancing shoes, with which she was returning home, upon her feet, being all blood, and the other bloody, who can say whether, startled with observing, as she walked, that blood upon it which would be visible to persons meeting her on the road, and to her uncle on her return home, she might not have put down her bundle, and taken off her shoes and bonnet, in order to take out and put on her half boots instead of her bloody shoes? And what is more probable than that she should do so? If that was the fact, when the exhaustion and fatigue she had just gone through in her walk (twelve or thirteen miles) to Birmingham and back the day before, her dancing at night, her want of sleep and rest afterwards, the circumstances attending the connexion that had taken place between her and Thornton, her loss of blood, and want of nourishment, for none was on her stomach when her body was opened, what is more probable then that in sleeping or turning to take out her half boots, in order to put them on, on the top of a bank of a very sloping pit side, when the surface of the water was so much as four yards below the pit bank, she should by an inadvertent step backward, or otherwise, slip in, or should turn faint and giddy and so tumble in."

The case is attended with great difficulties in any point of view. On the supposition that the violation and murder of Mary Ashford took place by Thornton after her visit to Mrs. Butler's, there are one or two circumstances which it is difficult to explain. She left that house as late as a quarter past four o'clock. According to the supposition that she was murdered by Thornton, she had to cross the harrowed field, to be met by him, then to run away and be overtaken, and then, after the criminal intercourse had taken place, to be carried from thence to the pit and thrown in; and then Thornton had to run a mile and a half and be seen at twenty-five minutes before five o'clock, by several witnesses. Besides, all this must have happened in broad day light, and when many people appear to have been about.

In this view of the subject, it will seem to impartial readers at the

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present day, that the proof of an *alibi* was too well made out to justify the conviction of the accused, notwithstanding the public sentiment was entirely against him at the time of his trial. The parties were near the pit before Mary Ashford called at Butler's; is it not more probable that her connexion with Thornton took place at that spot before four o'clock, and that she subsequently revisited the place on her way home, and either threw herself into the pit, or accidentally fell in? If Thornton left the dance at Tyburn, partly intoxicated, with an intention to violate his companion, would he have been with her all night, and without effecting his object? Would he wait for broad day light?

But the most extraordinary part of this case, in a legal point of view, was the subsequent proceedings. The public were so dissatisfied with Thornton's acquittal, and particularly the family of Mary Ashford, that her brother was advised to proceed against Thornton by the ancient WRIT OF APPEAL, with a view to bring him to a second trial. On this appeal Thornton was taken into custody, and removed to London, that he might personally appear in the king's bench to answer the process at the suit of Mary Ashford's brother. But it appeared to Thornton's legal advisers, that by the same ancient law, he had a right to repel the appeal by a WAGER OF BATTEL, and, to the astonishment of the court, the bar, and the whole nation, when he was brought before the court, he pleaded as follows: "Not guilty, and *I am ready to defend the same by my body.*" And thereupon taking off his glove, he threw it upon the floor of the court.

The appellant, after taking time, counter-pleaded, setting forth all the facts tending to prove the guilt of the appellee and praying that he might not be allowed his wager of battel; to which the latter, in reply, stated the evidence in his favor, which led to his acquittal. Upon these pleadings, after elaborate arguments by Chitty, for the appellant, and by Tindal, for the appellee, the court held, that there was not sufficient proof of guilt on the face of the proceedings to justify them in refusing the battel; but whether the court should allow the appellee his wager of battel, or to go without day, they did not then determine; suggesting to the appellant the propriety of considering whether he would wish any further judgment to be given. In consequence of this suggestion, and as Ashford was a stripling, and Thornton an athletic man, the former declined the combat, and prayed no further judgment. Whereupon Thornton was discharged. Otherwise the civilized world might have been further astonished at the barbarous spectacle of a trial in England by wager of battel.[1]

Thornton immediately left England for America, under a feigned name, where he soon died, and his father, who was a respectable man, did not long survive him.

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[1] The proceedings in the king's bench are reported at length in the first of Barnwell and Alderson's Reports. See also 3 Blackstone's Com. 337, *note*.

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RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, May Term, 1841, at Boston.

Blagge *v.* Miles.

The Revised Statutes of Massachusetts of 1835, chapter 62, § 21, providing for the case of a descendant, having no provision in the will of the ancestor, do not apply to cases, where the testator has a power of appointment of the estate to dispose of the inheritance, but only to cases, where it is the testator's own estate in fee.

It is the well settled doctrine of the law, that courts, in the interpretation of wills, are to regard the intention of the testator; and that technical words and set phrases are controlled by and do not control that intention, when clearly expressed or positively ascertained.

The same rule prevails generally in regard to the execution of powers, especially in regard to their execution by last wills and testaments. But the intention to execute the power must be clear. If it be doubtful, under all the circumstances, that doubt will prevent it from being deemed an execution of the power, although it is not necessary, that the intention to execute the power should appear in express terms or recitals in the instrument.

A will contained a clause, by which the testatrix devised to A one fifth of all her real estate, in trust for the entire use and benefit of B during her natural life, the said fifth part to be subject to the absolute disposal of the said B by her last will and testament, and if the said B should die without having disposed of the same then the remainder and reversion was devised to her heirs forever. B subsequently procured a resolve of the legislature of Massachusetts authorizing the sale of a part of the real estate, which had been set off to her under the aforesaid will, the proceeds to be invested in other estate to be held upon the like trusts and for the same uses, and purposes, as the same estate was then holden. The proceeds were accordingly invested in real estate in New London, Connecticut. Subsequently B died, having made her will, by which she bequeathed to E "my house and land in New London, being the same, which I purchased of, &c." and then, by a residuary clause, "All the rest and residue" of her estate of "every nature and kind" she devised to her three daughters and their heirs forever. B had no other real estate, except what was devised to her by the original will. Upon these facts it was *held:*

1. That the resolve by the legislature of Massachusetts was not an unconstitutional exercise of power.
2. That by the terms of the resolve, the substituted estate was to be held upon precisely the same trusts as the original estate.
3. Admitting the trustee (by the resolve) had no right to invest the proceeds of the sale *out of the Commonwealth of Massachusetts*, yet if that investment was adopted by the appointees under the power, and the power had been well executed, third persons had no right to interfere and object to it.
4. That the words "all the residue of my estate of every name and kind" in the residuary clause of the last will and testament of B were sufficient to pass real estate.
5. That the last will and testament of B was a complete execution of the power in the will of A, and that the premises demanded in this action passed by it to the daughter of B, the tenant.

This was a writ of entry in which the demandant claimed the demanded premises as grandson and heir of Sarah Blagge. The tenant claimed under the last will and testament of Sarah Blagge. The case came before the court upon an agreed statement of facts, and was argued by *George M. Mason*, for the demandant; and by *Rufus Choate* and *George S. Hillard*, for the tenant.

The facts in the case, and the points of the counsel sufficiently appear in the opinion of the court.

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Story J. This cause has been very ably argued upon both sides. It turns mainly upon a question, which rarely occurs in our jurisprudence, the due execution of a power of appointment; and the learning appropriate to it has been fully brought before the court in the course of the present discussion. Mrs. Hall, by a codicil to her will, duly executed, after revoking the devise of real estate in her will, devised as follows: "Item, to Elizabeth Jarvis aforesaid (the daughter of the testatrix) I give, bequeath and devise one undivided fifth part of all my said real estate, in trust, nevertheless, for the entire use and benefit of my daughter Sally Blagge for and during her natural life; the said fifth part to be subject to the absolute disposal of the said Sally by her last will and testament, and the income, rents and profits thereof to be paid over and applied to her use annually; and if the said Sally Blagge shall die without having disposed of the same, then I give and devise the remainder and reversion thereof to her heirs forever." The will and codicil, after the death of the testatrix, were duly proved and approved by the court of probate in 1822. In January 1836, Mrs. Blagge procured, on her petition, a resolve of the legislature of Massachusetts to be passed, whereby one Fitz James Price was authorized to sell a part of the real estate in Boston, devised to her by Mrs. Hall, and which had been duly set off to Elizabeth Jarvis in trust for her upon a division of the estate by the judge of probate, he first to give bond with sureties to invest the net proceeds of the said sale in other estate to be held by him upon the like trust, and for the same uses and purposes, as the same estate was then holden. Price accordingly, under this resolve, sold the land stated in the resolve for $13,000. With the consent of the guardian of the demandant (who is a grandson and heir to Sarah Blagge) Price afterwards invested a portion of the proceeds of this sale in certain real estate in New London, Connecticut, one parcel of which was first conveyed by the grantor, Ezra Chappell to Sarah Blagge, and by her afterwards to Price, and the other parcel was conveyed directly to Price by the grantor, George Erving; both upon the very same trusts stated in the will of Mrs. Hall.

Afterwards, in 1839, Sarah Blagge died, having first made her will in the same year, which was duly executed, proved, and approved; and by that will, after certain specific and pecuniary legacies, she made the following devises. "To my daughter, Eliza J. Caldwell, I give and bequeath my house and land in New London, being the same which I purchased partly of Ezra Chappell, and partly of George Erving, during her natural life, and at her decease I give and devise said house and land to my two grandsons, Charles H. B. Caldwell and Samuel Blagge Caldwell, and to their heirs forever. All the rest and residue of my estate of every nature and kind, I give, devise and bequeath, as follows, namely: one third part to my daughter Sarah Miles and her heirs forever; one third part to my daughter

Margaret C. Drane and her heirs forever; one third part to my daughter Eliza J. Caldwell and her heirs forever."

In point of fact, the legacies in Mrs. Blagge's will are more than sufficient to exhaust the whole of her personal estate at the time of her death and of her making her will; and she owned no other real estate, except that devised to her by the will of Mrs. Hall, and that purchased with the proceeds of the sale under the resolve above-mentioned.

The demandant claims title as an heir of Mrs. Blagge to the demanded premises, which are parcel of the real estate set off to her in the division of Mrs. Hall's estate.

The main question, therefore, is, whether, under the circumstances, Mrs. Blagge, by the devise in her will, has duly executed the power given her by the will of Mrs. Hall. If she has, then the demandant has no title whatsoever; if she has not, then he is entitled to recover in the suit.

Some other questions have, however, been raised at the argument, which should be disposed of before we proceed to that, which constitutes the main hinge of the controversy.

And, first, it is said, that even if Mrs. Blagge's will is a due execution of the power, the demandant is entitled to a share of her estate under the Revised Statutes of Massachusetts of 1835, ch. 62, sect. 21, as a lineal descendant of Mrs. Blagge, who was unprovided for in her lifetime and was unintentionally and by mistake or accident omitted to be named as a devisee in her will. The language of the statute is as follows: "When any testator shall omit to provide in his will for any of his children or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to, if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it shall appear, that such omission was intentional and not occasioned by mistake or accident." The argument is, that this clause is equally applicable to cases, where the testator has a power of appointment of the estate to dispose of the inheritance, as well as to cases, where it is his own estate in fee. It does not appear to me, that this argument is maintainable. The language of the section seems to me clearly to point exclusively to a case, where the testator has an inheritance in the estate, and not merely a power of appointment over it. It supposes a case, where the omitted descendant would and could take a title by descent — as of an heritable estate of the testator, and under him, as his heir, in case of his dying intestate. But no person can claim an inheritance, as heir, in case of intestacy, where the ancestor has a power only, and not an interest. The party, if he can take at all, must take as an appointee under the power, and not as heir. A power is not a descendible inheritance. The property, which he is to dispose of, is in no just sense vested in the appointor. It is not an interest in, right of, or title to the property; but a mere authority

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given to the donee of the power to be exercised over the property in a manner, and to an extent, which he does not otherwise possess. And such has been the uniform construction from the earliest period of the law on this subject.[1] The present power is technically a power in gross, that is to say, the estates, to be raised by it, do not fall within the compass of the estate for life devised to Mrs. Blagge.[2] A power to dispose of an estate by an appointment among third persons in fee may be given to a mere stranger; and it would certainly be utterly without the intent of the statute to create an inheritance in the appointor in the execution of the power, which should give his descendants an interest in the estate, upon which the power is to operate. It can make no difference in point of law, that the power, if executed, might be by an appointment among his own children or descendants. This would not change the nature of the power, but only its objects.

Then, as to another objection, which has been urged, that the resolve is an unconstitutional exercise of power by the legislature, because it is usurping the functions of the judiciary contrary to the provisions of the bill of rights of the constitution of Massachusetts, which declares that "the legislative department shall never exercise the executive and judicial powers, or either of them." Assuming that such a resolve might be construed, under some circumstances, to be an exercise of judicial power, it would be difficult to apply the doctrine to a case like the present, where it is passed, not *in invitum*, but at the solicitation of the very person, who, under the power, possessed a complete dominion over the disposal of the entire property. But after the exercise of this authority by the legislature for more than sixty years, (for such, I am persuaded, has been the practice), in very numerous cases of a like or an analogous nature, without any objection by the parties in interest, and with the entire acquiescence of the public, it is not, perhaps, too much to say, that it would be still more difficult to treat it as an exercise of judicial power in the sense of the constitution. The case of *Rice* v. *Parkman*, (16 Mass. R. 326), seems to me directly in point, and establishes, that an authority, granted by the legislature, to transmute real property into personal property for purposes beneficial to the parties interested therein, is not properly the exercise of a judicial power; for it is not a case of controversy between party and party, nor is there any decree or judgment affecting the title to the property. In short, the court on that occasion held it to be not a judicial act, but a mere ministerial act. The case of *Wilkinson* v. *Leland*, (2 Peters R. 627, 660,) goes a great way to establish the same doctrine. There an act of the legislature of Rhode Island, confirming a sale made by a foreign executrix, for the

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[1] See Co. Litt. 342. b. Butler's note (1). 1 Chance on Powers, § 1, § 2. 2 Chance Powers § 1632. Co. Litt. 265. b.

[2] Co. Litt. 342. b. Butler's note (1). Sugden on Powers, § 4, p. 43, 44, 6th edit.

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payment of debts of the testator was held to be, not a judicial act, but an exercise of legislation; a legislative resolution, and not a decree. The case of *Ashburton* v. *Ashburton*, (6 Ves. 6), where the lord chancellor, upon the petition of a minor to have some of his money laid out in the purchase of lands, authorized the purchase to be made, by no means shows, that the act was exclusively judicial. It seems, being upon petition, to have been an act by the lord chancellor, not as a judge, but as the representative of the crown, as *parens patriæ*, having the custody and care of the persons and property of infants. Besides; it is one thing to assert, that a power may be delegated and exercised by a court or judge; and quite another thing to assert, that every power delegated to or exercised by a court or judge is judicial, and not ministerial. Many powers, exercised by courts and judges, are in no accurate sense judicial; as, for example, the power to make rules for the due order and arrangement of business. But it is the less necessary to dispose of this question absolutely, and therefore I give no positive opinion upon it; because, if the power has been duly executed by Mrs. Blagge, whether the resolve be constitutional or not, makes no difference in this case, since the demandant has no title whatsoever to the property under her will; and the constitutionality of the resolve is not contested by those, who alone are donees under the power.

Having disposed of these points, we may now advance to the main question involved in this controversy. Was the will of Mrs. Blagge a due execution of the power contained in that of Mrs. Hall? And this, after all, I take to depend upon her intention, as expressed in and derived from the language and object of the will of Mrs. Blagge. There was a long struggle in Westminster Hall upon the point, whether in wills, the intention of the testator, as gathered *ex visceribus testamenti*, was to be followed in the interpretation of devises, or whether the technical construction of law, given to certain phrases, was to prevail over the intention. That struggle, at least since the decision in *Perrin* v. *Blake*, (4 Burr. R. 2579; Fearne on Conting. Rem. by Butler, 9th edit. p. 156), seems to have terminated. It is now admitted to be established, as the general rule, that the intention of the testator is the polestar to direct the court in the interpretation of wills, and that technical words and set phrases are controlled by, and do not control, that intention, when clearly expressed or positively ascertained. The consequence is, that decisions upon particular wills are of far less consequence now, than they formerly were supposed to be; unless, indeed, where the leading provisions are almost identical, and the facts substantially alike. They now furnish, not so much authorities, as analogies, by which to interpret the words of wills in new cases.

I apprehend, that similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last wills and testaments. The main point is, to arrive at the intention and object of the donee of the power in the instrument of

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execution; and that once ascertained, effect is given to it accordingly.[1] The authorities upon the subject may not all be easily reconcilable with each other. But the principle furnished by them, however, occasionally misapplied, is never departed from, that if the donee of the power intends to execute, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree, that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree, that it is not necessary, that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient, that it shall appear by words, acts, or deeds, demonstrating the intention. This was directly asserted, not only in *Sir Edward Clere's Case*, (6 Co. R. 17); but it was positively affirmed in *Scrope's Case*, (10 Co. R. 143, 144), where the reason of the rule is stated; *Quia non refert, an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.* On the other hand, to use the language of Lord Chief Justice Best, in *Doe* d. *Nowell* v. *Roake*, (2 Bing. R. 497, 504), "No terms, however comprehensive, although sufficient to pass every species of property, freehold or copyhold, real or personal, will execute a power, unless they demonstrate that a testator had the power in his contemplation, and intended by his will to execute it." Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power; (1) where there has been some reference in the will or other instrument to the power; (2) or a reference to the property, which is the subject, on which it is to be executed; or (3) unless the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power.[2] It seems unnecessary to refer at large to the cases, which establish these propositions. They will be found collected, generally, in Mr. Chance's Treatise on Powers, (2 vol. ch. 13, § 1591 to § 1714), and in Sir Edward Sugden's Treatise on Powers, (vol. 1, ch. 6, § 2, p. 257, &c.; Id. § 7, p. 373, &c.; Id. § 8, p. 430, &c.), and, in the opinion of the court, delivered by Lord Chief Justice Best, in *Doe* d. *Nowell* v. *Roake*, (8 Bing. 497). Lord Chief Baron Alexander, in delivering the judgment of the judges, in the House of Lords, in *Denn* d. *Nowell* v. *Roake*, (6 Bing. R. 475), reversing the decision in the same case, in 2 Bing. R. 497, and affirming that of the King's Bench, (5 B. & Cresw. 720), has enumerated the same classes of cases; and has added, that in no instance has a power or authority been considered as executed,

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[1] Bennett *v.* Aburrow, 8 Ves. 609.
[2] Langham *v.* Nenny, 3 Ves. 467; Bennett *v.* Aburrow, 8 Ves. 609, 616.

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unless under such circumstances. Whether this be so, or not, it is not material to inquire; for there is no pretence to say, that, because no other cases have as yet occurred, there can be no others. That would, in fact, be to say, that the cases governed the general rule as to intention, and not the rule the cases. Lord Chief Justice Best has put these classes of cases upon the true ground. They are only instances of the strong and unequivocal proof required to establish the intention to execute the power; but are not the only cases.[1] On the contrary, if a case of clear intention should arise, although not falling within the predicament of these classes, it must be held, that the power is well executed, unless courts of justice are at liberty to overturn principles, instead of interpreting acts and intentions. I entirely agree with Lord Chief Justice Best, in his remark in *Roake* v. *Denn*, (4 Bligh (N. S.) 22), that, "rules with respect to evidence of intention are bad rules, and I trust I shall live to see them no longer binding on the judges." The Lord Chancellor, (Lord Lyndhurst), said, that "it has been settled by a long series of decisions from the case, which has been referred to in the time of Sir Edward Coke, (Sir Edward Clere's Case, 6 Co. R. 17), down to the present time, that if the will, which is insisted on as an execution of the power, does not refer to the power, and if the dispositions of the will can be satisfied without their being considered to be an execution of the power, unless there be some other circumstances to show, that it was the intention of the devisor to execute the appointment by the will, under such circumstances the courts have uniformly held, that the will is not to be considered as an execution of the power." Certainly it is not. But then this very statement leaves it open to inquire into the intention under all the circumstances; which seems to me to be the true and sensible rule upon the subject; and when that intention is thus once ascertained, it governs. So it was expressly held in *Pomery* v. *Partington*, (3 Term R. 665); and in *Griffith* v. *Harrison*, (4 Term R. 737, 748, 749), the Court expressly repudiated the notion, that any technical exposition was to be given to the words of a will, executing a power; and held that the intention was to be collected from the words according to the ordinary and common acceptation thereof. And again, in *Bailey* v. *Lloyd*, (5 Russ. R. 330, 341), the Court held, that the question of the execution of a power by a will, was a mere question of intention, and that intention was to be collected, not from a particular expression, but from the whole will.[2]

Now Sir Edward Clere's Case, (6 Co. R. 17), is not only unquestionable law, and has so been always held; but it affords a strong illustration of the true doctrine. In that case, it was held, that the power was well executed, notwithstanding it was not referred to, because

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[1] Doe *d*. Nowell *v*. Roake, 2 Bing. R 504.
[2] See 4 Kent Comm. Lect. 62, p. 333, 334, 4th edit.

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otherwise the devise in the will would be inoperative and void. The testator had no estate in the property devised, but only a power over it; and so, *ut res magis valeat, quam pereat*, it was held, that he intended to execute the power. Nor is there any objection to the doctrine of Lord Chief Justice Hobart, in the Commendam Case, (Hob. R. 159, 160), that if an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest and not to the power." That is but saying, in other words, that where the terms of a devise are perfectly satisfied and operative without any reference to the execution of a power, by working on the interest of the testator in the land, there it shall not be deemed, that he intended to execute the power; but merely to pass his interest. This proceeds upon the plain ground, that there is nothing in the will, which shows any intention to execute the power; and in cases of doubt the court cannot deem it a good execution of the power.[1]

Sir Edward Sugden, (Sugden on Powers, vol. 1, ch. 6, § 7, p. 402, 428), has critically examined and commented upon all the leading authorities; and it appears to me, that his criticisms (and he is himself a very high authority upon this subject), are entirely well founded. The courts have, indeed, as he abundantly proves, proceeded in some cases upon very narrow and technical grounds, and in others have adopted a more liberal and just intepretation; and that they do not all well stand together. The rule of ascertaining the intention, however, has been recognised at all times; and, as Lord Kenyon has well observed, in *Pomery* v. *Partington*, (3 T. R. 674, 675), if the judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not, that they have denied the general rule; but because some of them have erred in the application of the general rule to the particular case before them. In a conflict of authorities, I own that I should choose to follow those, which appear best founded in the reason and analogies of the law. But in cases of wills, where the intention is to govern, no authorities ought to control the interpretation, which the Court is called upon to make, unless all the circumstances are the same in both cases, and the ground of interpretation in one is entirely satisfactory to the mind, as applied to the other. If I were compelled to decide between the cases of *Wallop* v. *Lord Portsmouth*,[2] *Hurst* v. *Winchelsea*,[3] *Standon* v. *Standon*,[4] *Lewis* v. *Lewellyn*,[5] and the case of *Jones* v. *Curry*,[6] if there be any dissonance between them, I should much incline to follow the former. But, in my view, all these

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[1] See 4 Kent Comm. Lect. 62, p. 333, 334, 4th edit.
[2] Sugden on Powers, ch. 6, § 7, p. 394.
[3] 2 Ves. jr., 589.
[4] Ibid.
[5] 2 Ld. Kenyon's R. 444, by Harmer.
[6] 1 Swanst. R. 66.

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cases stand upon their own particular circumstances, and neither is exactly like the present.

We must dispose of this case, then, upon principle; for I cannot admit, that it is governed by any positive controlling authority, or that it will trench upon any established doctrine, whichever way it is decided.

But before proceeding to discuss the terms of this devise as an execution of the power, it is indispensable to dispose of an argument greatly pressed at the bar, and that is, that the New London estates, in no proper sense, fall within the scope of the power, which only applies to the original devised property, and not to these substituted New London estates; first, because the resolve itself does not attach the power to any substituted estates after the sale; and secondly, if it does, still the investment in the New London estates, being out of the state, was not authorized by the resolve, and, therefore, cannot be deemed an execution of the power, but is an utterly void act. I cannot accede to this interpretation of the terms of the resolve. The language of it is, that Price, the trustee, is "to invest the net proceeds of said sale in other real estate, to be held by him upon the like trusts, and for the same uses and purposes as the estate above described is now holden." It seems to me impossible to entertain any real doubt, that the substituted estate was to be held upon precisely the same trusts, as the original estate, by the will of Mrs. Hall. The original estate was held expressly in trust for the use of Mrs. Blagge during her natural life, subject to her absolute disposal by her last will and testament, and if she should die without having disposed of the same, then the remainder and reversion to be to her heirs forever. The language then of the resolve, is not only appropriate to fasten upon the substituted estate the like trusts, uses and purposes as were attached to the original estate; but I am at a loss to understand, what other words could have been more directly expressive for this purpose. The power was attached to the original estate, and was to be served out of the original trust for the uses and purposes therein stated; and the moment the power was executed, it created a direct trust and use in favor of the appointees. The case of *Wallop* v. *Lord Portsmouth*, (1 Sugden on Powers, ch. 6, § 7, art. 34, p. 394, 6th edit.), seems to be strongly in point.

The other part of the argument may have a better foundation in law. It may be true, that the trustee had no right to invest the proceeds of the sale in any real estate out of the commonwealth of Massachusetts; and yet, if that investment has been adopted by the appointees under the power, and the power has been well executed, third persons have no right to interpose and object to it. It amounts at most but to a wrongful conversion of trust property, which, however, may, at the election of the *cestuis que trust*, be followed, and the trusts attached thereto in the hands of the persons, holding the property. Nothing is more common in courts of equity, than for the

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cestui que trust, upon a wrongful conversion of the trust fund to follow it in its new forms, and hold it subject to the original trust.[1]

But it is wholly unimportant, in the present case, whether the investment was rightful or wrongful on the part of the trustee, so far as the present controversy is concerned. It was adopted and sanctioned by Mrs. Blagge, as an investment properly made, and upon the identical trusts created by the will of Mrs. Hall, and authorized in the substituted estate by the resolve. In making her own will, and therein devising the New London estate, Mrs. Blagge manifestly intended to execute the power reserved to her, (in conformity to the original trusts) contained in the deeds of these estates to Price. She had no other right or title over or in the same to give effect to her devise; and this devise must, therefore, if at all, take effect solely as an execution of this power over the substituted property, as to this estate, and in this respect then, the case falls directly within the rule already adverted to. It is a case, where, although the power is not referred to in terms, yet the subject matter is expressly disposed of, and the will is void and inoperative, except as an execution of the power.

The whole question is then narrowed down to the mere consideration, whether Mrs. Blagge intended a mere partial execution of the power, *quoad* the New London estate, or meant a full and entire execution of the whole power over all the property to which it was attached. She speaks of this estate indeed as her own estate, "my home and land lying in New London;" but this does not change the proper interpretation of the words. The language is precisely that, which would ordinarily be used by the donee of a power, absolutely to dispose of the whole property, although without any interest in the property. Lord Loughborough, in *Standen* v. *Standen*, (2 Ves. jr., 589), alluded to such a form of disposition, as not producing the slightest difficulty in construing the devise to be an execution of a power; and this is certainly now the received doctrine. But the true bearing of this language in the will of Mrs. Blagge most strongly applies to illustrate her meaning in the residuary clause, to which I shall presently allude. She treats the New London estate as her own property; but it was her own in the same sense, and in that only as the other part of the unsold property devised to her by the will of Mrs. Hall, that is, her property, as possessing the absolute power to dispose of it by her own will.

Now, immediately after the devise of the New London estate comes the residuary clause. "All the rest and residue of my estate of every nature and kind, I give, devise and bequeath, as follows: viz. one third part to my daughter, Sarah Miles, and her heirs forever; one third part to my daughter, Margaret C. Drane, and her heirs forever; one third part to my daughter, Eliza J. Caldwell, and her heirs and assigns

[1] 2 Story on Eq. Jurisp. § 1258 to § 1266, and cases there cited.

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forever." I do not dwell upon the circumstance, that here the language used, "heirs and assigns," applies peculiarly and emphatically to a devise of real estate; nor contrast it with the peculiar language in the numerous pecuniary legacies named in the preceding part of the will, where the words "heirs and assigns" are wholly omitted. Nor do I rely upon the fact, that the personal estate of Mrs. Blagge at her death was insufficient to discharge these legacies; for that circumstance alone would not affect the present question; as from the nature and fluctuation of personal estate, the amount which would be assets at the death of the testatrix, must always be somewhat conjectural; and on that account, has not, like real estate, been supposed to be within the contemplation of the testatrix as a specific bequest.[1]

But what may be relied upon is this, that Mrs. Blagge died possessed of no other real estate than that, which was attached to the power, and disposable by her under the same. Under such circumstances, if instead of the words "the residue of my estate of every name and nature" she had said "the residue of my estate real as well as personal," it was admitted at the argument, and, indeed, is conclusively established by the authorities, that the residuary clause would have operated upon the real estate subject to the power, since in that way and in that way alone, could it be operative;[2] and, therefore, to effectuate the intent, it must be construed as a due execution of the power. The case of *Standen* v. *Standen*, (2 Ves. jr., R. 589), which was affirmed in the house of lords, could be decisive on this point; and, indeed, it is but following out the principle of Sir Edward Clere's case, (6 Co. R. 17).[3]

There is no doubt, that the words "all the residue of my estate of every nature and kind" in Mrs. Blagge's will, are sufficient to pass real estate; and if she had left any interest in real estate in her own right, that interest would have passed by the devise. This doctrine is clear upon the general principles applied to the interpretation of wills, and is also fully borne out by the authorities. It was admitted in *Jones* v. *Curry*, (1 Swanst. R. 66, 72, 73), and recognised in the very recent case of *Saumares* v. *Saumares*, (4 Mylne & Craig R. 340).[4] Still, however, as the word "estate" is *nomen generalissimum*, it may be satisfied by the mere bequest of personal property, if the testator has no real estate, upon which it can operate; and, therefore, a residuary clause of this sort is not *per se* decisive as an execution of a power, as it may operate without touching real estate in the power of the party, but not in his interest.

But the view, which I take of the clause, is this, that it may include real estate, if the testator has any; and if the language then may

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[1] Sugden on Powers, ch. 6, § 7, art. 32, art. 33, p. 393, 394, 6th edit.; Andrews *v.* Emmott, 2 Brown Ch. R. 297; Standen *v.* Standen, 2 Ves. jr. 594; Doe *d.* Nowell *v.* Roake, 2 Bing. R. 497, 510; Jones *v.* Curry, 1 Swanst. R. 60, 71, 72.

[2] Sugden on Powers, ch. 6, § 7, art. 33 to art. 38, p. 393, 394, 6th edit.

[3] See also Doe *d.* Nowell *v.* Roake, 2 Bing. R. 509, 510.

[4] See also Church *v.* Mundy, 15 Ves. 396, and Doe *d.* Morgan *v.* Morgan, 6 Barn. & Cresw. 516.

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justly admit of this interpretation, then we have a right to look to see, whether the testatrix did not, from other parts of the will, naturally, if not necessarily, mean to apply the residuary clause to real estate. If she did so intend, and it can be clearly seen, from the other provisions in the will, then it is the duty of the court to carry that intention into effect; and if it cannot be, except as an execution of the power, then it amounts to a due execution thereof. Now, it is precisely here, in my judgment, that the whole stress of the case lies. When I see, that Mrs. Blagge has, in the preceding clause of the will, executed the power, specifically, over certain real estate within the scope of the power, calling it "my house and land," and then immediately adding, "all the rest and residue of my estate of every nature and kind," it is plain to me, that she contemplated all the real estate within the scope of the power, as her own estate, and subject to her own absolute disposal, and that she intended to dispose of all of it by her will, by the very words, which she has used. I am not bold enough to fritter away such an intention, coupled with such acts, by resorting to any technical niceties and refinements. They partake too much of subtlety, and artificial distinctions, (and I say it with the utmost deference for other judgments,) to suit a just or even a reasonable administration of private justice. The case of *Walker* v. *Mackie*, (4 Russ. R. 76), was one of far less stringent circumstances; and yet the then Master of the Rolls, (Sir John Leach), held the will a good execution of the power. In that case the testatrix had power to appoint by will a certain leasehold estate, and certain 3 per cent. stock, standing in the name of the Accountant General in Chancery, she being entitled to both during her life. By her will, after certain pecuniary legacies, she gave "all the rest and residue of her bank stock to her daughter A., with her wearing apparel, goods and chattels of every kind whatsoever, and all other property she possessed at the time of her decease, excepting £50 of her bank stock, which she gave thereout to her executors." It was proved, that she had no bank stock, nor any stock whatsoever, except the stock in court. The Master of the Rolls held, that the will was a due execution of the 3 per cent. stock, and also of the leasehold estate. I am aware, that in a later case, *Hughes* v. *Turner*, (3 Mylne & Keen, 666, 697), his successor (Sir C. C. Pepys), disapproved of that decision. But I confess, that I am not prepared to join in this disapproval; and it be not reconcilable with *Webb* v. *Honor*, (1 Jac. & Walk. 352), or rather with a dictum of Sir Thomas Plumer in that case, I am not at all disposed to surrender to the authority of the latter.[1] Be this as it may, the present case differs from all these three cases in its circumstances, and therefore is not governed by the authority of either of them, whatever may be its weight.

The judgment of Sir Thomas Plumer, (M. R.) in *Jones* v. *Curry*, (1 Swanst. R. 66), has been greatly relied on, at the argument, as directly in point against the present case being a due execution of the

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[1] See Sir Edward Sugden's remarks on this latter case, 1 Sugden on Powers, ch. 6, § 7, art. 28, p. 390, 6th edit.

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power. I have already had occasion to suggest, that it is not so in point; but is fairly distinguishable in its circumstances. The language was not the same, nor the power the same, nor the facts the same. There seems to me to be great force in the criticism of Sir Edward Sugden on this case. If the words were not sufficient to pass real estate, (which they clearly were), the point did not arise. If they were sufficient, the case does not appear to have been well decided; for if they were sufficient to pass real estate, and the testatrix had none but under the power, then it might fairly be presumed, that she intended to pass real estate by her will; and if so, it could only be by an execution of the power.[1] Besides; Sir Thomas Plumer in that case strongly relied upon the fact, that there was no language in the will of the testatrix, which showed any intention to execute the power, even in relation to the personalty. There was no case of clear part execution of the power. Here the contrary is established; and the testatrix has executed her power as to the New London estate. And I cannot but consider the language of Sir William Grant, in *Bennett* v. *Aburrow*, (8 Ves. 609, 616), to contain the true doctrine; and it is strictly applicable to the present case. "This," said that great judge, "is always a question of intention, whether the party meant to execute the power or not. Formerly it was sometimes required, that there should be an express reference to the power. But that is not necessary now. Its intention may be collected from other circumstances; as, that the will includes something the party had not otherwise, than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power."

Upon the whole, my judgment is, that the will of Mrs. Blagge was a complete execution of the power as to the premises in question; and therefore, that judgment ought to be entered for the tenant.[2]

Supreme Judicial Court, Maine, September Term, 1841, *at Alfred.*

Smith *v.* Coffin.

The statute of Maine of February 21, 1833, chapter 58, contemplates a belief in the Supreme Being as a prerequisite to the admission of a witness to testify. But after he is admitted, no inquiry is proper as to his religious opinions.
Before rejecting a witness, courts will require proof of clear, open and deliberate avowal of his disbelief in the existence of a Supreme Being.
One conscientiously scrupulous of taking an oath may be admitted to affirm, which rests on temporal penalties only, being "under the pains and penalties of perjury."
The declarations of a witness are competent evidence of his want of belief in a Su-

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[1] Sugden on Powers, ch. 6, § 7, p 425, 6th edit.

[2] It may not be unimportant to state, that all these refined and subtle distinctions, in relation to the execution of powers, are now swept away in England by the statute of Wills, (of 7th Will. IV. and 1 Victoria, ch. 26, § 27), which has declared, that a general devise of real or personal estate, shall operate as an execution of a power of the testator over the same, unless a contrary intention shall appear on the will. The doctrine, therefore, has at last settled down in that country, to what would seem to be the dictate of common sense, unaffected by technical niceties. J. S.

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preme Being. But if it appear that he has honestly changed his opinion, he may be admitted to testify.

Where a person, offered as a witness, had recently expressed a disbelief in a Supreme Being, and a witness was offered to show that he had been for several years a member of a religious society, and had ever been a firm believer in the Christian religion, it was held, that such evidence was not competent. *A fortiori*, where the witness offered to prove these facts was the wife of the witness in chief.

THE facts in this case sufficiently appear in the opinion of the court, which was delivered by,

EMERY J. The statute of 1833, chapter 58, enacts, that no person, who believes in the existence of a Supreme Being, shall be adjudged an incompetent or incredible witness, in the judicial courts, or in the course of judicial proceedings in this state, on account of his opinions in matters of religion, nor shall such opinions be made the subject of investigation or inquiry. Here a witness was rejected, because, when he was offered, the defendant's attorney objected that the proposed witness was an atheist, or disbeliever in the existence of a Supreme Being; and one Benjamin Gordon was called, who testified that in a conversation which he recently had with Richard Bettes, the offered witness, he repeatedly said he believed that any thing and every thing was God; that that stick, that pair of wheels, Jordan mountains was God; that every thing like that was God; that every thing about them was God, and that there was no other God in heaven or earth but what was in that or them. Gordon further stated, in reply to a question put by the plaintiff's attorney, that said Bettes had, before the time of the conversation above referred to, said he was an universalist, and that he, the said Bettes, was friendly to that class of christians, and also that he had expressed himself friendly to the religion of the unitarian denomination.

This testimony of Gordon was not introduced before the plaintiff objected to its introduction; for the objection against its introduction was interposed before Gordon was sworn. We apprehend that the permission to let in the testimony of Gordon was right, for the opinion and belief of men can be known only by what they have said or written; their declarations therefore, either verbal or written, are the proper evidence of their opinions, and are not to be considered in the light of hearsay evidence, but as facts. *Swift's Law of Evidence*, 48.

In the English treatises on the law of evidence, it is a general rule, that those infidels who believe in a God, and that he will punish them in this world, or as it seems the next, if they swear falsely, may be admitted as witnesses. Roscoe's Criminal Evidence, 96, citing *Omichund v. Baker*, (Willes's R. 549.) The opinion of Willes J. was, that those infidels who either do not believe in a God, or if they do, do not think that he will either reward or punish them in this world or the next, cannot be witnesses in any case, nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them.

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It is not yet settled by the Scotch law, whether a witness professing his disbelief in a God and a future state of rewards and punishments is admissible. When the point shall arrive, says Mr. Alison, it is well worthy of consideration, whether there is any rational ground for such an exception; whether the risk of allowing unwilling witnesses to disqualify themselves, by the simple expedient of alleging that they are atheists, is not greater than that of admitting the testimony of such as make this profession. Roscoe's Crim. Ev. 96, 97, citing Alison Prac. Cr. L. Scotch, 438.

In New Hampshire, in the year 1828, in the case of *Norton v. Ladd*, (4 N. H. Rep., 444,) one John Hunter was offered as a witness. It was proved, that he had several times within a short period before the trial, stated that he had no belief in the existence of a God. The court say, *he who openly and deliberately avows* that he has no belief in the existence of a God, furnishes clear and satisfactory evidence against himself, that he is incapable of being bound by any religious tie to speak the truth, and is unworthy of any credit in a court of justice. This witness is proved to have repeatedly avowed such a sentiment, and we have no hesitation *in rejecting him as a person worthy of no credit. Butts* v. *Swartwood*, (2 Cowen, 431); *Jackson* v. *Gridley*, (18 John, 98); *Omichund* v. *Barker*, (Willes's Rep. 538.)

In *Jackson, ex dem. Tuttle,* v. *Gridley*, (18 John. Rep. 98,) it was held, that one who does not believe in the existence of a God, nor in a future state of rewards and punishments, cannot be a witness in a court of justice, under any circumstances, and that when it was proved that a person offered as a witness had, within three months before the trial, often deliberately and publicly declared his disbelief in the existence of a God and a future state of rewards and punishments, he *cannot*, on being called to be sworn and objected to, *be admitted to deny those declarations or to state his recantation of them and his present belief in a God.*

A like decision was made in Connecticut, in 1809, in the case of *Curtis* v. *Strong*, (4 Day's Cases in Error.) In *Wakefield* v. *Ross*, (5 Mason's Rep. 16,) the counsel for the defendant objected to the admission of two witnesses, father and son, upon the ground of their want of any religious belief, and to establish the fact, a witness was called, who swore that he knew the persons well, that he had often heard the son say that he did not believe in the existence of a God or of a future state. As to the belief of the father, he said that he had heard him declare that he did not believe in a future state; that he had read Tom Paine's works, and did not know whether he, the father, believed any thing. In answer to a question from the court, whether the father believed in a state of rewards and punishments, the witness answered only as before, adding, that from the statements of the father, he did not seem to believe any thing. It was then suggested, on the part of the plaintiff's counsel, that the father

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and son might be examined personally as to their belief, for the father might be a universalist. To this suggestion the court answered, that the defendant's counsel, who took the objection, were not bound to rely on the testimony of these persons for proof of incompetency. The court said: "We think these persons are not competent witnesses. Persons who do not believe in the existence of a God, *or of a future state*, or who have no *religious belief*, are not entitled to be sworn as witnesses. The administration of an oath supposes that a moral and religious accountability is felt to a Supreme Being, and is the sanction which the law requires upon the conscience of a person, before it admits him to testify." This was in Rhode Island.

In New York, in the cases cited from 18 John. 98, it was considered, that a *witness may be restored to his competency*, on giving satisfactory evidence *of a change of mind*, some time before the trial, so as to repel the presumption, arising from his former declarations of his infidelity, *existing at the time he is called to be sworn.* And it was further held, that although infants may be examined as to their religious knowledge and belief, it is merely to test their capacity to give evidence, or their understanding of the nature and obligation of an oath. But an adult of sound mind, when called as a witness and objected to as an infidel, is not to be questioned as to his religious creed.

In *Hunscom* v. *Hunscom*, (15 Mass. 184,) the objection to the competency of the witness offered was founded upon his professed *disbelief of a future state of existence*, and proof was offered of his repeated declarations of such disbelief. But the court, Parker, chief justice, Thacher and Wilde, justices, admitted him to be sworn, and said the objection went *only to his credibility*.

When we consider what changes have been made as to the admissibility of witnesses, we may well deliberate before we hastily adopt rules, which may lead to consequences of a most disappointing and distressing character. At one time persons not believing in the christian religion could not be admitted as witnesses, nor quakers, who would not take an oath.

In the celebrated opinion delivered by chief justice Willes, in *Omichund* v. *Barker*, which was not published from his own manuscript till 1799, about fifty years after it was delivered, he says, "supposing an infidel who believes a God, and that he will reward and punish him in this world, but does not believe a future state, be examined on his oath, as I think he may, and on the other side, to contradict him, a christian is examined, who believes a future state, and that he shall be punished in the next world as well as in this, if he does not swear the truth, I think that the same credit ought not to be given to an infidel as to a christian, because he is plainly not under so strong an obligation," and he quotes Lord Stairs, in his Institutes of the Laws of Scotland, page 692. It is the duty of judges, in taking the oaths of witnesses, to do it in those forms that will most touch the conscience

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of the swearers, according to their persuasion and custom; and the quakers and fanatics deviating from the common sentiments of mankind, refuse to give a formal oath, yet if they do that which is materially the same, it is materially an oath.

Swift, in his Law of Evidence, page 50, says it may still be a question, whether it would not originally have been better to consider questions of this kind as going to the credit rather than the competency. *In the conflict of parties, both religious and political, misrepresentations will often take place*, and it will commonly *be safer to rely on the general character for truth which a man has acquired by his conduct in society, than on his mere opinions.* The application of the rule in Connecticut defeated a devise, the party rejected being one of the subscribing witnesses.

In Walker's Introduction to American Law, 544, he remarks that the oath of an atheist, though it wants the religious obligation which belongs to the oath of the believer, has yet the same temporal obligation, resulting from the pains and penalties of perjury. For these reasons, he says it would seem that the want of religious belief ought not to render a witness incompetent, though the jury may properly take it into consideration in weighing his credibility.

It was doubted in Ohio whether a defect in religious belief should go to the competency, or merely to the credibility of the witness. The objection was raised, and it was shewn by third persons, that the witness' creed, so far as collectable from his conversations, was as follows: he said he did not believe in the existence of a God, but added that he saw God in trees, bushes, herbage, and every thing he saw; that a man would be punished for falsehood by his conscience, and in this life only; that a man is bound to speak true at all times, and an oath imposes no additional obligation. The court held, that it was unnecessary to inquire whether in Ohio the same rule should prevail as in England, for if it should, the witness was competent. Wright, justice, said, the court thought his declarations equivalent to an avowal of belief in the existence of a God; he sees Him in all created nature. *Easterday* v. *Kilborn*, (1 Wright, 345, 6.)

In South Carolina, a person who does not believe in future rewards and punishments, but that our evil deeds will all be punished in this world, and that we shall exist immortal in a future state, exempted from punishment for deeds done in the body, is a competent witness. *Farnandes* v. *Henderson*, in chancery, before chancellor Desausure, August, 1827. South Carolina Law Journal, 202, (cited in Cowen and Hill's, notes to Philips's Treatise on the Law of Evidence, part 2d, in the supplement, page 1503.)

In this case we think our statute contemplates that the belief in a Supreme Being is a prerequisite for the admission of a witness, but after he is admitted, no inquiry is to be tolerated as to his religious opinions. Yet as it is calculated to impose, as it were, a penalty of degradation and disgrace upon a citizen, to object to his being admit-

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ted as a witness for such disbelief, according to the decisions in New York and Connecticut, and is against the spirit of our institutions in other respects, inasmuch as it, as it were, condemns without a hearing. For according to decided cases, the person excepted against is not permitted to explain. Therefore, as the law seems to stand thus, courts ought to require proof of clear, open, deliberate avowal of the disbelief on the part of the proposed witness in the existence of a Supreme Being. It is communicated, that the witness asserted that he was a universalist, who may believe in punishment in this world, and our statute is entitled "an act to secure to witnesses freedom of opinion in matters of religion." Besides, agreeably to our statute, one conscientiously scrupulous of taking an oath, may be admitted to affirm, which will be under the pains and penalties of perjury. In this there is no appeal to God, it rests on temporal penalties.

In this case, there was no assertion made by the witness that he was conscientiously scrupulous of taking an oath, so that the question came nakedly, whether a person, who was before the court, and proffered as a witness to take an oath, did believe in the existence of a Supreme Being. Grateful as we feel to that source of excellence for our own creation; soothed, consoled and sustained by our deep conviction of our dependence alone upon Him, we can scarcely imagine that any mortal can seriously avow his disbelief in the existence of a Supreme Being, yet the judge was necessarily to decide upon the competency of the proposed witness on the evidence offered against him. Had there been distinct and satisfactory evidence given of the honest change of opinion on the part of the proposed witness, after the proof made by the testimony of Gordon of the recent avowal by Bettes of his belief, the rejection of the witness could not have been supported. The proposal to prove by Azubah Bettes, that the said Richard Bettes was, and for many years last past had been a universalist, and was an active member of a universalist society in Biddeford, and had ever been a firm believer in the christian religion, and was at the time of the examination, the court think was not calculated to prove a change of opinion, which had been avowed by said Richard, in the recent conversation with Gordon, and therefore the judge might direct the nonsuit without hearing the testimony of said Azubah Bettes. Whether this person was man or woman is not stated. If the wife of said Richard, we think she could no more be admitted than Richard himself.

Exceptions overruled.[1]

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[1] After reading the foregoing opinion, Mr. Justice Emery remarked, for himself alone, that this statute of Maine, entitled "an act to secure to witnesses freedom of opinion in matters of religion," had been passed over eight years. He did not recollect that it had before come in question for decision. Upon the necessarily strong judicial construction which had been made upon the terms of the statute, and the act of the judge in deciding, as he must, on the evidence, he said: "I can frankly declare, that a much more appropriate title to the act would be, "an act to deprive witnesses of freedom of opinion in matters of religion, and to jeopardize the rights of innocent

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Supreme Judicial Court, Maine, April Term, 1841, *at Portland.*

HOOPER AND OTHERS *v.* DAY AND TRUSTEE.

Goods in a chamber in the trustee's dwelling house, nailed up in boxes, not liable to the trustee process.

THE trustee disclosed that certain goods belonging to the principal defendant were in a chamber in his dwelling house, nailed up in boxes and trunks, that he did not know the contents: he contended that being thus situated, they could be attached by the officer, and that he was therefore not liable to the trustee process.

SHEPLEY J. It does not appear, that the officer did or could know the contents of these boxes, or in what part of the house they were to be found, or that he would be permitted to search for them. He, as well as the creditor, might well desire to avoid the risk of attaching articles not exhibited to sight, and which might not be liable to attachment. They were not so situated as to enable the officer acting with prudence to make an attachment without the danger of subjecting himself to an action of trespass, for taking goods not liable to attachment. Goods so situated cannot be regarded as liable to attachment in the ordinary process, in the sense contemplated by the statute.

Supreme Judicial Court, Massachusetts, October Term, 1841, *at Worcester.*

COMMONWEALTH *v.* TAYLOR.

Upon *habeas corpus* the court will interpose to prevent the removal of a slave from the commonwealth, when brought here by his master, even by the slave's consent, when he is not of sufficient discretion by age to exercise his own judgment in the matter. *Aliter*, where the slave is of a suitable age to judge for himself.

In case of a child, a slave, brought into this state, the court, upon a hearing upon *habeas corpus*, will commit him to the care and custody of a guardian appointed here.

A judge of probate may appoint a guardian to such child until he is fourteen years of age.

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people, who may have a deep interest in the knowledge and testimony of an unwilling witness, perhaps hairbrained and reckless enough *to avow his atheism*, so that the requisite proof can be had, and so escape examination, when *he ought to be holden* to disclose the truth, under such temporal penalties as can be brought to bear upon him." The Revised Statutes of Maine, without retaining the delusive title of the former act, yet continues the objectionable matter, and brings no relief. The Revised Statutes, chap. 115, § 72, runs thus: "No person, who believes in the existence of a Supreme Being, shall be adjudged an incompetent or incredible witness in any judicial court, or in the course of judicial proceedings, on account of his opinion in matters of religion, nor shall such opinions be made a subject of investigation or inquiry."

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This was a writ of *habeas corpus*, sued out in vacation, against the defendant, a married woman, belonging to Arkansas, where her husband was at the time of suing out the writ, to bring into court the body of Anson, a black boy, alleged to be detained as a slave in Athol, in this county. In her answer, Mrs. Taylor admitted that the boy had been a slave, but she disclaimed any intention to carry him beyond the limits of this commonwealth, unless with his consent. The case was argued by

Sewall for the commonwealth, and by

Hallet for the respondent.

Shaw C. J. The hearing of this case was properly adjourned from Suffolk, where the writ was made returnable, to this county, because, as the justices of this court are justices for the whole commonwealth, it might be heard by adjournment in any county in the state. The answer of Mrs. Taylor, that she will not remove this boy from the commonwealth, *unless with his consent*, is a strong negative pregnant that she will so remove him if he shall consent. This raises the question, what course the court shall pursue in cases like this, where the child is of tender years. In the case of *Aves*, (18 Pick. 193,) the master claimed the right to carry the slave with him back to New Orleans. Here the respondent does not set up any such claim, unless he is willing to return, clearly indicating an intention to remove him to Arkansas if he consents. But in this case the child is too young to have any decided judgment upon the matter. The case, then, is briefly this: here is a child — the respondent's husband does not appear — she cannot bind him by her disclaimer, and the child is too young to exercise a free election, and therefore has no will on the subject. It cannot, therefore, be distinguished, in principle, from the case of *Aves*.

Although bond-slavery does not exist here, yet by the laws of nations it is recognised as legally existing so far, that nations regard the right which other nations exercise to hold slaves. And it is on this ground, that the constitution of the United States recognises slavery and provides for the restoration of fugitive slaves. The states are, to some purposes, foreign to each other, and in respect to slavery, that is one of the particulars in which the constitution so regards them. That principle, however, is limited to fugitive slaves alone, and where a slave is brought into this state by his master, there is no authority by which he can be removed against his will.

If a slave is old enough to exercise a sound judgment, and prefers returning to the state where he will be held in bondage, the court will permit him to do so. This was done in the case of a steward of a vessel, who belonged to Maryland, and was brought before this court by *habeas corpus*, as being detained as a slave. On being informed he was free, if he chose to remain here, he said he should like to be free in Maryland, but having left his wife and children there, he pre-

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ferred returning there to be a slave, to abandoning them and remaining here, and he was accordingly permitted to return in the vessel to which he belonged. But when from feebleness of age this election cannot be freely exercised, the court will not put such a child under the control of his master. The writ of *habeas corpus* is one of great public right, and the power of granting it ought to be liberally construed. The court will see to it, therefore, that a child situated as this is, is put into the custody of suitable persons, who will take charge of him until he is of a proper age to exercise his own judgment in electing whether to remain here or return to the state from whence he has been taken. Judges of probate have a general power in appointing guardians for minors until fourteen years of age, and there having been such guardians appointed for this child by the judge of probate for this county, it is ordered, that the boy should be delivered to them, to have the care and custody of him.

After passing this order, the court were informed that an appeal had been taken from the decree of the judge of probate, appointing the persons named as guardians of the boy Anson, but the court held, that such appeal could make no difference with regard to the order of the court, that they should have the care and custody of the child.[1]

Farnum v. Perry.

In case of a sale of the whole of a certain quantity of an article, the sale will be complete as between the parties, although the article is to be weighed or measured, in order to ascertain the quantity, and thereby fix the amount of the price to be paid.

If a future time is fixed for payment of an article sold, and no time is fixed for the delivery, it seems that the vendee may take the property at any time.

Where a contract of sale has been entered into, so far as to perfect the sale between the parties, the loss of the property, if destroyed before actual delivery, must fall upon the vendee, although the vendor had possession of it at the time of such destruction, under a lien for the price.

This was an action to recover damages for the non-delivery, by the defendant, of a lot of teasles purchased by the plaintiff, and for which

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[1] Upon declaring the opinion of the court, the person who had been bail for the custody and appearance of the child, from day to day, was directed to deliver him up to one of the persons named as guardian, who was then in court; when a scene of most painful interest occurred. The boy, who was about ten years old, had, during several successive days, been apparently an unconcerned spectator of the proceedings before the court. He seemed to be a bright, intelligent child, and remarkably cheerful and happy while with his bail. His former owner was also in court at the time the opinion was given. But the moment the child understood that he was to be given up to his new guardian, to remain here, he broke out into most impassioned entreaties to be permitted to go back and see his father and mother and brothers and sisters, weeping bitterly, and pleading with his guardian to let him go. The business of the court was suspended, while the child was led away, shrieking and begging to be suffered to go back to his father and mother

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he had advanced the payment to the defendant. The writ also contained the money counts. It appeared that, in December, 1838, an agent of the plaintiff made a contract with an agent of the defendant, for an entire lot of teasles, and paid him one hundred dollars towards them, when the following memorandum was made: "Received of W. & D. D. Farnum one hundred dollars, part pay for my lot of teasles, now lying, a part in my old farm house, and the remainder in my shed loft, say about 800,000 teasles, at one dollar fourteen cents a thousand, and to allow seven and a quarter pounds for one thousand teasles, which are to be paid for, the balance by 20th of 3d month next, and I agree to allow ten thousand for poor ones. Stockbridge, 12 mo. 27, 1838. (Signed) F. P. for J. B. P." (the defendant.)

The plaintiff paid for about 750,000 at or near the time of payment mentioned in the memorandum, and received at different times about half the quantity stipulated for; the balance, it was alleged, were stolen and carried away without the fault of either party, and the question was, upon whom the loss should fall. There was considerable evidence offered in the case, but the case turned upon the question, whether the contract was an executed or unexecuted one, so as to throw the loss upon the one party or the other.

Merrick for the plaintiff.

Porter, of Lee, and *Washburn*, for the defendant.

Shaw C. J. The only written evidence in the case is the memorandum which the parties have very properly referred to as fixing the terms of the sale. There is no stipulation as to the time of delivery; the plaintiff might have taken them when he pleased. Whose, then, was the loss? It must be his in whom was the property at the time it occurred. The plaintiff has contended, that not having been counted or weighed, the property in the teasles did not pass by the contract. But this rule is to be taken with great limitation. It applies where some act is to be done to put the property in a condition to be delivered. In all such cases, nothing passes till this is done.

This question was fully considered and determined in the case of *Macomber* v. *Parker*, (13 Pick. 183.) The case of *Tarling* v. *Baxter*, cited by the counsel, (6 B. & C. 360,) is a leading case in point.

Although a lien remains in favor of the vendor for the price, it does not prevent the property passing to the vendee. Indeed, the very idea of a lien in such case goes upon the ground that the general property in the article is in the vendee.

In the present case, the whole quantity of teasles was sold, and no counting was necessary in order to ascertain what part of them was intended to be sold. The vendee, moreover, had a right to take away the goods at any time. The property, therefore, must be considered as having vested in the vendee, and he must sustain the loss.

In regard to the money counts, as it is admitted that the money

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paid did not exceed the contract price of the quantity of teasles, as they were when the sale was made, the plaintiff can recover in neither form of his claim.

Superior Court, Connecticut, September, 1841, *at Hartford.*

JONES *v.* ÆTNA INSURANCE COMPANY.

Foreign attachment — Insurance — Lex loci.

THIS was an action of *scire facias*, brought to recover the amount of a judgment obtained by the present plaintiff, residing in Montreal, in Lower Canada, against Francis Baby, formerly a resident of Lower Canada, but now of Albany, in the state of New York, at the November term of the county court, 1838, for this county, for the sum of 1174 dollars and 95 cents damages, and 13 dollars and 68 cents cost of suit. The plaintiff sought to recover the amount of the aforesaid judgment of the Ætna Insurance Company by process of foreign attachment, on the ground that at the time of the commencement of the former suit, said company was indebted to said Baby. It appeared in evidence, that said company had become indebted upon a policy of insurance, effected upon property belonging to the wife of said Baby; and that previously to the marriage of said Baby the property belonging to his wife was settled upon her in such manner as to be beyond the reach or disposition of her husband. It appeared also that Mr. Baby had acted as the agent of his wife in the management of her property. The great question in this case was, whether the indebtedness of said company to Mrs. Baby upon a policy of insurance effected upon property, which by the laws of Canada had been secured to the wife, and placed beyond the reach or control of the husband, could, by process of foreign attachment in this state be made liable to pay the debt of Mr. Baby to the present plaintiff.

Toucey and *T. C. Perkins* for the plaintiff.

Ellsworth and *Hugerford* for the defendant.

The court instructed the jury, that the laws of Canada, in relation to the property of the wife residing there, having been proved, were binding here, in the present case, and that consequently, upon the evidence admitted, the indebtedness of said insurance company to Mrs. Baby could not be made liable to pay the debt of her husband to the present plaintiff. The jury thereupon, without leaving their seats, returned a verdict for the defendants.

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DIGEST OF AMERICAN CASES.

Selections from 21 and 22 Wendell's (New York) Reports.

ACCORD AND SATISFACTION.

1. The acceptance of the note of a third person from one of the members of a firm, indorsed by him, together with the payment of the balance of the account against the firm in cash, is an accord and satisfaction of the demand against the firm; there being no agreement that such note was received merely as collateral security. *Frisbie* v. *Larned*, 21 Wendell, 450.

2. So a judgment confessed by one of the partners for the debt of the firm is a satisfaction. *Ib.*

ARBITRATION AND AWARD.

1. In a submission between an insurance company and a party assured, in respect to a loss, and an award of a sum of money to the assured, the arbitrators will be deemed not to have exceeded their authority in directing a transfer by the assured of his claims against another company for a loss, as the legal intendment is, that there was a double insurance. *Nichols* v. *The Rensselaer County Mutual Ins. Co.* 22 Wendell, 125.

2. Upon such an award, it is not necessary that the assured should aver an offer of performance on his part, if there be no necessary connection between the act to be done by him, and the payment of the money, or if the part of the award which directs the assignment be void; if both parts of the award be valid, each party is entitled to an action for the default of the other. *Ib.*

3. If an award directs the performance of acts by both parties, and the award as to the acts to be done by one of the parties is void, and the void part is the consideration or recompense of the thing awarded on the other side, the whole award fails; whether an offer to perform the part of the award void for uncertainty, or because out of the submission, would remove the objection, *quere*. *Ib.*

4. To bring a case, however, within the above rule, it must be manifest that the act directed to be performed by one party in respect to which the award is bad, is the consideration of the act to be performed on the other side; every intendment being in favor of the award. *Ib.*

ASSUMPSIT.

1. Where goods are sold to be paid for by a note or bill, payable at a future day, which is not delivered according to the terms of sale, the vendor may sue immediately for a breach of the special agreement and recover as damages, the whole value of the goods, allowing a rebate of interest during the stipulated credit; he cannot, however, maintain assumpsit on the common counts until the credit has expired. *Hanna* v. *Mills*, 21 Wendell, 90.

2. Where goods are to be paid for in a note or bill, the vendor cannot recover on the common count for goods sold and delivered until the credit has expired; but he may proceed immediately for a breach of the special agreement. *Yale* v. *Coddington*, 21 Wendell, 175.

ATTORNEY.

An attorney who prosecutes a suit to judgment, has not power by virtue of his general authority to discharge a defendant from arrest on a *ca. sa.* without the actual payment of the debt. *Simonton* v. *Barrell*, 21 Wendell, 362.

BAILMENT.

1. An innkeeper is responsible for the safe keeping of a load of goods be-

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longing to a traveller who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the innkeeper, although such place be an open unenclosed space near the public highway. *Piper* v. *Manny*, 21 Wendell, 282.

2. Common carriers, who carry passengers and their baggage as well as merchandise, are answerable under their common law liability for the baggage of passengers left at their offices in charge of their agents, with the intention of proceeding with the same in the next train of cars, steamboats, or other conveyances departing from the place where the baggage is deposited. *Camden and Amboy Rail Road Co.* v. *Belknap*, 21 Wendell, 354.

BILLS AND NOTES.

1. Notice of protest sent by mail directed to the town where the party resides is sufficient, although there be several post offices in the same town, unless it appear that the holder knew that it should be directed in a different manner; or now by statute, unless the party when affixing his signature to a bill or note specifies thereon the post office to which notice must be addressed. *Downer* v. *Remer*, 21 Wendell, 10.

2. Where there are three consecutive indorsers to a promissory note, the release by the plaintiff of the first indorser, is a bar to an action against the second and third indorsers. *Newcomb* v. *Raynor*, 21 Wendell, 108.

3. Where a bank receives and discounts negotiable paper, places the proceeds to the credit of the holder, and charges over against him and cancels other notes upon which are responsible parties, but which are over-due and lie under protest, such cancellation is equivalent to paying value at the time, and precludes all defence existing as between the original parties. *Bank of Salina* v. *Babcock*, 21 Wendell, 499.

4. A guaranty of a debt in the form of an indorsement of a promissory note is obligatory upon the guarantor; and in case of non-payment by the debtor, the guarantor is liable for the whole amount of the debt, and not merely for the sum received by him, with the interest thereof. *Oakley* v. *Boorman*, 21 Wendell, 588.

5. An action does not lie against a notary for the omission of notice of protest to an indorser, where the holder may resort to other grounds for fixing the indorser independent of the notice, and wilfully or negligently omits to avail himself of such facts. *Franklin* v. *Smith*, 21 Wendell, 724.

6. A bank receiving for collection a bill of exchange drawn here, upon a person residing in another state, is liable for any neglect of duty occurring in its collection, whether arising from the default of its officers here, its correspondents abroad, or of agents employed by such correspondents. *S. & M. Allen* v. *The Merchants' Bank*, 22 Wendell, 215.

7. This liability may be varied, however, either by express contract or by implication arising from general usage in respect to such paper; it is competent, therefore, for the bank to show an express contract, varying the terms of its liability, or in the absence of a judicial determination upon the point, to show that by the usage and custom of the place, a bank thus receiving foreign paper is liable only for its safe transmission to some competent agent, and is not responsible for the acts or omissions of such agent, or of any subordinates employed by him. *Ib.*

8. The inquiry, however, in such case, is not as to the opinion of merchants, however general, as to the law of the case, but as to the usage and practice in respect to such transactions, or the general understanding of merchants as to the nature of the contract evidenced by their acts, so as to enable the court to give the contract a correct interpretation. *Ib.*

9. Where a debt was lost by the omission of a notary to give notice of the non-acceptance of a bill presented before maturity, it was held not to excuse a bank which had received the same for collection, that, by the law merchant of the place where the bill was presented, notice of non-acceptance was deemed unnecessary; but that on the contrary, as the *lex loci contractus* governed in a case like it, it was the duty of the bank to have given the necessary instructions to its correspondents. *Ib.*

10. The omission to give notice of non-acceptance happening through the default of a commissioned public officer, a notary does not vary the rights of the

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parties: *pro hac vice*, he acted merely as the agent of his employers, and not in his official capacity. *Ib.*

CASE.

1. An action on the case may be sustained by a father for the seduction of his daughter without proving any actual loss of service; it is enough that the daughter be a minor residing with her father, and that he has the right to claim her services. *Hewitt* v. *Prime*, 21 Wendell, 79.

2. In an action on the case for a collision of vessels, the plaintiff is not entitled to recover, if the injury is in any degree attributable to his own want of care; and where such is the fact, and he obtains a verdict, a new trial will be granted. *Barnes* v. *Cole*, 21 Wendell, 188.

3. An action on the case for a malicious prosecution lies against a party who falsely and maliciously prosecutes another, although the court in which such prosecution was had was utterly destitute of jurisdiction in the matter; consequently it is not necessary in the action for the malicious prosecution to aver or prove that the court in which were the proceedings complained of had jurisdiction, provided that the malice and falsehood of the charge be put forward as the *gravamen*, and the arrest or other act of trespass be alleged merely as a consequence. *Morris* v. *Scott*, 21 Wendell, 281.

4. Where a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a public highway without any one to guard him, and is there run over by a traveller and injured, neither trespass or case lies against the traveller, if there be no pretence that the injury was voluntary or arose from culpable negligence on his part. *Hartfield* v. *Roper*, 21 Wendell, 615.

5. In an action for such injury, if there be negligence on the part of the plaintiff, there cannot be a recovery; and although the child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents or guardians of the child furnishes the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult. *Ib.*

6. The same rule, it seems, would apply in an action by a blind or deaf man, or a person *non compos*, who, under similar circumstances, received an injury on a public highway. *Ib.*

CONSIDERATION.

1. Where lands were sold and conveyed by deed, containing a covenant for quiet enjoyment, and the purchaser executed his bond for the consideration money, it was held, that it is no defence to an action on the bond, that the grantor was not seized in fee and had no right to convey the premises, if there be no allegation of any fraudulent representation on the part of the plaintiff in respect to the title; the above facts showing neither a failure or an original want of consideration. *Whitney* v. *Lewis*, 21 Wendell, 131.

2. A promise or obligation cannot be defeated in whole or in part, on the ground of the inadequacy of the compensation received for the obligation incurred—the slightest consideration is sufficient to support the most onerous obligation; the meaning of the rule that you may impeach the consideration is only that you may show fraud, mistake or illegality in its concoction, or non-performance of the stipulations of the agreement on the part of the promissee. *Oakley* v. *Boorman*, 21 Wendell, 588.

3. Where an action is brought for breach of a contract, whether the same be sealed or not, and the defendant can show that the plaintiff has not performed the contract on his part, according to its terms or spirit, so as to entitle him to a cross-action, he may at his election, instead of bringing an action in his turn, *recoupe* his damages arising from the breach committed by the plaintiffs, whether they be liquidated or not. *Ives* v. *Van Epps*, 22 Wendell, 155.

4. It seems, however, that in such case, the defendant should give notice with his plea of his intention to insist upon the right of *recoupement*. *Ib.*

CORPORATIONS.

1. Where an incorporated company, the capital stock of which is divided into shares, are authorized by their act of incorporation to make calls upon the stockholders for the payment of the sums by them respectively subscribed, in such proportions and at such times

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as the directors see fit, under penalty of forfeiture of the shares subscribed and of the previous payments made thereon, the company may, in case of non-payment, proceed by suit to recover the amount of the calls, or may declare a forfeiture of the stock. *Herkimer Manuf. and Hydraulic Co.* v. *Small*, 21 Wendell, 273.

2. So even after suit brought, they may declare a forfeiture of the stock, and such latter proceeding cannot be pleaded in bar of the further maintenance of the suit, where the value of the stock forfeited is not equal to the money due to the company. The stockholder, however, is entitled in such case, on the assessment of the damages, to insist that the value of the stock forfeited shall be allowed in mitigation or diminution of the sum which the plaintiffs would otherwise be entitled to recover. *Ib.*

3. Where the stock forfeited is equal in value to the money which may be demanded by the company, the forfeiture may be pleaded in bar; but a plea of forfeiture without such averment of value is bad. *Ib.*

4. The clause in an act of incorporation of a turnpike or railroad company authorizing a forfeiture of stock and previous payments in cases of non-payment of calls, confers a cumulative remedy; and does not deprive the company of the right to proceed by action for the recovery of subscriptions. *Troy Turnpike and R. R. Co.* v. *M'Chesney*, 21 Wendell, 296.

5. Nor is the company limited to the remedy by forfeiture, although the promise be expressed in the subscription to be upon pain of forfeiting, &c., and consequently the plaintiffs may declare upon such contract as upon an absolute promise. *Ib.*

6. An action of *assumpsit* lies against a corporation for refusing to permit a transfer of stock upon its books; and the measure of damages is the full value of the stock at its highest price at any time between the refusal and the commencement of the suit. *Quere.* Might not the time have been extended to the day of trial? *The Commercial Bank of Buffalo* v. *Kortright*, 22 Wendell, 348.

7. A blank transfer of a certificate of stock, where the holder has affixed his name and seal upon the back of the certificate is valid; and the transferee is authorized to fill it up by writing a transfer and a power of attorney over the signature. *Ib.*

8. Proof of custom as to the mode of transferring stock is admissible. *Ib.*

9. A corporation is bound by the acts of its acknowledged agents in the common transactions of the corporation, although the appointment of the agents be not evidenced by the records of the corporation. *Ib.*

10. Where, by the act of incorporating an insurance company, the management of the stock and affairs of the corporation is given to a board of twenty-three directors to be annually elected, a major part of whom by the act are competent to the transaction of all the business of the corporation, and an election of directors takes place, at which only twenty-two persons receive a plurality of votes, such twenty-two persons are duly elected, and take the place of their predecessors, notwithstanding that it chanced that the full number of twenty-three directors was not filled up. *In the matter of the Union Insurance Co.*, 22 Wendell, 591.

11. Where, under such circumstances, the old board conceived that the election had wholly failed, and a second election had been held by their order, at which twenty-three directors were chosen, this court, upon the summary application authorized by statute, set aside the second election, declared the twenty-two directors first chosen duly elected, and ordered a new election to supply the vacancy of the one director who was not chosen at the first election. *Ib.*

12. Application was made to the court previous to the second election to declare the twenty-two persons chosen, directors of the company, and to direct the election of one additional director; but the court refused to act upon it, considering the proceeding premature. *Ib.*

13. It seems, that the stockholders, without any order of the court, have the power to fill up a vacancy happening under the above circumstances; and further, that on the neglect of the board to make order for an election to supply such vacancy, a *mandamus* would lie. *Ib.*

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INTELLIGENCE AND MISCELLANY.

Bar Rules. By the Revised Statutes of Massachusetts, it is provided, that any citizen of the commonwealth, of the age of twenty-one years, of good moral character, who shall have devoted three years to the study of the law, in the office of some attorney within the state, shall, on application to the supreme court, or court of common pleas, be admitted to practise as an attorney in the courts of the commonwealth. Any person having the other qualifications, required as above, but who shall not have studied three years, may, on the recommendation of any attorney within the commonwealth, petition the supreme court, or court of common pleas, to be examined for admission as an attorney in said courts, whereupon the court shall assign some time and place for the examination, and if they shall thereupon be satisfied with his acquirements and qualifications, he shall be admitted in like manner as if he had studied three full years. When this law went into operation the association of the Suffolk bar was dissolved, although we believe their example was not followed in all the other counties. Of the utility of bar rules and legal associations, in general, different opinions are entertained by the profession, but we are inclined to think that the abolition of the rules in Boston, and the operation of the provisions of the Revised Statutes, have been attended with fewer difficulties than was apprehended. The admission to practise, where the student has not devoted three years to the legal studies, is within the discretion of the courts, and there are not so many applications of this sort as it was supposed there would be, for it seems to be understood that a very rigid examination is made by some of the courts at least, where three years have not been devoted to law studies. We have heard that there have been some instances where the supreme judicial court, after a long examination, have refused to admit the applicant, a mortification that could not but have a salutary effect on those persons anxious to get into the profession before their time according to the old fashioned requirements. There is one inconvenience attending the abolition of bar rules, and that relates to the rates of compensation and fees, which were formerly fixed and uniform, but are now an open question, inviting discussion in every case. The rates of compensation, fixed by the Suffolk bar, were adopted after mature deliberation, and are very generally adhered to at present. We have thought it might be useful to copy the principal part of them, for the accommodation of the younger members of the bar, who do not possess copies of the old rules; and the following may not be without interest to distant readers. The tenth article of the bar rules of Suffolk, as it has stood since 1827, until the rules were abolished, is as follows:

Taking into consideration that the rules of the supreme judicial court require that nine years, at least, should have been passed in literary and professional pursuits, to qualify a man for admission to that court as an attorney thereof, and two years practice therein as an attorney, to qualify him for admission as a counsellor thereof, and also that those who take upon themselves to perform professional duties are, and ought to be, holden in law and in honor to indemnify their clients for all losses or damages which are occasioned by negligence or want of professional knowledge; and lastly, that the members of the profession are never applied to, if the party can obtain, without their agency, the rights which the laws of the land secure to him; —

We, the subscribers, members of the bar in the county of Suffolk, establish the fol-

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lowing rates of compensation and fees as the lowest which we can reasonably and honorably receive; and we bind ourselves not to receive less fees or compensation than are herein expressed, nor any commutation or substitute therefor, viz.

Advice or consultation. For advising, when the property in dispute exceeds 100 dollars, and does not exceed 500 dollars, not less than $4; for advising when the property exceeds 500 dollars, not less than $5.

Drafting of legal instruments. The compensations in these cases do not admit of any precise rule. The service to be compensated is compounded of professional advice and knowledge, and the labor of applying them in writing to each particular case.

Letters before suit. For a letter demanding payment, under 500 dollars, $2; above 500 dollars, $3.

Writs, &c. advising and commencing the action Where the demand or cause of action does not exceed 100 dollars, $3; where the demand or cause of action exceeds 100 dollars, and not 500 dollars, $4; where the demand or cause of action exceeds 500 dollars, $5.

Trustee process, advising, &c. One dollar in addition to each of the sums chargeable as above for common writs, that is, four, five, and six dollars, instead of three, four, and five.

These charges are to be made when the action is settled before entry, and are to be paid together with the sheriff's fees.

In addition to these charges, the plaintiff's attorney or counsellor will charge his fees for advice, if the case be such as to authorize such charge to the plaintiff.

Court of Common Pleas. For plaintiff's counsel or attorney. If he prevails, the counsel or attorney is to charge the plaintiff with the bill of costs, and give him credit for it, if it be received from the defendant, or on execution.

He is also to charge the fees for arguing the cause, if argued either to the court or jury.

If the plaintiff does not prevail in the suit, his counsel or attorney is to charge the writ according to the rates before stated, and all sums of money paid for the plaintiff in carrying on the suit. He is also to charge a term fee for each term. In cases not exceeding 100 dollars, $3; exceeding 100 and not exceeding 500 dollars, $4; exceeding 500 dollars, $5.

If the cause be argued to the court or jury, the arguing fee is to be charged for the term at which the argument took place, instead of the term fee.

In cases where several actions are brought on one and the same title, or on the same policy of assurance, or other like cases, in which *all* are governed by the decision of one, or more, either term fees or half term fees may be charged at discretion, in such actions as are not tried or argued.

For defendant's counsel or attorney. Where the defendant prevails, his counsel or attorney is to charge the bill of costs recovered against the plaintiff, and in addition thereto, term fees as before stated, excepting the term when the cause is argued to the court or jury, when the arguing fee is to be charged instead of a term fee.

But when the costs cannot be obtained of the plaintiff, the defendant's counsel may charge either the bill of costs and arguing fee only, or the term fees and arguing fee only, at his option.

If the defendant does not prevail, his counsel or attorney is to charge him term fees, as aforesaid, for each term. If the cause be argued, the arguing fee is to be substituted for the term fee at the term when the argument is had.

For arguing a case in the common pleas, not less than $10; for trustee's answer, &c., where he has no effects, $3; where he has effects exceeding 100 dollars, $5; for a surrender of principal by bail, &c., $5.

Supreme Judicial Court. For plaintiff's counsel or attorney. When the plaintiff prevails, the counsel or attorney is to charge the bills of costs in the court of common pleas, and in the supreme court, and fees of arguing to the court or jury, or both, as the case may be.

When the plaintiff does not prevail, the counsel or attorney is to charge the sums paid in the prosecution of the suit, and term fees, double the amount chargeable as term fees in the common pleas, and also the fees of arguing the cause either to the court or jury, or both, as the case may be.

Defendant's counsel or attorney. When the defendant prevails, the counsel or attorney is to charge the bill of costs and the fees for arguing the cause to the court or jury, or both, as the case may be, and term fees double the amount chargeable in the court of common pleas.

When the costs cannot be obtained from the plaintiff, the defendant's counsel may charge the bill of costs and arguing fee only, or the term fees and arguing fees only, at his discretion.

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When the defendant does not prevail, the counsel or attorney is to charge term fees double the amount chargeable as term fees in the common pleas, and instead of term fee, the fees of arguing at the term when argument is had.

For arguing a cause to the jury in the supreme judicial court, for plaintiff or defendant, not less than $20; for arguing a question to the court, for plaintiff or defendant, not less than $20; but when the matter in dispute does not exceed 100 dollars in value, the counsel shall charge for arguing the cause what they shall deem a reasonable compensation; for divorce, for naturalization, for process of partition, not less than $20, exclusive of clerk's dues.

References, &c. In all arbitrations, and in references entered into in the supreme judicial court and court of common pleas, and rules entered into before a justice of the peace, the compensation is to be regulated according to the rate of fees established as to the courts of common pleas and the supreme court, as to arguing cases; and for the advice and preparation for the hearing, a reasonable charge to be made, according to the spirit of these rules.

After the term when a cause is referred, and before the term when the report is made, the counsel or attorney of the plaintiff, and the counsel or the attorney of the defendant, shall charge half term fees only.

Collecting money. For attention and responsibility of the attorney or counsel in effecting a settlement with the debtor before judgment, and obtaining the money due, or for obtaining execution and committing the same to a proper officer, and receiving the money from him or from the debtor, and paying the same over to the creditor, when the amount does not exceed one thousand dollars, a commission of two and one half per cent. is to be charged, and for every hundred dollars above one thousand dollars, a commission of one dollar.

When mortgaged premises are sued for, and the money is paid, the like rate of commission is to be charged; but if the demandant receives his writ to take possession, or when the judgment recovered is to be satisfied by a levy on real estate, a reasonable compensation shall be charged and received.

If the plaintiff thinks fit to take the execution from the attorney or counsel, and disposes of the same himself, he shall be charged and required to pay the same per centage as if the attorney had collected the money, or done other duty as to the execution, which would entitle him to a commission, according to the foregoing provisions.

Where money is collected for a client, who lives out of the commonwealth, a commission of three per cent. shall be charged to him upon the amount received.

When the plaintiff cannot obtain any benefit from his suit, the counsel or attorney may charge the bill of costs only.

These rules are intended to establish the lowest compensation, and not to restrict gentlemen from taking higher compensation in cases of difficulty or magnitude; and these rules are not to apply to cases not exceeding twenty dollars.

OBITUARY NOTICES. Died, in Hillsborough, New Hampshire, on the 17th of October, ALBERT BAKER, Esq., aged 31. He was born in Bow, N. H., and was graduated at Dartmouth College in 1834. He commenced the study of law with Hon. Franklin Pierce, in Hillsborough, but passed the last year of his novitiate in the office of Hon. Richard Fletcher, in Boston. He commenced practice at Hillsborough, in 1837, and was elected a member of the state legislature in 1839—1840—1841. As a lawyer, he was industrious; as a politician, he was ardent and uncompromising, and was regarded as a young man of great promise.

In Arkansas, in September last, Hon. B. G. TENNY. He was a native of Massachusetts, and was graduated at Dartmouth College, in the same class with Hon. Rufus Choate, the present distinguished senator from Massachusetts, with whom he was a room-mate. Mr. Tenny went to Louisiana, about the year 1823, and settled in Vidalia, where he practised law for many years with great success. For several years he represented the district in the state senate. In October, 1840, on the decease of Judge Davis, he was elevated to the bench, which office he filled with great credit and to the general satisfaction of the citizens of the district. A decision of his in June last, in a suit for a separate maintenance, brought by a Mrs. Rowley, being in her favor, her husband took umbrage and sent Judge Tenny a challenge. The challenge was accepted, and the parties met near the line, in Arkansas. A correspondent of the Salem (Mass.) Gazette says, the parties "were placed at sixty paces, each armed with

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a rifle, a brace of pistols, and a bowie knife; at the word they were to advance towards each other and fire at discretion — the rifles failing in effect, resort was to be had to pistols — both failing, the bowie knives were to be used. Rowley advanced several paces towards the judge, took deliberate aim, and at his first fire the ball entered the judge's right side, immediately below the nipple, and passed through his body; he fell, and merely said to S. S. Prentiss, his second, '*I am dying, good-by.*' The judge's rifle was not raised, nor did he advance; he went to the ground with a determination to '*stand a shot*,' believing that if it failed Rowley would be satisfied." The melancholy circumstances of Judge Tenny's death receives additional interest from a fact within our knowledge, which has not yet been published. On the day before his death he wrote a letter to his brother in Charlestown, Mass., in which he stated he was to fight a duel the next day, that he had been pressed into the affair by circumstances beyond his control, and that it was a thing he could not avoid, as he had already done every thing to satisfy his antagonist, consistent with honor. He inclosed his will, and gave general directions to his brother in case of his death. The next mail brought a letter from his second, S. S. Prentiss, containing the melancholy intelligence of his death! At a meeting of the members of the bar, held at Concordia, the following resolutions were passed: Resolved, That we deeply deplore the loss of our late district judge, the Hon. B. G. Tenny. Our state has been deprived of one of her best and most esteemed citizens; society of a gentleman, bland, kind, and the most courteous; and the bench one of its brightest ornaments. Concordia must mourn and weep over his name, for her ablest son has departed, ere the honors she had in store for him had encircled his brow. He has stood forth her friend in the council of the state, and returned to her bosom to dispense justice to her children, and though his career has been thus prematurely arrested, his honor as a gentleman, his impartiality as a judge, and his integrity as a man, remain pure and unsullied. Resolved, That, as a mark of our regret for his loss, we wear the usual badge of mourning for thirty days.

In Boston, on the 6th of October, Hon. George Blake, aged 72. He was born at Hardwick, Massachusetts, in 1769. He entered the sophomore class at Harvard college in 1786, and was graduated in 1789. He commenced the study of the law in the office of his brother-in-law, William Caldwell, Esq. of Rutland, in the county of Worcester, where he pursued his professional studies for nearly two years, after the expiration of which time he entered as a student the office of Governor Sullivan, at Boston, and under his auspices was admitted to the bar in 1794. He commenced the practice of his profession in that year, at Newburyport, as a junior partner, in the office of Hon. Dudley Atkins Tyng, formerly reporter of the decisions of the supreme judicial court, but in the course of about one year afterwards he removed from thence and opened an office in Boston, where he ever afterwards resided. He was appointed attorney of the United States for the district of Massachusetts in 1801, at which time he was a member of the house of representatives. He resigned his seat in the summer session of that year, having received his appointment after his election to the house. He had been at the bar but seven years when he was invited to accept this very responsible office, which he filled with great ability for nearly twenty-seven successive years, and left it at the expiration of the term in 1829, on the accession of Gen. Jackson to the presidency. In that year he was again elected to a seat in the house of representatives, and re-elected till 1833, when he was chosen a member of the state senate, and again elected in 1834. For the four succeeding years he was a member of the house, and in 1839 again took his seat in the senate. In the winter of that year he met with a serious accident, (the fracture of a limb,) which confined him to his house for the most part of the time till his decease. His chief distinction was acquired at the bar, as a public officer. In criminal cases, particularly, he was eminent for his learning, discrimination, clear argument, and power with the jury. His forensic powers were of a very high order, as was extensively known and recognised. In the legislature, although sixty years of age when he re-entered it, he was distinguished for his ability in debate upon all questions of public interest. The

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soundness of his views, and his power of enforcing them, were generally felt and appreciated. The propriety and elegance of his diction, and his eloquence and fervor in debate, often excited admiration, even when his physical energies became somewhat impaired. He was deeply interested in political topics, and always participated in debates with which they were connected. His only compositions have been merely miscellaneous, such as political and speculative essays in the public gazettes, orations, Washington eulogy, speeches in the general court and elsewhere, together with divers published arguments in capital and other trials. He was, we believe, for several years associated with his brother Francis, in supporting the National Ægis, published at Worcester, a political newspaper of excellent reputation then, as it has been since. He furnished a considerable portion of the political articles which appeared, from time to time, in that paper, during the first few years of Mr. Jefferson's administration. His tastes were political, and had the terms of his office permitted him to have gone into the national councils, he would unquestionably have been as distinguished as a statesman as he was at the bar. In intellectual qualities he had few superiors. His general reading was extensive; his information on all topics of public interest always at command; his literary attainments highly respectable, and his powers of illustration remarkable. He was a gentleman of excellent feelings, and possessed of a high sense of honor. For the above notice of the deceased we are indebted to the Hingham Patriot.

Irish Eloquence. It is often supposed, that despatch of business is hindered in the Irish courts by ill-timed declamation. A late English writer in ridicule of the idea, gives the first speech a friend of his heard on entering the courts in Dublin, which is surely not open to the charge of extravagant eloquence: — "Your lordships perceive that we stand here as our grandmother's administrator *de bonis non*, and really, my lords, it does strike me that it would be a monstrous thing to say, that a party can now come in, in the very teeth of an act of parliament, and actually turn us round, under color of hanging us up on the foot of a contract made behind our backs."

Conveyancing. The following originally appeared in Henry Phillips's Purchaser's Pattern. The advice needs no recommendation.

First, see the land which thou intend'st to buy
Within the seller's title clear doth lie;
And that no woman to it doth lay claim,
By dowrie, jointure, or some other name,
That it may cumber. Know if bond or free
The tenure stand, and that from each feoffee
It be released. That the seller be so old
That he may lawful sell, thou lawful hold.
Have special care that it not mortgaged be,
Nor be entailed on posterity;
That if it stand in statute, bound or no,
Be well advised what quit-rent out must go:
What custom-service hath been done of old
By those who formerly the same did hold;
And if a wedded woman put to sale,
Deal not with her *unless she bring her male*,
For she doth under covert baron go,
Although sometimes some traffic so, (you know.)

Thy bargain being made, and all this done,
Take special care to make thy charter run
To thee, thine heirs, executors, assigns,
For *that* beyond thy life securely binds.
These things pre-known and done, you may prevent
Those things rash buyers many time repent;
And yet, when as you have done all you can,
If you 'll be *sure*, deal with an honest man.

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MONTHLY LIST OF INSOLVENTS.

Boston.
Alker, Thomas, } Stable keepers.
Doe, Elijah, }
Austin, Henry, Housewright.
Barnes, Joseph W. Furniture dealer.
Birdsall, Edward M. Housewright.
Bruce, George. Trader.
Chaney, Joseph B. Carpenter.
Eastman, Wm. H.
(Eastman, Brother & Co.)
Huber, Peter, Tailor.
Lincoln, Alex'r. S. Gentleman.
Proctor, Azaria, Innkeeper.
Roberts, Chas. A. Trader.
Symonds, John H. Hairdresser.
Whitney, Ephr. W. Trader.
Wright, Epharim, Trader.
Becket.
Harris Elijah D. Yeoman.
Chaffee, Nathan M.
Bedford.
Fuller, Henry H. Equestrian.
Billerica.
Cowdey, Joseph R. Cordwainer.
Charlestown.
Briant, Chas. M. Carpenter.
Giles, John B. Marble polisher.
Cambridge.
Stanniford, John, Glassmaker.
Chelsea.
Clock, Abram, Yeoman.
Chester.
Stebbins, Franklin, Chairmaker.
(Williams & Stebbins.)
Dartmouth.
Turner, Calvin, Trader.
Dorchester.
Withington, Daniel, Brickmaker.
Dracut.
Whittier, Oliver, Laborer.
Duxbury.
Magoun, William, Harnessmaker.
Hanson.
Hawes, Samuel, Jr. Trader.
(late I. S. Perry & Co.)
Harwich.
Underwood, Sidney, Bookseller.
Lee.
Hall, Jesse, Yeoman.
Lowell.
Alger, Daniel, Trader.
Dudley, Alvin, Carpenter.
Mace, Samuel F. Cordwainer.
New Bedford
Smith, Wm. G. F. Mariner.
North Bridgewater.
Buckley, William C. Baker.
Pittsfield.
Howard, Welcome S. Merchant.
Roxbury.
Green, David, Merchant.
Springfield.
Buckland, Ashbel, Armorer.
Townsend.
Lewis, Alexander,
Tyringham.
Bishop, Eliad T. Combmaker.
Weymouth.
Burrell, Thomas J. Merchant.
Woburn.
Rice, Samuel M. Trader.
Richardson, Saml. S. Trader.
Worcester.
Clark, Julius S. } Merchants.
Elwell, David, 2d, }

NEW PUBLICATIONS.

The speeches of Lord Brougham upon questions of public rights, duties and interests; with historical introductions, have been reprinted in two handsome octavo volumes, from the English edition, by Lea & Blanchard of Philadelphia, and are received on sale, in Boston, by Little & Brown. The work contains all the most celebrated speeches and forensic arguments of this remarkable man, including his defence of Queen Caroline and his speech on Law Reform. His notes and illustrations are in the highest degree instructive, and not seldom amusing. The work, which is afforded at a moderate price, commends itself to all classes of readers.

We have received the first part of the ninth volume of the New Hampshire Reports. It contains the cases from the December Term 1837, to the July Term 1838.

The nineteenth volume of Pickering's Reports has been published, which completes the series down to the twenty-third volume, which is in press.

The first part of Mr. Metcalf's second volume is published.

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THE LAW REPORTER.

DECEMBER, 1841.

REMARKABLE TRIALS. — No. VI.

POISONING — CASE OF LUCRETIA CHAPMAN.

Lucretia Chapman, whose trial in Pennsylvania, several years ago, for the murder of her husband, caused great excitement in that state, and was the subject of much comment throughout the whole country, was a native of Massachusetts; her maiden name was Winslow. She was a woman of strong passions, of tolerable education and considerable activity, and was at the head of a boarding school when she married William Chapman, a physician, who devoted his attention to the cure of persons afflicted with infirmity of speech. He was a man of little knowledge, or decision of character, and his wife contrived to be the active person in the establishment, which was continued after their marriage, and until his death, in Andalusia, Pennsylvania.

In May, 1831, a young man wretchedly dressed, and apparently fatigued with travelling, stopped at Mr. Chapman's late in the evening, and asked leave to spend the night there, saying that he had been refused lodging at the nearest public house. Mrs. Chapman, not suspecting the misery that would arise from the permission, persuaded her husband, somewhat against his inclination, to allow the stranger to remain. He represented himself to be the son of the governor of California, and said that his name was Lino Amalio Espos Y Mina. So well did he follow up the good impression he had made upon Mrs. Chapman, that his stay at Andalusia was prolonged, till mid-

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summer, professedly for Mrs. Chapman to instruct him in English, in which he was no proficient; for which he was to pay her $2000 a year. During this time, a strange infatuation had taken possession of Mrs. Chapman; she treated her husband harshly, and often with contempt, and gave her money and her thoughts to the friendless Mexican.

On the 19th of June, Mr. Chapman was taken sick, slightly, but suddenly; being better the next day, with the consent of his physician, he ate some chicken-broth, and part of a chicken, cooked in the house; immediately after which he became more ill, and continued to fail, till the 23d, when he died, and was immediately buried. On the 5th of July, Mrs. Chapman was secretly married to Mina, who immediately set out for the north. In September, Mina was arrested in Boston, and both he and Mrs. Chapman were indicted at the February term, 1832, of the court of Oyer and Terminer, held at Doylestown, for Bucks county, Pennsylvania, for the murder of William Chapman, *by poison.*

At the trial of Mrs. Chapman, which came on first, Mr. Ross, deputy attorney general, opened the case for the prosecution, with a short statement of the facts he intended to prove. Twenty-five witnesses were called for the prosecution, and twenty-three for the defence; from whose testimony, and from the documents in the case, the following facts appeared.

Mr. Chapman's was not a public house, in the usual meaning of the word, though one of the witnesses said there was a room called the "beggars' room;" but travellers not unfrequently stopped there, as the tavern was at some distance. Mina came there a friendless stranger, and Mrs. Chapman understanding his broken English better than the rest of the family, and being interested by the history of his disasters, at first allowed, and then desired him, to remain with them. He said that he had come from Philadelphia that day, and was on his way to Count Bonaparte's, where he should find a friend who would supply him with money. On the 16th of May, Mr. Chapman wrote to Mina's father, informing him of his son's arrival at his house, and saying that he would stay there until he could hear from his father. Mrs. Chapman wrote to his mother, at the same date, expressing a great interest in her son, and saying that he would remain with them under her instruction in the English language — indeed, she said, "your son talks of spending three years in my house, which I hope he will do; and if he does, you may rest assured, Madam, that parental attentions shall be extended to him by myself and my husband."

Having recovered from his fatigue, Mina went with Mrs. Chapman, in her carriage to Bonaparte's. He found his friend was not there, and Bonaparte was engaged with company. On the 17th or 18th of May, Mina and Mrs. Chapman went to the Mexican consul's. Mrs. Chapman left Mina there to write a letter for the consul to forward to his friends in Mexico. Mrs. Chapman not returning, the

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consul asked Mina to take dinner with him, as a matter of form, not expecting him to accept the offer, but Mina accepted the invitation, and remained. They were scarcely seated when Mrs. Chapman was announced. She was shown into another room, and requested to wait till dinner was over, the sister of the consul going to remain with her, who expressed to Mrs. Chapman her gratitude for the care and attention she had bestowed on her friendless countryman, adding "that it was a pity to see a young man so unfortunate, as he represented himself to be rich in his own country." Dinner being over, Mina and Mrs. Chapman took their leave.

After this he frequently drove with Mrs. Chapman, and on one occasion, he lay with his head in her lap, and they sang scraps of love songs to each other. Mina said that he was subject to fits; and whenever he was attacked, Mrs. Chapman would turn every one else out of the room, because he did not like to have people with him when he recovered; but she shut the door, and remained with him herself. It was testified that they used to kiss each other, but there was no evidence offered of adulterous intercourse. Throughout the testimony, it appears that Mrs. Chapman treated her husband in a most unbecoming manner. One of the servants in the house testified that she gave Mina some of Mr. Chapman's fine linen shirts, and then told her husband that she was mistress in her own house, and should do as she pleased; that she was ashamed of him, and wished he was gone from the house; and the same witness testified that she saw her "one day give her husband a push with her foot."

After his recovery from one of these attacks of sickness, Mina gave Mrs. Chapman a paper which she endorsed "Don Lino's will," which was signed by him, and purported to "leave to Mrs. Lucretia Chapman the sum of fifteen thousand dollars for having assisted me with particular attention before my death, which sum will be paid in Mexico." This document was marked in the margin 15,00000 dollars. One day Mrs. Chapman's little daughter found Mina leaning against the barn, crying, and he said he heard a voice like his mother's or his sister's, saying, "Linetto, Linetto, Linetto," and he should soon hear of the death of one of them. In a short time, he heard of the death of his youngest sister, and Mrs. Chapman went with him, and ordered a tailor to make him a suit of black, and charge it to Mr. Chapman. A day or two after he had the clothes, he said he had heard that his sister was not dead, as a friend of his from Mexico, had seen the family, and they were all well.

At last Mr. Chapman began to suspect that all was not as it should be, and when Mrs. Chapman went with Mina to Philadelphia with the intention of returning the same evening, and they did not return till the third day, he became uneasy, and said to a comparative stranger, "I believe that this Mina is an impostor; a roguish fellow; — I had rather be poor than have my peace so disturbed. In all probability their object is to tarry until the family has retired, and I would

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like to know whether they would be guilty of improper conduct after they do return; for if I know of their going together to Mina's lodging room, I will be in there, and by —— I 'll take his life;" — and he said to the same person, that his wife's affections were gone from him — that he could not confide his troubles to his neighbors — and that he would bear it no longer.

On the 16th of June, Mina went to a druggist's in Philadelphia, and asked for some arsenical soap to prepare birds for being stuffed; and when he found it was not kept ready made, he preferred to take a shilling's worth of pure arsenic to waiting till the soap could be prepared.

Alfred Guillou, an assistant in the druggist's store, where Mina bought the arsenic, about this time, wrote a letter to Mr. Chapman, at Mina's request, and signed it "Est. Cuesta," which he believed to be Mina's name. This letter expressed the writer's sense of obligation to Mr. Chapman for the kindness he had shown to the friendless Mina, and continues, "I hasten to put myself at your disposal, and assure you that any commands you may think proper to honor me with, I will, to the fullest extent in my power, accomplish immediately." Col. Estanislao De Cuesta was the consul of the Mexican government for the city of Philadelphia.

On the 19th of June, Mr. Chapman not feeling perfectly well, sent for Dr. Phillips, who recommended some very mild course of treatment, and told him he might eat a beef-steak. Mrs. Chapman said he had been subject to attacks of vertigo, and nothing was thought of the attack till the next day, when immediately after eating some chicken broth, he was seized with the most violent vomiting and a burning pain in his stomach. The broth was made by his wife, in the kitchen, and carried by her into the parlor to be seasoned; he also ate of the chicken so heartily, that when his wife saw how little was left, she exclaimed to her daughter, "how heartily your father has eaten of the chicken, and how little of the soup! I am afraid it will hurt him."

He continued to suffer from the most violent attempts to vomit, till when the doctor again visited him on the 21st; he found him *in articulo mortis.* Dr. Phillips's testimony concerning his state at this time, is rather general, as he could not recall after the length of time before his examination, many of the symptoms. When Dr. Phillips and Dr. Knight visited him on the 22d, they found his senses were impaired — his hearing was almost gone — his extremities were cold — his pulse was barely perceptible — and he expired in rather a comatose state early on the morning of the 23d. It was supposed that he died of the cholera morbus, though the physicians were not certain that such was the fact. Mina was in the room part of the time during Mr. Chapman's sickness, and said to a person who was taking care of him, who was the same who testified to the indignation of Mr. Chapman, at his wife's conduct with Mina, that "when I was sick,

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Mr. Chapman did wait on me night and day, and prayed for me," "and," — continues the witness — "he then pretended to cry — but I saw no tears."

The remains of the chicken and the broth were thrown into the yard. Near the yard was a neighbor's pond, where he kept a number of ducks; who, on the day the chicken was lying in the yard, crept through into Mr. Chapman's yard, and when they returned, they were seen to fall over and die, to the number of twenty or thirty. Those that died were young ducks; there were four old ducks, too large to get into Mr. Chapman's yard; and they did not die. Those that died were buried, and some time afterwards, on examination, the bones and the craw were found in perfect preservation, and covered with something in "little fine pieces, and they fairly glittered, they were so white."

The friend who was with Mr. Chapman at the time of his death, remarked, that the body became cold and stiff sooner than usual, and that the face grew dark. He was surprised at these symptoms, as he understood that Mr. Chapman died of cholera morbus.

Mr. Chapman's remains having been removed from the grave, Dr. John P. Hopkinson, at the request of the deputy attorney general, proceeded on the 21st of September to make a post-mortem examination, with the view of deciding whether Mr. Chapman's death was caused by poison. Dr. Hopkinson took the stomach from the body, and placing it in a glass jar, carried it to Dr. John K. Mitchell's laboratory, in Philadelphia. Dr. Reynell Coates assisted Dr. Hopkinson in his examination of the body, and Dr. Mitchell, proceeded with Thomas G. Clemson, to analyze the stomach and its contents. The evidence here is very voluminous and complex. The stomach was very nearly or entirely empty; it was washed, and the water in which it was washed, with whatever was taken from the stomach, was submitted to various tests; from which it was ascertained, that arsenic did exist in the liquid in the state of arsenical acid in combination with lime. The stomach itself was dissolved in nitric acid; and the solution was filtered, mixed with water, evaporated, and the resulting powder was submitted to several tests, for the discovery of arsenic or other poison in a metallic form, which, however, could not be done. Part of this resultant was placed in a glass tube, and heated over a spirit lamp, in order to produce the arsenical rings, which would have been conclusive proof of the presence of arsenic. No such rings appeared. The heat of the lamp broke the tube. Mr. Clemson exclaimed — "is any one subliming arsenic in the room?" and smelling of the tube, said he was confident that there was arsenic there. The testimony concerning the proof of the presence of arsenic, from an alliacious odor, is somewhat contradictory. Mr. Clemson testified, in his cross-examination, that "a man can smell the shadow of a shade of arsenic;" but Dr. Mitchell would not allow the single comparative fact, of the presence of the smell to form any part of the foundation

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of his opinion. Dr. Bache, who was a witness for the defendant, declared it as his opinion, that the odor was not to be depended on, because some substances have some analogy in odor, and Dr. Togno, another witness for the defendant, would "not rely on the alliacious odor." Judge Fox, in his charge to the jury, says, "the odor peculiar to arsenic being clearly proved to exist, the presence of the metal is taken for granted by chemists, for all ordinary purposes," and afterwards, "the existence of the peculiar odor of the metal cannot admit of doubt." Dr. Coates testified, that "a man may die by arsenic, and, from vomiting and purging, no trace of it afterwards be found."

The day after Mr. Chapman's death, Mrs. Smith came to the house, for the purpose of placing her two children at Mrs. Chapman's school. She saw Mina, but observed nothing uncommon in the state of the family. She carried her children there four or five weeks afterwards, and found Mrs. Chapman in the utmost grief. After a few words of preface, Mrs. Chapman said to Mrs. Smith — "this young man, of whom you have heard me speak, who has been boarding with me, I fear has turned out an impostor." She then gave Mrs. Smith a history of her acquaintance with Mina, adding, that if the consul's sister "had not told me that this young gentleman was a gentleman of large fortune," I should not have been deceived; and she went on to say, that just before he left her, Mina asked her for her watch. She told him that he had Mr. Chapman's already; but he said he wanted her's as a memento of regard. He took the watch, giving her a chain, and saying, "I give it to you in return for the watch — when I come back you shall have it." He then went away, taking all the money in the house. Mrs. Chapman, finding the chain irritated her neck, took it to a jeweller, who told her it was nothing but brass. "I then made up my mind," said she, "that I hoped he never would come back" — and he never did, till he came under the charge of an officer.

The recorder of Philadelphia, hearing that Mina had obtained money in Washington and elsewhere under false pretences, went in the last of August, to Mrs. Chapman's, and told her his suspicions of Mina, and asked her if he had not plundered her of her property. She answered, "no," pretty promptly. He asked her if it was possible that he had $500 of the notes of the Farmer's Bank, in Bucks county, when he left Bucks to go to Baltimore. She immediately answered that it was impossible. He then told her of an advertisement, of his having lost that sum in notes upon that bank, and that he had used that advertisement for the purpose of defrauding several persons in Washington, and that, therefore, it was his duty to see that he was arrested. The recorder then asked her if nothing had occurred within her observation to make her suspect that Mina had administered poison to her husband. There was a "very marked effect on her countenance" when his meaning became plain to her. She made a great effort to recover herself, and succeeded, and answered, no; she had seen nothing of the kind. She then detailed to the recorder the

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circumstances of her husband's death, and of Mina's departure; after which, the recorder returned to Philadelphia.

On the 10th of September, Mrs. Chapman went to the recorder's office in Philadelphia, and told him that she had been deceived and injured by Mina, and asked the recorder to give her advice in her trouble. He told her she had been very imprudent, and it was very difficult to advise her; that one course only could possibly do any good — to convince the public, that she had been, throughout the whole, a victim of deception; and that she ought to show her sincerity by aiding by all means in her power to bring Mina to justice. She then gave him details of his conduct, and of their marriage, and showed him a certificate from the Mexican minister, resident at Washington, certifying that Mina and Mrs. Chapman were lawfully man and wife. The moment the recorder saw it, he knew, and said it was a forgery, and said he must retain it, to enable him to detain Mina on a charge of forgery in Pennsylvania.

It also appeared from the evidence that Mina had induced a young lady in Boston, a niece of Mrs. Chapman's, to agree to marry him, and she escaped by his being arrested only about twenty-four hours before the time when they were to be married. While Mina was on his way from Boston to Philadelphia under the charge of an officer, he was seized with one of his fits; there happened to be a physician on board the boat, and he was immediately called to attend to Mina. The fit passed off in a short time, and the physician said he did not know what to make of it. Mina insisted on having a private conversation with the officer; and told him that when the woman brought the chicken-broth to Mr. Chapman's room, his wife took it, and "put physic into it. After Mr. Chapman take the soup, he get very bad and die. Mrs. Chapman then come, kiss and hug me, and say, 'Lino, I want you to marry me.' I say, 'no, not till I ask my father.' She say, 'Oh, yes, I love you so much.' Then I say, well, when Mr. Chapman get bury, then I will marry you. Then she say, 'we get marry in New York.'"

Judge Fox charged the jury, rather in Mrs. Chapman's favor, though he said, that from the evidence it was clear that arsenic was found in Mr. Chapman's stomach. In the course of his charge, he said that in capital cases, he "had never known a verdict of acquittal, which he did not think justified by the evidence, although he might have believed that it would have warranted conviction."

The jury took two hours for deliberation, and brought in a verdict of *not guilty*.[1]

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[1] She afterwards became an outcast from society, and wandered through the country with her children, giving a kind of theatrical exhibitions. She was a sister of Mark Winslow, a notorious counterfeiter, who committed suicide in Boston jail, a few years since, after his conviction, and before sentence. It is believed by many, that Mrs. Chapman was a confederate of her brother in making counterfeit money. At the trial,

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Mina was tried as a principal in the second degree, at the next term of the court; the question was raised as to the admissibility of the evidence of one of the servants who testified in Mrs. Chapman's trial, to her declarations. The court decided that they should be admitted. Some evidence was put in concerning experiments made by the chemists since Mrs. Chapman's trial. Dr. Mitchell, on his cross-examination, testified, that if "confined to one single test, I would prefer the odor "to detect the presence of arsenic." The jury brought in a verdict of "guilty of murder in the first degree."

A motion was made by Mina's counsel for a new trial, on several points of law; but it was refused by the court, and the prisoner was brought up for sentence. His counsel then rose and read a paper drawn up by Mina himself, as follows:

"Before the court shall proceed to pass upon me the sentence of the law, I wish to say a few words to them. My name is Carolino. I was born on the 20th of December, 1809, in the city of Trinidad, in the island of Cuba, where my parents now reside. I was baptized in the Roman Catholic church, and desire to die in its faith. I pray that a priest of that religion may be sent to me, that I may prepare myself for death, by confession, and the blessed absolution, and by partaking of the holy communion according to the rites and ceremonies of that church. I have written to my father and brother, and expect that they will come to this country to see me; and I have, in the island of Cuba, a daughter four years old. It is necessary before I die that I should execute some legal papers in order to secure some property to my daughter. I therefore pray the court to grant me at least a few months of existence before I am ordered to be executed."

The presiding judge said; "These will be laid before the governor, who will no doubt grant the request which you make." He then proceeded to pass sentence of death on Mina, with a voice which showed how deeply he partook of the feeling which pervaded the assembly: "Lino Amalia Espos Y Mina, the sentence which the law imposes upon you is, that you be taken hence to the prison of Buck's county, from whence you came, and from thence to the place of execution; and that you be there hanged by the neck until you are dead. And may God have mercy on your soul."

Willis H. Blayney, a police officer of Philadelphia, testified, that since 1829, he considered her character bad. At the time of the trial, it was intimated that Mina had met Mrs. Chapman in Philadelphia, in a place of bad reputation, before the evening when he came to her house and requested lodging as a stranger.

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RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, October Term, 1841, at Boston.

ROGERS *v.* MECHANICS INSURANCE COMPANY.

A policy of insurance upon "outfits" and upon "catchings" substituted for the outfits in a whaling voyage, protects the "blubber" or pieces of whale flesh, cut from the whale and on deck.

Whether the blubber stowed on deck or stowed in the proper place below deck would be covered by a policy of insurance on "cargo" — *quære.*

The usage or custom of a particular port in a particular trade is not such a usage or custom as the law contemplates to limit, or construe, or qualify, the language of contracts of insurance. It must be some known general usage or custom in the trade applied to all ports of the state.

Where a quantity of blubber was thrown overboard in order to preserve the ship from sinking in a violent tempest, it was *held* to be a subject of general average, covered by the policy, under the circumstances.

THIS was an action of assumpsit on a policy of insurance, dated 23d August, 1838, whereby the Mechanics Insurance Company, of New Bedford, insured ten thousand dollars on the bark America and outfits, from Bristol, Rhode Island, on a whaling voyage until her return to Bristol, with liberty to touch at all ports and places for refreshments, and to sell catchings; the policy also contained a stipulation that one fourth of the catchings should replace the outfits consumed; except that catchings, shipped from the Cape de Verds or this side, should be at the risk of the assured without diminution of value. The declaration alleged, that during the voyage the vessel, having on board at the time a large quantity of blubber in the blubber room, encountered a violent hurricane, during which the shifting boards in the blubber room gave way, and the blubber all went to leeward; that in order to preserve the ship from sinking, it was necessary to throw the blubber overboard, and to cut away some masts; that afterwards the vessel was obliged to put away for the isle of Mauritius to repair the damages of cutting away; that the expense of going there, making repairs, &c., together with the value of the blubber thrown overboard, constituted a general average loss; and that the defendants as insurers were bound to pay to the plaintiffs the sums which the vessel and outfits ought to contribute toward that loss. Plea, the general issue. At the trial the facts were proved as set forth in the declaration, and also that the blubber thrown over was equal to sixty-five or seventy barrels of sperm oil.

It was admitted, that the underwriters were liable for the general average occasioned by the repairs and expenses in going into the isle of France. And the principal question was, whether the blubber

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thrown overboard in the storm was a subject of general average, averred by the policy, under all the circumstances.

Coffin for the defendants, contended, (1), that the blubber thrown overboard was not a part of the cargo of the bark, within the meaning of the policy, and the loss thereof was not covered thereby. (2.) That the blubber was not an article of value for which contribution could be claimed in jettison. That a technical meaning was attached to the word "catchings" in whaling voyages; and that until "catchings" became "cargo," which they did not until reduced to oil and put into casks, under deck, they were not deemed cargo, nor an insurable interest in policies upon whaling voyages. (3.) That it was impossible to put any value, whatsoever, upon blubber, while it remained in that state, so uncertain was the amount of oil which could be made therefrom, and so much depended upon the state of the weather and the ability to reduce it to oil within a few days; for, otherwise, it became decomposed and worthless. That the blubber in the present case, was utterly worthless and without value, when thrown overboard. (4.) That by the usage and custom of the whaling business in New Bedford, blubber in this situation, not reduced to oil, is not deemed an insurable interest, or entitled or liable to contribution in general average.

C. G. Loring and *F. C. Loring*, *e contra*, contended against the whole doctrine on the other side. They insisted "catchings," was, by the present policy, perfectly covered as an insurable interest as a substitute for "outfits." That the memorandum in the policy showed this. It is there stated: "In whaling risks it is understood that one fourth part of the catchings shall replace the outfits consumed, except that catchings shipped home from the Cape de Verds on one side shall be at the risk of the assured, without diminution of the value of the outfits at the time." That the question was not whether the blubber was at the time "cargo," but whether it was "catchings" in the sense of the policy; and it clearly was, being under deck and in the blubber room, whatever might have been the case if on deck, or along side the ship. They cited Weskett on Insur. Title Greenland, p. 265, (folio edition); 2 Phillips on Insur. 78, 2d edit.

Evidence was offered by *Coffin* to establish the supposed general custom, as to blubber not being an insurable interest, in policies on whaling voyages, or entitled or liable to contribution.

Story J. It does not strike me, that, upon the evidence produced by the defendants, it is possible to maintain the doctrine contended for by their counsel. Nearly every witness, whose deposition is in the case, has testified, that the blubber in the present case is, in his opinion "catchings" in the sense of that word, as it is understood in the whaling business. Most of the witnesses have added, that they should have considered the blanket pieces (as they are called), of the whale, when cut from the whale, and put on the deck of the ship.

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also as catchings. And some of them have gone farther, and asserted, that, according to their understanding, a dead whale, when fastened along side the ship, for the purpose of being cut up, falls within the same denomination. Now, the question in this case, is not, what in the sense of a policy of insurance on "cargo" would be treated as cargo, whether such goods only as are stowed under deck, or whether other goods, which are insured, and are ordinarily and properly stowed upon deck, under the usage of a particular trade, are not also to be deemed cargo with reference to a policy of insurance in that trade; for the word "cargo" does not occur in the present policy. The insurance is upon "outfits," and upon the "catchings" substituted for the outfits in the course of the voyage. Now, the construction of the words, "outfits" and "catchings," is, in the absence of any peculiar technical meaning thereof by the usage of trade, a matter of law for the decision of the court; and these words must have the ordinary meaning belonging to them in the language of common life and common sense, in the absence of any such technical meaning. So far, as I am able to perceive, the testimony of the principal witnesses completely establishes, that when the blubber or pieces of whale flesh are cut from the whale, and are on the deck, or at least, when they are stowed under deck, they are in the sense of the trade "catchings;" and certainly they are so in the import attributed to the word in common life. What other meaning can we properly apply to "catchings," unless it be, that they are things caught, and in the possession, custody, power and dominion of the party, with a present capacity to use them for his own purposes? I cannot find, then, from the testimony, that there is any technical meaning to the word in the whale fishery, which is not coincident with the ordinary meaning of the word. Whether the blubber stowed on deck, or at all events when stowed in its proper place below deck, would not also be covered by a policy of insurance on "cargo," I do not decide; for it is unnecessary in the present case. That is a point, which might deserve consideration under other circumstances, and would be governed by the analogies of the law, and the usages of the particular trade.

Then, as to the point, that by the usage or custom of trade in whaling voyages, blubber, in this condition, is not deemed an insurable interest, or entitled to or liable for contribution; there is no evidence, whatsoever, in the cause, which, in a legal view, establishes any such usage or custom even in the port of New Bedford. Even if such a usage or custom were shown to exist in New Bedford, that would not be sufficient. The usage or custom of a particular port in a particular trade, is not such a custom, as the law contemplates to limit, or construe, or qualify the language of contracts of insurance. It must be some known general usage or custom in the trade, applicable and applied to all the ports of the state, where it exists; and from its character and extent so notorious, that all such contracts of insurance in that trade, must be presumed to be entered into by

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the parties, with reference to it, as a part of the policy. If the usage or custom be not so notorious; if it be partial, or local in its existence or adoption; if it be a mere matter of private and personal opinion of a few persons engaged therein; it would be most dangerous to allow it to control the solemn contracts of parties, who are not, or cannot be presumed to know it, or to adopt it, as a rule to govern their own rights or interests. Indeed, in the present case, as has been suggested at the bar, the policy in its printed form refers, not to the usages and customs of New Bedford, but to those of Boston. But not a single witness has spoken of his knowledge of any such general custom or usage, even in New Bedford. On the contrary, all of them deny any knowledge of such usage or custom, and only speak of their own opinions, how the interpretation of the language of the policy ought to be, and is understood by them personally. But this court has nothing to do with the private opinions of witnesses, however respectable, upon matters, which respect the interpretation of contracts. That is matter of law, which the court itself is bound to expound, in the absence of any usage or custom, which impresses upon the words a peculiar and technical meaning.

I own myself to be no friend to the indiscriminate admission of evidence of supposed usages and customs in a peculiar trade and business, and of the understanding of witnesses relative thereto, which has been in former times so freely resorted to; but which is now subjected by our courts to more exact and well defined restrictions. Such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and imperfect notions of the subject; and, therefore, it should, as I think, be admitted with a cautious reluctance and scrupulous jealousy; as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts.

As to the other point, I cannot entertain any doubt, that this blubber was as much entitled to and liable to contribution in cases of a jettison, as any other property on board. It is property; and if it is of any, the slightest, assignable value, and is sacrificed for the common benefit, it constitutes a claim for general average. It is said, that it is difficult, and indeed impracticable, to ascertain its true and exact value, when thrown overboard. There may be difficulty, and perhaps an impossibility, to ascertain its exact and minute value — for we have no means of weighing it in scales, or fixing its positive price. But the same difficulty occurs in many other cases of insurance; as in cases of injuries to sails or rigging, or spars, by tempest, or by cutting them away, in cases of jettison; and yet no one doubts, that they must be contributed for according to their value, ascertained by a jury, in the exercise of a sound discretion, upon proper evidence. Suppose, that fruit is insured, and the vessel has a long passage, in which by ordinary waste and decay it must suffer some deterioration, and then, a storm occurs, in which it suffers other positive damage and injury, or there is a jettison thereof; how are we to ascertain, what diminution

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is to be attributed to natural waste and decay, and what to the perils of the seas? or what was its true value at the time of the jettison? There can be no positive and absolute certainty. The most, that can be done, is, to ascertain by the exercise of a sound judgment, what, under all the circumstances, may reasonably be attributed to one cause, and what to the other. Absolute certainty in cases of this sort is unattainable. All that we can arrive at, is, by an approximation thereto; and yet no man ever doubted, that such a loss must be paid for, if it is covered by the policy.

If, indeed, this blubber, at the time it was thrown overboard, was entirely worthless, and had no assignable value, certainly it cannot be brought into general average; for, under such circumstances, nothing has been sacrificed, and, of course, nothing is to be contributed for. But this is a matter, which will most properly come before the assessor, who, by the agreement of the parties, is to be appointed to ascertain the amount of the general average, and also of the contributory interests.

Upon this opinion being expressed by the court, a verdict was taken for the plaintiff, subject to be awarded by the report of the assessor, as to the amount of damages and of the contributory interests.

Henry Lee *v.* Levi Lincoln.

Construction of Tariff Laws — Gunny Bags — Cotton Bagging.

This was an action against the defendant, as collector of the port of Boston, to recover back the amount of duties paid under protest upon a quantity of *gunny cloth*, imported by the plaintiffs, and by the collector charged with the duty on *cotton bagging*. The tariff act of 1832, lays a duty "on *cotton bagging* three and a half cents per square yard, without regard to the weight or width of the article." There is no mention in this, or in any preceding tariff law of the article *gunny cloth*. It was stated, and not denied on the part of the government, that the comptroller of the treasury at Washington, issued a circular dated December 26th, 1833, in which gunny cloth was declared "exempt from duty, on the assumption of its being an unenumerated article." After this declaration the article was imported and admitted free of duty in the port of Boston, for nearly five years and a half. But subsequently, the department at Washington was informed, that "gunny cloth" was imported in large quantities, and sold for the purposes of cotton bagging; in consequence of which another circular was issued by the comptroller, dated June 3d, 1839, instructing the collectors of the different ports to levy the cotton bagging duty "on all articles suitable for and used in making cotton bagging." This circular was repeated, on the 12th May, 1840. The importers of gunny cloth gave their bonds, in conformity with this requisition, but always under protest; and brought the question

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before the circuit court at its next sitting. This was at the October term, 1840. A verdict was then rendered, under instructions from Mr. Justice Story, in favor of the importers, on the ground, that gunny cloth was not dutiable as cotton bagging within the meaning of the law. (*Bacon* v. *Bancroft*, 3 Law Reporter, 386.) After this decision, instructions were transmitted to the collectors of the principal ports, by a circular dated January 19th, 1841, under which the article was admitted free of duty. This continued for a few months, when the former order of June 3d, 1839, was issued again by the comptroller of the treasury. Under this order the collector of the port of Boston has compelled the importers to give bonds for duties on gunny cloth as cotton bagging, which they have done under protest, and paid under protest. This action, with others, was brought to recover back the money so paid.

Mr. Wigglesworth, Mr. Whitney and Mr. Dixwell, merchants of Boston, testified, that they were acquainted with the trade with Calcutta and the East Indies, prior to 1832 (the year when the tariff was enacted); that the article gunny for a long series of years before, was well known as the covering of packages and bales of goods coming from the East Indies; that it had been imported in the shape of bags prior to 1832; and that it had been sometimes imported in whole pieces prior to 1832; that prior to 1832, it was well known among merchants as *gunny*, and was never included under the term *cotton bagging;* that its commercial name was gunny, and that it had never been applied to the uses of cotton bagging until a considerable time after the passage of the tariff law, and about three or four years ago.

Depositions of New York merchants were offered on the part of the defendant, in order to show, that the term *cotton bagging* in 1832 was applied to all fabrics intended for the bailing of cotton. Mr. Brown, an assistant appraiser in the New York custom house, was also introduced by the defendant, to establish this view. He said, that the term cotton bagging was not applied to a fabric of any one material; that generally the fabric was of hemp, tow, or flax; and that twenty years ago he had known it made of cotton. Most of the witnesses, who had deposed, in their answers to the cross-interrogatories, agreed with the witnesses for the plaintiffs, that if, in 1832, they had received an order from a distant correspondent for a certain quantity of *cotton bagging*, they could not, at that time, have considered it a proper compliance with the order, to send gunny cloth. They also agreed, that gunny cloth was never applied to the purposes of cotton bagging previous to 1832.

Charles G. Loring and *Charles Sumner* for the plaintiff.

Dexter, district attorney, for the defendant.

Story J., in summing up to the jury, said, that the case turned upon a question of fact, dependent upon the true interpretation of the tariff law of 1832. If gunny cloths, or gunny bags, were at or before the

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passage of the tariff act of 1832, known or denominated by merchants, or in commercial trade or business, as cotton bagging, then the collector had acted rightly in demanding the duties. But if gunny cloth or gunny bags were at and before that period always known by merchants, or in commercial trade or business, by a distinct name, and were never known by the denomination of cotton bagging, then they were not liable to the payment of duties under the act of 1832, as cotton bagging. The tariff laws are to be construed according to the commercial sense of the terms used in them. If this were not so, they would be a fraud upon the people and merchants, who were guided by them in their business. The language of merchants is looked to in the construction of commercial laws and commercial contracts. The government must show, that gunny cloth was known as "cotton bagging" in 1832, and had, at that time, acquired this appellation. Congress are not presumed to tax an article under a denomination which it never bore; much less, if the article has always borne another distinct name. In the present case, if the evidence was believed, not only before and up to the passage of the act of 1832, but long afterwards, gunny cloths and gunny bags were always known by a distinct name and denomination, and never by the name of cotton bagging; and never had been used or applied to the purposes of cotton bagging; that it was wholly used for other and different purposes; and that it had been used for cotton bagging only within three or four years last past. If the evidence was true, and believed by the jury, then the case was made out for the plaintiff. In articles of promiscuous use, the mere fact, that a particular article was now used for a new purpose, to which it had never before been applied, that alone would not change its character, or make it liable to a different duty from what it was before liable to.

Verdict for the plaintiff.

Circuit Court of the United States, Boston, May Term, 1841.

Baring and others *v.* Lyman, Executor.

Where, by a banker's circular, a certain commission was named on bills or credits "used east of the Cape of Good Hope;" it was *held*, that the drawing of bills under a letter of credit, in favor of a third person, who, upon the faith of the letter of credit, takes and receives the same for value, and is entitled to hold and use them on his own account, is a *use* of the letter of credit within the terms of the circular, although the bills are never presented for acceptance or payment.

Thus, the agent in Boston of certain London bankers, gave to A. a letter of credit, by which B., in Canton, was authorized to value upon them to the amount of £25,000 sterling at six months' sight, at Canton, the customary commission on bills, used under similar letters, being two per cent. The credit was obtained to furnish funds in part for loading the ship of A., which was consigned to B., at Canton. Bills were accordingly drawn in Canton by B. payable to C., but as there was no demand what-

ever at that time for exchange, the latter agreed to send the bills to his agent in Boston, and to give A. the option of replacing them, with other funds, or to have them forwarded to London, to the account of C. On the arrival of the bills in Boston, A. concluded to reimburse C. by remitting dollars to Canton, and the bills and letters to the London bankers were destroyed. An action by the London bankers for the customary commission, on the bills, was defended on the ground, among others, that they had never been used; but it was held, that the defence was not maintainable.

Any partner in a firm may be the agent of a third person in drawing bills in favor of the firm, for advances made to such third person, under an express authority.

A firm may negotiate its own paper to one partner, and the latter will thereby become the owner thereof So, a firm may take a separate negotiable security from one of its partners, and hold and use the same for its own purposes. *A fortiori*, where he acts as the agent of third persons.

Assumpsit for the recovery of money, viz.: five hundred pounds sterling, claimed as due to the plaintiffs for commissions, at the rate of two per centum, upon twenty-five thousand pounds, alleged to have been drawn by Robert B. Forbes, in bills upon them, under a letter of credit, given by them to the defendant's testator, dated 7th of June, 1838. By that letter, Forbes was authorized to value upon them to that amount, at six months' sight at Canton, on account of the testator: the bills to be duly honored, when presented at the banking house of the plaintiffs, if drawn within twelve months from said date. And in case of accident to Mr. Forbes, whereby he should be prevented from attending to the business, Messrs. Russell & Co., of Canton, were authorized to use the credit for account of the testator.

By a receipt in writing of the same date, the testator, in consideration of said credit, agreed to provide in London, sufficient funds to meet the payment of whatever (bills) might be negotiated, by virtue thereof, at maturity of the bills, and also to give security therefor, here, at any time previous, if required; and that the property which should be purchased by means of said credit, and the proceeds thereof; and policies of insurance, and bills of lading, were thereby pledged as security (collateral) for the payment as above provided, and held subject to the plaintiffs' order, on demand, with authority to take possession and dispose of the same at the discretion, for their security and reimbursement; that in all payments, settlements, and recoveries in the United States, growing out of the said credit, the pound sterling should be estimated at the current rate of exchange on London, existing at the time of such settlement. And the testator added a request and direction to his executors and administrators, that in the event of his decease, before maturity of all the bills, which might be drawn under the above credit, and the due provision for the same, as stipulated, they should provide promptly, for them, as they should become payable, without regard to the probate laws of Massachusetts.

The regular and customary commission charged by the plaintiff, on bills used under similar letters of credit, east of the Cape of Good Hope is two per cent. And if the whole amount authorized is not used, the commission is charged only on so much as is used.

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The credit was given to furnish funds in part for loading the testator's ship Vancouver, which arrived at Canton, December 1, 1838, consigned to R. B. Forbes, who became a member of the house of Russell & Co., 1st of January, 1839. Such consignment having been agreed upon by him and the testator, before the credit was procured. The business of the ship was transactod by Russell & Co.

On the 18th of March, 1839, they wrote to the testator, advising him of their determination to load the ship and despatch her directly for Boston; and that there being no demand whatever for exchange, even at the very unfavorable rate at which they had concluded to place his bills; they had obtained a loan for the purpose of getting the ship away; but that as Mr. Forbes had no orders to resort to, he authorized them to draw the bills at the market rate, and to give him his choice of paying for them in London, or replacing the cost of the cargo in dollars, without delay, paying at the rate of nine per cent. per annum, interest; and that they should charge their usual commission of one per cent. for drawing, and should send the bills and letters of advice to their agent in Boston, to be cancelled, upon his agreeing to replace the funds, or to be forwarded to London for their account, if he should conclude to meet them there.

This arrangement was consummated on their part, by their loading the ship, and sending forward the bills drawn by R. B. Forbes, May 4, 1839, in favor of Russell & Co., as proposed and specially endorsed to their agent, J. M. Forbes of Boston, with corresponding instructions. The testator died on the 24th of May, 1839, before the letter or ship arrived, and they were received by the defendant, who, without delay, notified J. M. Forbes, that he should remit dollars to reimburse Russell & Co., at Canton. Neither the bills and letters to Baring & Co., accompanying them, nor any advice thereof, were ever sent forward to London. But the bills were destroyed by the said Forbes, after the specie was shipped and received. The specie was shipped by the defendant, in the years 1839 and 1840, and received and credited by Russell & Co. in 1840 and 1841, the proceeds of which covered the amount of the advance. The bills before mentioned were held by J. M. Forbes, for Russell & Co., on 11th July, 1840.

The case was submitted to the court on the above statement of facts, with liberty for either party to refer to certain letters and documentary evidence, which were in the case. Among these was a circular of the plaintiffs, dated January 1, 1838, a copy of which was sent to the testator, in which it is stated, that "the banking commission on credits or bills used east of the Cape of Good Hope, to be two per cent." The other documentary evidence is sufficiently exhibited in the arguments of the counsel and the opinion of the court.

Charles P. Curtis for the plaintiffs.

The question is, whether the credit granted by the plaintiff, to the

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defendant's testator, has been *used* or not; if it has, then the plaintiffs are entitled to the commission of two per cent. on the amount used. It is not denied, that R. B. Forbes, the agent of the defendant's testator, has drawn bills of exchange on the plaintiffs, in favor of Russell & Co., amounting in all to £25,000 sterling; and that Russell & Co. indorsed and forwarded them to J. M. Forbes, their agent in Boston. In point of form, the terms of the letter of credit have been strictly complied with, so that if the bills had been presented to the plaintiffs, at their banking house in London, they would have been bound by their contract to accept and pay them. What more was necessary to constitute a *use* of the credit? The letter of credit authorized R. B. Forbes to value on Baring, Brothers & Co., London, at six months sight, at Canton, for account of T. Lyman, Esq. of Boston, for any sums not exceeding £25,000 sterling; and by a subsequent clause, Russell & Co. were authorized to use the credit, in case of accident to Forbes. What is the mercantile meaning of the phrase, to value on a banker? To draw and pass bills on him — to negotiate bills on him. The authority given to R. & Co. in the event of Forbes's inability "to value" on the plaintiffs, is, to use the credit as he was to use it, that is, by drawing and passing bills under it.

The agreement of the testator, acknowledging the receipt of the credit, contains an engagement on his part, to provide funds in London to meet the payment of whatever bills might be negotiated by virtue of the letter of credit. These, then, are synonymous terms; to value, to draw and pass bills, to negotiate bills, is to use the credit.

The *use* of such a credit cannot depend on the subsequent use of the bills drawn under it; if the party who grants the letter of credit is for any period of time liable to accept the bills, the credit has been used and the whole commission earned.

The liability of the banker is fixed as soon as a bill is negotiated, in conformity with the terms of the letter; for, by the law of the United States, the taker of a bill so drawn, who receives it on the faith of such a document, has a right to claim upon it as an *accepted bill*, and though this may not *now* be the law of England, (which is the place of performance of the contract in this case,) yet there a suit in chancery might be maintained by the holder of such a bill of exchange, to compel the specific performance of the banker's agreement.

The bills drawn by R. B. Forbes, in May, 1839, and negotiated to Russell & Co., were held by them, in the hands of their agent, J. M. Forbes, for upwards of a year, as appears by his letter of 11th July, 1840; during all which time the plaintiffs were bound to honor them at any time when they should be presented at their banking house. The act of the defendant prevented them from honoring the bills, but they were always ready to do so, and this is sufficient to entitle them to their commission, which does not depend on the actual acceptance and payment of the bills, but on their liability to do so. It might be contended with safety, if necessary, that the plaintiffs,

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would be entitled to their commission on the amount of their credit used as before stated, even if they had refused to accept the bills; for in that case, the holders would have their legal remedies, as before stated, and the testator would have had a right to recover from them for all the damages he might sustain from their breach of promise; but the case does not require the assertion of this principle; the whole service stipulated by the plaintiffs, or at least as much of it as was not prevented by the defendant, was performed by the plaintiffs, and they were always ready to perform the residue.

If it is contended by the defendant, that the bills drawn by R. B. Forbes, were not used or negotiated, the answer is found in R. B. Forbes's deposition, who says, "I drew bills for £25,000 sterling, on Baring, Brothers & Co. at six months, dated Canton, 4th May, 1839, in favor of Russell & Co., and indorsed by them to J. M. Forbes, Esq., Boston." "The bills were held by Russell & Co. as *their security* for the advance they had made; they had no orders to advance funds for Mr. Lyman, but thinking it was for his benefit, they did it, and held the bills as *their security*. Mr. Lyman's instructions were merely to act in exchange."

The letters of Russell & Co. to the testator, also show, that the value of the bills was actually passed to his credit; the cargo was *paid for* by his agent, by bills on the plaintiffs, and was shipped to Mr. Lyman as his property. But Russell & Co. regarding his interest in the transaction, gave him the option of providing for the bills in London or of redeeming them in the United States, by shipping dollars to Canton. Mr. Lyman, the defendant, elected the latter alternative, and the bills were held by J. M. Forbes, till the dollars were received in Canton. This was in effect a purchase by the defendant of his testator's bills, on better terms than the payment of them in London would have been.

Mr. Lyman has availed himself of the benefit of the plaintiffs' high credit; — his cargo was purchased and shipped to him on the faith of it; — he has had the opportunity of a more advantageous mode of remittance than he expected, when he took the credit; he has enjoyed the whole consideration for which the plaintiff's right to compensation accrued, and he is therefore legally bound to pay the stipulated price.

Charles G. Loring for the defendant.

What was the contract, and what was done under it? The contract is contained in three documents, namely, *a letter of credit given by the plaintiffs*, through their agent, Mr. Ward; the *receipt given by the defendant*, and the *circular of the plaintiffs.*

By the *letter of credit*, Mr. Forbes, or, in event of accident to him, Messrs. Russell & Co. were authorized to draw upon the plaintiffs to the amount of £25,000, at six months sight, if drawn within twelve months from 7th of June, 1840; and the plaintiffs promised to honor

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the bills, when presented at their banking house. Their obligation, therefore, was to *accept the bills* if presented at their banking house, within the time specified, and nothing more. Consequently, they could be under no liability until such presentation.

By *the receipt*, the testator promised to provide funds in London to pay whatever bills should be nogotiated by virtue of the credit, at their maturity; and to give security in Boston previously, if required. And that all property purchased by means of the credit, &c. should stand pledged as collateral security for such payment; that all settlements growing out of the credit should be at the current rate of exchange; and in the event of the death of the testator before the maturity of the bills, his executors, &c. should provide promptly for them as they should become payable. This is the whole contract on his part, excepting as to the compensation which the plaintiffs were to receive, which was not specifically provided for, but left to the operation of the custom of the plaintiffs, which is set forth in their circular.

By *the circular*, it was stated that "the banking commission or credits on bills, *used* east of Cape of Good Hope, was to be two per cent." The *use*, for which this compensation was provided, is clearly indicated by the whole term of the circular — to be the negotiation of the bills and acceptance of them by the plaintiffs; corresponding precisely with the use, as described in the letter of credit itself, the gist of which is the promise to accept. And also with the use described in the receipt, which provides for providing funds to meet such bills as should be negotiated, at their maturity, which necessarily implies acceptance.

Upon this contract, then, two things are clear. ***First***, that the use of the credit contemplated by both parties, was, the drawing and delivery of bills for the purpose of their being presented to the plaintiffs to be accepted by them, whereby they would assume the liability of acceptors, and that the compensation or commission was to be for such a use, and nothing short of it; for there could be no pretence, that the mere issuing of the letter of credit, if no bills were drawn — or that if the plaintiffs should refuse to accept any drawn, the commission would then be due.

Secondly, while the contract was obligatory on the plaintiffs to accept all bills so drawn and presented, it was perfectly optional with the testator, whether to use the credit or not to use it. He might have destroyed it, or kept it in his pocket until the expiration of the twelve months, with the right to use it at pleasure; but unless he had actually used it, he was under no liability to pay any compensation to the plaintiffs. The ***power*** and the ***right*** to use it, were therefore totally distinct from the ***actual use***; and the testator might desire and enjoy great benefits from ***possession of the mere power***; but such results, from its mere ***possession***, would give no right to the plaintiffs to claim compensation. Nothing short of the ***exercise of that power***, that is, the ***actual use of the credit as stipulated for***, could give them any claim to the compensation agreed upon.

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The question, then, is, whether there was any such use of this credit as was contemplated as the consideration of the commission. The facts are, that the letter of credit was delivered to Mr. Forbes, who became one of the firm of Russell & Co., who were the consignees of the vessel, and on whom the testator relied to furnish the cargo, before any steps were taken to procure one. Finding it difficult or impossible to negotiate any bills under this credit, in order to procure a cargo in the manner directed by testator, this firm negotiated a loan of money on their own credit, on his account, with which the cargo was procured. This being done without his authority, and not being binding upon him unless ratified, they gave him notice accordingly; and, in order to provide for the contingency of his refusing to ratify this proceeding, and reimburse themselves for their advance, Mr. Forbes, then being one of the firm, drew these bills in favor of his house, and sent them to their agent here with a letter of advice to the drawees, to be forwarded to them at London, for acceptance, *if the testator should refuse to ratify and provide for the loan;* but to be destroyed, if he should ratify and provide for it; and, in order to preserve the usual formal regularities in such cases, the bills were charged at the current rates in the books of the firm. But the bills were never negotiated, nor for a moment out of the possession or control of the firm. The testator did ratify the loan and pay it; and the bills were consequently cancelled here, and the plaintiffs were never notified of their being drawn, and were never called upon to accept or provide for them.

Upon these facts, it is denied, that there was any use of the credit which entitles the plaintiffs to a commission. It is clear, that the right to use or not to use the credit, was entirely at the option of Mr. Lyman or his agent; and equally so, that it *was optional with him* to make the use of it *dependent upon any contingency* or condition to occur within the time limited. It is obvious, too, that any "use of the credit," which should vest a right in the plaintiffs, must be one that bound them, or made them liable to the party receiving or acting upon the credit or bills; for, unless they incurred some obligation or responsibility, their credit was not used; and, in this case, as the bills were payable at a given time after sight, it is clear, that the payees, Messrs. Russell & Co., could have no claim on the bills until actually accepted; and that their only remedy, if they had finally resorted to this credit, must have been by special action on the case, founded on the letter of credit and their reception of the bills under it. So that the letter of credit and not the bills could alone give them any security.

Now, then, there is no pretence, that the cargo was purchased on the faith of this credit. It was quite otherwise. They expressly forbore to use it; they adopted other means of procuring the cargo, and pointed out other means for the testator's reimbursement of their advances. The utmost that can be alleged, is, that Messrs. Russell

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& Co. would not have made the loan, but for the power they possessed of using this credit, if they should see fit so to do, on the testator's refusing to ratify the loan. But this was no more than a mere possession of the power to be used at their option, upon the happening of a contingency, but was not any actual exercise of it. Messrs. R. & Co. might well say, "we will furnish the cargo, but whether we shall use the credit, or rely upon other resources, we shall decide hereafter;" And they might be so far influenced in furnishing the cargo by the power to use the credit, that they would not otherwise have done it. And yet, as between *them or the testator* and the plaintiffs, there would have been no use of it. The benefit thus derived from the possession of the letter of credit to the testator, would have been *incidental* and *collateral* merely, not affecting the plaintiffs in the slightest degree, and not contemplated by the parties as a subject of compensation.

Keeping in mind the distinction between the use of the credit and the mere power to use it, let us see whether the facts show any actual use of it. It is apparent, that in the drawing and delivery of the bills to his firm, Mr. Forbes acted *as the agent of the testator*, as well as a partner of the house; so that there could be no possibility of misapprehension of the mutual understanding and intention of the parties. In the drawing and delivery of the bills, he was the agent of the testator, and had his power of absolute or conditional use of the credit. Did he, then, by his acts, create any actual liability or responsibility on the part of the plaintiffs, by the drawing of these bills? or was such liability entirely contingent upon the happening of a future event?

It will not be pretended, that the mere drawing of the bills, was a use of the credit; for if he had locked them in his desk, or delivered them to his firm for safe keeping merely, surely no one would say that he had used the credit, and that the plaintiffs were entitled to their commission. What, then, were the circumstances and terms upon which he drew and delivered these bills. He and his partners had already advanced funds for purchasing the cargo, and had elected to give the testator the opportunity of reimbursing them without using the credit. When, therefore, the bills were delivered to the house, it *was upon condition that they should not be used*, and *that the house should not have any claim under the letter of credit*, unless the testator refused to ratify the loan, and otherwise reimburse the advances. This condition of the delivery was communicated in writing, to the testator, and constituted a written contract between him and them. It is certain, therefore, that although the house were in possession of the bills and letter of credit, they could not use them, nor have any possible claim upon the plaintiffs until the testator had made his election; and that upon such election to ratify the loan and repay the advances, the bills and letter of credit became as blank paper — a mere nullity. In other words, there had been no actual use of the credit, but something remained to be done before it should be decided

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whether the right of using it, should, or should not, be exercised; and the contingency upon which it was not to be exercised, having happened, no use was ever made of it. Suppose a suit had been brought by Russell & Co., upon the credit, against the plaintiffs, before or after the testator had made his election, it is manifest, that the facts stated would prove a perfect defence. It would appear, that Russell & Co. so far from acting on the faith of the credit or any liability of the plaintiffs, had in truth declined so to do; they had made their advances upon a different credit, and with a view to a different resource for reimbursement; and had, at the most, only a contingent right to resort to this upon the happening of an event which had never taken place. Suppose that Mr. Forbes had never drawn any bills, but retained the letter of credit in his possession, with the intention to draw, if the testator should not ratify the loan and reimburse the advance; could it be pretended, that the credit had been used, and that the plaintiffs were entitled to their commission? Clearly not. But the case at bar is essentially the same; for the delivery of the bills to Russell & Co., being upon the condition stated, would as effectually prevent their recovery *during the continuance of the condition*, as if the bills had not been drawn; for proof of the condition would defeat any intermediate claim; and the position of Forbes as agent of the testator and a partner of the house, rendered it as safe and easy for all parties to protect them, by this delivery of the bills, on condition, as could have been done by his omitting to draw until the condition should terminate. And it is plain, that the reason why he did draw, was, not to give or create any security to the firm, for that already fully existed in his power to draw, he also being one of the firm; but his only object was to facilitate and expedite arrangements here, if the loan should not be ratified. It is substantially the same thing, as if he had retained the letter of credit and bills in his own hands, to await Mr. Lyman's decision. As to the alleged notice to the plaintiffs, of the use of these bills, none was given. Forbes or Russell & Co. withheld any, not intending to notify them, or put them to any liability or trouble, unless the testator should reject the loan, *and they were the only persons to notify.* The letter of the executor, after the testator's death, was no notice that any bills were or would be drawn; for he could not know that any would be. It was no more than a notice, that any bills drawn under the letter of credit, which the plaintiffs had, doubtless from their agent here, would be provided for.

To illustrate the position, we take, that the cargo was not furnished on the faith of this credit, nor any such use made of it, as entitles the plaintiffs to their commission, the following may be suggested as parallel cases. Suppose that the testator had proposed to Forbes here, to purchase the cargo by an advance or loan, such as was made, and to be repaid in the same manner; and Forbes had refused, but would agree to do it if the testator would furnish him such a letter of credit as this, to be used if circumstances should render it inconvenient

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to make the loan, or more advisable to resort to bills of exchange; and this had been done, and his house had proceeded to procure the cargo without first determining which fund they would resort to, but had finally determined to make the loan, and not to use the credit. There would be in such a case a purchase of the cargo on the faith of the credit, equal to that alleged here, and as much a use of it. But no one would pretend, that the plaintiffs would be entitled to a commission, for there was no purchase on the faith of the credit; nor was there any use of it affecting the plaintiffs for an instant. Or suppose the testator had agreed with Forbes, that his house should furnish a cargo, to be paid for by a shipment to be made to them by the testator, if he would furnish such a credit as this, to be used, if the shipment should not arrive within a limited time, and the cargo was furnished before the arrival of the shipment, — which, however, was received within the time, and so no bills were drawn. There would have been precisely such a use of the credit in that case as there was in this, but surely no commission would have been earned.

The only distinction between those cases and this, is, that in them, the contingency upon which the use of the credit was to depend, was contemplated by the parties, when it was delivered to the agent, so that an absolute use was not then contemplated. But it is not perceived why one might not be created by the agent, subject to the ratification of the principal; and be as effectual, if ratified, as if originally appointed. In either case, there would be no actual use of the credit until the determination of the contingency.

The position taken by the plaintiff's counsel, amounts to this; that if the consignee or agent *be influenced* by the mere power of using the credit, this is such a use as entitles the party giving it to his full commission. But it seems clearly untenable. The *power* to use, is created by the mere delivery of the letter of credit. Its *exercise* is entirely at the volition of the receiver. And neither he nor his agents are bound to any immediate or absolute decision, but may exercise the right of election at any time within the period limited, and upon any reasonable contingency; and it is the *exercise*, and not the *mere possession* of the power, which gives the right of compensation.

As to the language of Mr. Forbes in his deposition — wherein he states, that the house of Russell & Co. held the bills as *collateral security* — we are to look to the facts to ascertain what he means by those terms, and not to take this mere declaration as proof of a position inconsistent with these facts. Now upon the facts appearing in the correspondence and deposition, it is manifest, that Russell & Co. did not hold the bills as collateral security; properly speaking they merely held the right to use them as such. The bills in their hands were in themselves of no avail, to bind the plaintiffs, being after sight, and if they would have been binding on the plaintiffs, if delivered, to be sent to them; they were not so here, for they were not delivered to Russell & Co., to be sent for acceptance, but to hold until a certain con-

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tingency should happen, which was to determine whether they should be sent or not. Russell & Co. were not, therefore, in possession of those bills, with any right whatever to use them, and never could have acquired that right but upon a condition which never happened. In truth, therefore, the only security which Russell & Co. had in the possession of the bills, was the power to use the credit, if the condition should happen upon which the use was to depend. But the same power existed, the moment the credit was delivered by testator to his agent. And the mere possession of the power was surely no exercise of it. In order to say properly, that the bills were held as collateral security, it should appear, that the holder had elected to use them, by notifying the drawees, or taking the usual means to bind them. It is one thing to possess the power to use the credit, and quite another to use it by an actual exercise of the power. The mere drawing of the bills, as above shown, was no use of the credit; for they might have been locked up in Forbes's desk.

Nor was the mere delivery of them into the hands of Russell & Co. such use; for the delivery was to them as bailees, for safe keeping, merely, until the happening of a contingency, which alone would authorize the use of them, and which never occurred. No moment has ever existed, when Russell & Co. could claim of the plaintiffs, to accept or pay these bills. Any presentation for acceptance, would have been a violation of the trust reposed in them by Forbes and the testator; and the facts existing would have exonerated the plaintiffs from all obligation to accept or pay, if Russell & Co. had attempted to induce or compel them to do so. The mere drawing and delivery of the bills, upon such a condition, is no more a use of the credit or the creation of collateral security, than the intention of drawing upon such a contingency, would be. Suppose, that instead of thus drawing and delivering the bills, the house had made the advance, relying on Forbes's power so to draw, in case the testator should not ratify the loan; and that it be admitted, that otherwise they would not have made the loan. There would have been just as much reliance on this credit, as collateral security, in that case as in this. In other words, the power to draw would be the collateral security, such as it was here. But would any one pretend, that it was a use of it, which entitled plaintiffs to a commission.

The case has thus far been presented as if Forbes and Russell & Co. were not partners, when the bills were drawn and delivered; but it is much strengthened by the consideration that they were such. For the case in that point of view becomes the same as if Forbes had merely drawn the bills and kept them in his own pocket. He and Russell & Co. were one person, and the drawing and delivery of the bills in the manner proved, amounts, in fact, to nothing more than the mere intention to draw, if the emergency should require it.

It cannot be correctly said, that the contingency, upon which the bills were to be used, were a condition subsequent, and not precedent.

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For none of the acts which were to be done, upon the drawing of the bills, for the purpose of creating any liability on the part of plaintiffs, were performed. If the bills had been so drawn, the property, by the terms of the contract, was to be pledged to the plaintiffs; and bills of lading, &c., were to be made out and forwarded to the plaintiffs, in a particular manner; and they were to be notified of the drawing, &c. To constitute this, a condition precedent, all the measures should have been taken to fix a present liability, with notice of the condition of defeasance; and plaintiffs should have been informed of the drawing intended, and use of the bills, and that they should be held responsible, unless testator should elect to ratify the loan. Instead of which, all these preliminaries were dispensed with, and the notice was deferred until the plaintiff's election was made. It was clearly, therefore, a condition precedent, and not subsequent. And such is the plain purport of the correspondence.

Story J. The first question naturally arising in this cause is, as to the true construction of the circular of the plaintiffs, of the first day of January, 1838, with reference to which the letter of credit in the present case was given and accepted by the testator, Lyman. By that circular, Messrs. Baring & Co. expressly stated, that "the banking commission on credits or bills, used east of the Cape of Good Hope [is] to be two per cent." The question is, what is to be deemed in the sense of this circular a use of the bill of credit? Is it the mere drawing of any bill under the letter of credit, in favor of a third person, who, upon the faith of the letter of credit, takes and receives the same for value, and is entitled to hold and use it on his own account? Or is it necessary to make the right to the commission attach, that it should be presented to Messrs. Baring & Co., and accepted and paid by them, or at least should be accepted by them? If it be necessary that acceptance and payment, or, at least, that acceptance by them, should take place before the right to the commission attaches, it is very clear, that the present action is not maintainable; for there never has been any presentment of the bills drawn in the present case. My opinion, however, is, that neither presentment for acceptance to Messrs. Baring & Co., nor payment by them, is essential, under the terms of the circular, to give the right to the stipulated commission. In the sense of that circular, the bill of credit was used the moment any bills were drawn upon Messrs. Baring & Co. under the letter of credit to the testator, Lyman, and placed in the hands of holders, who took it for value upon the faith of the letter of credit, and thus became entitled, as such holders, to require an acceptance and payment thereof, according to their tenor, whether they were ever presented for acceptance and payment, or not. My reason is, that Messrs. Baring & Co., from the moment, that such bills were drawn and taken for value, became bound, as well to the holders, as to Lyman, to accept the bills upon presentment, and to pay them at

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maturity; and if they had refused, an action might have been maintained against them, upon the promise contained in the letter of credit, not only by Lyman, but by the holders. Indeed, if the bills were made payable at a certain time after date, instead of after sight, and were received by the holders upon the faith of the letter of credit, the holders might maintain an action thereon against Messrs. Baring & Co. as upon a virtual acceptance. Such was the decision of the Supreme Court in the case of *Coolidge* v. *Payson*, (2 Wheat. R. 66), following out the doctrine of the cases of *Pillans* v. *Van Meirop*, (3 Burr. R. 1663), and *Pierson* v. *Dunlop*, (Cowper R. 571), and *Mason* v. *Hunt*, (Douglas R. 296). It is of no consequence, what were the nature and extent or conditions of the contract between the holders and Lyman, under which the bills were received, provided Messrs. Baring & Co. became for a single hour liable to accept and pay the same to the holders; for every such contract would be *res inter alios acta*, with which Messrs. Baring & Co. could have nothing to do, and of which they could have no power to avail themselves, not standing in privity with the parties thereto. The question is not, what were the duties or liabilities between Lyman and the holders, under the bills and contract connected therewith; but whether Messrs. Baring & Co. were liable thereon. The use made of the bills by the holders for value, after receiving them, was of no consequence to Messrs. Baring & Co., or whether any use was made by them at all; but whether any responsibility attached to them for a moment, to accept or pay the bills under the letter of credit. The commission is, by the very terms of the circular, to arise from the use of the letter of credit, and not from the use afterwards made of the bills drawn under it. Suppose the bills had been unconditionally transferred to third persons, so as to become their absolute property, and afterwards, upon a new negotiation, they had been delivered up and cancelled by the parties before acceptance, would not the right to the commissions have attached? Suppose the bills had been accepted by Messrs. Baring & Co., and afterwards and before the maturity, they had been taken up and paid by Lyman, would not the like right to the commission have attached? The commission was a commission, not accruing upon the payment of the bills, but designed as an indemnity and compensation for the risk run, and responsibility incurred by Messrs. Baring & Co. and their duty to accept and pay the bills, if drawn under the letter of credit. If ever there would be perfect justice in the application of the maxim, *Qui sentit commodum, sentire debet et onus*, the present case, under such circumstances, would seem to furnish a fit occasion to apply it. I agree, that if Messrs. Baring & Co. were never responsible to the holders of these bills at all, and that no right attached in favor of the holders, for a moment, to bind them to the acceptance thereof, then they have no claim for the commission; for they have not earned it, and the letter of credit has not been used. On the other hand, if they are entitled to any commission,

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they are entitled to the whole commission, for there can be no apportionment of the contract at law. If the bills have been subsequently withdrawn, or paid by Lyman, that cannot vary the rights of Messrs. Baring & Co., if any rights once attached. It is a mere waiver by the holders and Lyman, of the right to require an acceptance and payment of the bills, instead of Lyman's providing for a subsequent reimbursement, after payment thereof by Messrs. Baring & Co. In the receipt of Lyman, of the 7th of June, 1838, he acknowledges the receipt of the letter of credit, and among other things, he promises "to provide, in London, sufficient funds to meet the payment of whatever may be negotiated by virtue thereof, at the maturity of the bills." Now, it seems to me, that the word "negotiated" is here used in precisely the same sense, as the word "used" in the circular. A bill is properly said to be negotiated, when it has passed into the hand of the payee, or indorsee, or other holder for value, who thereby acquires a title thereto.

In my judgment, therefore, the whole case turns upon the consideration, whether these bills were, at any time, in the hands of the holders, valid subsisting bills, taken by them for value, and held, either absolutely or as security, for advances made to Forbes on account of Lyman; or whether they were merely lodged in the hands of Russell & Co., not to give a present title of any sort thereto, as security or otherwise, but merely as a future springing, contingent title, dependent upon future occurrences, and in the meantime to be held as a mere special bailment in trust and for the benefit of Forbes or Lyman. In other words, the question seems to me (as I intimated at the argument), to resolve itself into this point, whether the bills were in the hands of Russell & Co. upon a condition precedent, or a condition subsequent. If the former be the true view of the facts, then they took no title, whatsoever, in the bills, but in the event that Lyman should refuse to ratify the acts of Forbes, as to the advances and arrangements made for the benefit of Lyman, in lieu of the bills. On the other hand, if the latter be the true view of the facts, then a present title to the bills passed to Russell & Co., subject to be divested by the acceptance and ratification by Lyman of the acts and arrangements of Forbes. And to the consideration of this point I shall now address myself.

It is not an unimportant circumstance, in examining this point, that Forbes, the agent of Lyman, and a partner in the house of Russell & Co., through whom the whole transaction was negotiated, and who certainly stands before the court as a disinterested witness, explicitly states in his deposition, that "the bills were held by Russell & Co. as their security for the advances they had made. They had no orders to advance funds for Mr. Theodore Lyman; but, thinking it was for his benefit, they did it, and held the bills then as their security." Now, if this statement is to be relied upon, as the true exposition of the transaction, it puts an end to the controversy; for if the

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bills were held by Russell & Co., as a present security for their advances, they had a present title to them, and a present right against Messrs. Baring & Co., to demand the acceptance and payment thereof; otherwise they would be no security at all. Still, Forbes may mistake in the matter; and, therefore, we are led to examine, whether the actual transactions, as disclosed in the correspondence, and other transactions in Canton at the time, do or do not confirm his recollection and interpretation thereof.

And I must say, that upon a full examination of all the acts and correspondence of the parties, it seems to me, that Forbes is fully borne out and confirmed in his statement by them; and that every other view thereof would be somewhat forced and strained, if not unnatural. In the first place, the bills were actually indorsed and sent by Russell & Co. to their agent in Boston, to await the final decision of Lyman, and if he did not confirm the proposed arrangement, then to be used and forwarded to London. Certainly, this would seem to be the exercise of a virtual authority and title over the bills, as owners, and could, in no just sense, be deemed a mere agency for the drawer, or for Lyman. It vested a title to the bills in favor of the agent at Boston, good against Messrs. Baring & Co., and against Lyman, and indeed against all the world, except Russell & Co. The natural effect of the indorsement, was that of an indorsement, conferring a present legal title to the agent, to hold and use the bills for the benefit of Russell & Co., and not a mere right to hold the same, as bailee, for the benefit of Lyman, until he had done some future act to transfer the title to Russell & Co. In point of fact, also, although Lyman's executor, (he having died on the 24th of May, 1839, before the advices were received,) assented to the arrangement made by the agent, Forbes, when the advices were received, and this assent was immediately made known to the agent of Russell & Co., in Boston; yet the bills of exchange were not thereupon surrendered, but they remained in the possession of the agent of Russell & Co. in Boston, (as appears by his letter of that date), up to the 11th of July, 1840; and, indeed, it is stated, that the bills were not cancelled until December, 1840, after the last remittance had reached Canton. Now, if the bills were intended to take effect solely in the case of Lyman's refusal to assent and confirm the arrangement of Forbes, and not before, as soon as Lyman had so assented to and confirmed it, they ought to have been given up. But the parties did not so act upon the case; nor did Lyman require the bills to be then given up. On the contrary, they were retained without any objection; and this can scarcely be accounted for, except upon the supposition, that they were retained as security for the due fulfilment on the part of Lyman, of the arrangement with Forbes by repayment at Canton, of the moneys advanced by Russell & Co. In this view, the retainer of the bills assumes a natural character. In any other view, it would seem inconsistent with the true rights and duties

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of the parties. Now, let us suppose, that after Lyman had acceded to the arrangement of Forbes, the moneys advanced by Russell & Co. had never been repaid to Russell & Co., either by the death of Lyman, or by the remittance being lost on the voyage, or in any other manner, would it not be clear, that the bills would be valid and obligatory against Messrs. Baring & Co. in the hands of the agent of Russell & Co., as well as against Lyman? If so, how can they be said not to be a security for the due fulfilment of the arrangement of Forbes? And if a security, must they not be so from the time they were actually drawn and delivered to Russell & Co., up to the time when the advances were repaid in Canton by Lyman? If they were designed as a security in this way, is it not equally clear, that Russell & Co. were, in the meantime, holders of the legal title for value?

Let us, in the next place, see, how the case stands upon the correspondence. The first letter of Russell & Co. to Lyman, of the date of 18th March, 1839, at Canton, says: "Your funds, under the credit of £25,000 at 5 shillings per dollar, with proceeds of rice and specie, we estimate, after deducting expenses of the ship, at about $106,000, which will not fill the ship by about one hundred tons. Freight could not be procured at over twenty dollars per ton, and if we had authority to fill up with freight for Boston, at market rate, we should doubt the expediency of so doing, fearing it might interfere with her ultimate destination. There is no demand, whatever, for exchange at the very unfavorable rate at which we have concluded to place your bills; and we have obtained a loan for the purpose of getting your ship away. But as our Mr. Forbes had no orders to resort to this, he authorizes us to draw your bills at the market rate, and to give you your choice of paying for them in London, or returning the proceeds of the £25,000 to us in *dollars*, without delay, paying at the rate of 9 per cent. per annum, interest, until the amount is refunded. *We shall, in either case, charge our usual commission of one per cent. for drawing*, and shall send the bills and letter of advice to our agent in Boston, to be cancelled, upon your agreeing to replace the funds, or to be forwarded to London for our account, if you conclude to meet them there." Again, on the 4th of May, 1839, they wrote to Lyman as follows. "In our letter of the 18th ult. [meaning 18th of March], we indicated the course, which we then thought of pursuing with regard to your funds. The present aspect of affairs, and the prospect for the future, is much changed since that date, and a different disposition of your bills would now be much more for our interest. But we confirm, what we then said, and now recapitulate more distinctly the arrangement, which we authorize our agent, (Mr. John M. Forbes), to carry into effect. Our R. B. Forbes has drawn on Messrs. Baring, Brothers & Co., under this date, the following bills (enumerating them), proceeds to your credit at 5 shillings per dollar, making £25,000 sterling. These bills will be forwarded to Mr. T. W. Forbes, Boston, accompanied by the letters

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of advice. Should you determine to provide for them in London, they will be sent forward immediately. But should you prefer to replace the amounts to your debit, as per statement, annexed in this place, paying interest at the rate of nine per cent. per annum from this date, you can do so," &c. "When the remittance is realized in Canton at the market value, we shall consider your charge of interest at an end, and not till then." The letter of advice of Russell & Co. to their agent in Boston, of the same date, which accompanied the bills, also of the same date, says: "On receipt of this letter, you will please call on Mr. Lyman, or his agent, and offer him a choice of the two plans indicated in our letter to him, one of which is, to allow the bills to be disposed of, as you may deem most for our interest, by selling them in the United States, and investing the proceeds in specie for our account, or forwarding them to London, to be there invested in specie for our account; or on the other hand, to cancel the bills in the United States, upon Mr. Lyman's giving you full security, that the amount advanced to him, as per memorandum at foot, shall be returned to us in specie, the interest at the rate of nine per cent. per annum from this date, (May 4th), to be charged, until the loan is realized in Canton, the dollars being disposed of at the market rate."

Now, it seems to me manifest, that this correspondence in its very terms and import, demonstrates, that the parties understood the bills to be in the hands of Russell & Co. as the true owners thereof for value, as a present immediate and continuing security; for the advances made by them under the letter of credit, and the instructions for the voyage. That an option was intended to be given to Lyman to reimburse Russell & Co., by a remittance of the amount in specie to Canton; and when that amount was received in Canton, and not till then, the interest was to cease, and the bills were to be cancelled. In this view, the correspondence amply confirms the deposition of Forbes, the agent of Lyman, that the bills in the intermediate time were in the hands of Russell & Co. as their security; and, of course, were their property, and were negotiated to them. Indeed, the language of the correspondence shows, that Russell & Co. treated the bills as their own in point of right and power of disposal, and only offered an option to Lyman to deliver them up, upon his acceding to another proposed arrangement, which was in the nature of a condition subsequent. It can make no legal difference in the case, that the drawing of the bills was never notified to Messrs. Baring & Co. That was not necessary to give them a legal validity, or to bind the latter to accept and pay them. It is sufficient, that they were bills drawn and negotiated for value under the letter of credit, and that the letter of credit was "used" for this purpose. Suppose, after the acceptance of the proposals by Lyman's executor, the terms had not been complied with, can there be a doubt, that Russell & Co. could have enforced their rights under the bills against Messrs. Baring &

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Co.? They had nothing to do with the new proposals to Lyman, nor with his acceptance or refusal of them. Nor would it have been any justification of their refusal to accept the bills, if Russell & Co. and Lyman had differed on the point, whether the proposals were accepted or not, or what was the true interpretation thereof. If the bills were once negotiated for value, to Russell & Co., conditionally or otherwise, as a present subsisting security, until they were actually cancelled by agreement of the parties, Messrs. Baring & Co. were bound by them. And I cannot but think, that the whole correspondence shows, that so all the parties understood the matter.

It was suggested at the argument, that R. B. Forbes, having become a partner in the house of Russell & Co. at the time, when the bills were drawn and delivered to Russell & Co., might vary the case favorably to Lyman. I am wholly unable to perceive, how any such effect can arise. R. B. Forbes was still Lyman's agent, and the bills were drawn as a security, not to Forbes alone, but to the firm, and the other members had a vested title in the same. There is nothing in the law, which disables any partner in a firm from being the agent of a third person, in drawing bills in favor of the firm, for advances made to such third person, under an express authority. A firm may negotiate its own paper to one partner, and the latter will thereby become the owner thereof; and on the other hand, a firm may take a separate negotiable security from one of its partners, and hold and use the same for its own purposes. *A fortiori*, the firm may do so, where he acts as agent of a third person.

Upon the whole, upon the best reflection, which I have been able to bestow upon this subject, my opinion is, that the plaintiffs, upon the facts, are entitled to recover the full amount of the commissions; and that they ought to have judgment accordingly.

Supreme Judicial Court, Maine, April Term, 1841, *at Portland.*

Dillingham *v.* Codman.

Held, that in order to charge an attorney as indorser of a writ, it must be proved, that the principal has absconded, or is unable to pay: evidence that he was committed on the execution and broke his bond, and that his bondsmen are not good, is not sufficient.

Morton *v.* Barrett and others, Trustees.

Held, that neither the certificate of the American consul in London, nor of a sexton there, is legal evidence of the death of a person having an interest in a trust estate to authorize the trustees to distribute his proportion to other heirs.

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DIGEST OF AMERICAN CASES.

Selections from 1 Metcalf's (Massachusetts) Reports.

ACTION.

When an action is commenced and prosecuted by a corporation, by direction of its officers *de facto*, — no other persons claiming a right to act as its officers, — the defendant cannot be permitted to show, for the purpose of procuring the action to be dismissed, that those officers were illegally elected. (1 Hall, 191.) *Charitable Association* v. *Baldwin*, 359.

ASSUMPSIT.

1. After one tenant in common has obtained partition by legal process, he may maintain an action of assumpsit against his former cotenant to recover his share of the rent received by such cotenant on a demise by him of the whole estate, before and during the pendency of the process for partition; although such cotenant appeared and pleaded to the petition for partition, that the petitioner was not seized of said estate as tenant in common thereof. *Munroe* v. *Luke*, 459.

2. Several members of an unincorporated religious society, mutually agreed in writing to take and pay for the number of shares affixed to their names, in the stock of a meetinghouse which they proposed to build, and to pay a certain sum on each share to such person as the majority of share holders present at a meeting to be held for that purpose should elect as a treasurer; such treasurer to give bond, with sureties, for fidelity, &c., and to pay over the money received by him to the treasurer that should be elected by the share holders when they should be organized under an act of incorporation, which they intended to obtain. A. subscribed for shares in said stock, and B. was chosen treasurer, and gave bond as provided for in said agreement of the subscribers. The subscribers afterwards obtained an act of incorporation, organized under it, and chose C. treasurer. A. refused to pay the sum which he had subscribed, and B. brought an action against him to recover the same. *Held*, that there was a sufficient consideration for A.'s promise, and that the action thereon was rightly brought by B. *Thompson* v. *Page*, 565.

BANK BILL.

If a creditor actually receives bank bills of his debtor, though he protests that he will not receive them unless the difference between their value and that of specie shall be allowed to him, and the debtor refuses to make, or to promise to make such allowance, the creditor cannot maintain an action to recover the amount of such difference. *Phillips, Judge*, v. *Blake*, 156.

BOND.

1. In computing the time within which a prisoner in execution must surrender himself to close confinement, when he gives bond, pursuant to Rev. Sts. c. 97, § 63, with condition that "if he shall not be lawfully discharged within ninety days from the day of his commitment, he will surrender himself," &c., the day of commitment is to be excluded. And as such prisoner has the whole of the ninety days, thus computed, to obtain his discharge, the condition of his bond is saved, if he surrender himself on the ninety-first day. *Wiggin* v. *Peters*, 127.

2. A bond with condition that the prisoner "shall, at the expiration of ninety days from the day of his com-

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mitment, surrender, &c., unless he shall before that time have been lawfully discharged," is of the same legal effect as a bond with condition in the precise terms prescribed by the Rev. Sts. c. 97, § 63. *Ib.*

BOUNDARIES.

Where a deed, conveying land, is of doubtful construction as to the boundaries, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. *Stone* v. *Clark*, 378.

BY-LAW.

A by-law of the city of Boston, requiring that every person, who enters his particular drain into a common sewer of the city, shall be held to pay to the city such sum as is his just proportion of the expense of making such common sewer, having reference always to the last valuation of such person's estate, in the assessors' books, previous to the expenditure, is void for inequality and unreasonableness. *City of Boston* v. *Shaw*, 130.

CONTRACT.

A promise, by the holder of a joint and several note, to one of the makers who had made part payment thereof, that he would look to the other maker for payment of what remained due thereon, is without due consideration, and furnishes no defence to an action against the maker, to whom such promise was made, to recover the remainder of the note. *Smith* v. *Bartholomew*, 276.

2. A promise to pay a demand which the promisee had voluntarily released for the purpose of rendering the promisor a competent witness in a suit against the promisee, is without consideration, and an action thereon cannot be sustained. After such release, there is no such moral obligation to pay the demand, as will support a promise to pay. *Valentine* v. *Foster*, 520.

COVENANT.

If a grantor of land is not seized thereof when he makes his deed of conveyance, his covenant of warranty does not attach to the land and run with it; and he, therefore, is not liable to an action, by the assignee of his grantee, for breach of such covenant. *Slater* v. *Rawson*, 450.

2. Where an assignee of a grantee, in an action of covenant against the grantor, avers and proves that the grantor had neither seizin nor title, at the time of his grant, the grantor is not estopped to rely on his want of seizin as a defence to the action on the covenant of warranty. *Ib.*

3. In a deed conveying real estate, the grantor, after a description thereof, added that it was sold subject to the right of the widow and daughter of B. in the same — the daughter's "right to exist no longer than the widow occupies the premises to which she is entitled under said B.'s will" — and covenanted that the premises were free from all incumbrances except the above mentioned. By the will of B., the daughter had a right after the widow's death, in the estate conveyed. Held, that the grantor was liable to the grantee, in an action on the covenant against incumbrances. *Jarvis* v. *Buttrick*, 480.

DISSEIZIN.

The levy of an execution on land which is not the judgment debtor's does not work such a disseizin of the true owner, as will prevent his maintaining an action of trespass, without reëntry, against the judgment creditor or those acting under him. *Blood* v. *Wood*, 528.

2. An execution was levied on land not the judgment debtor's, being part of a large unenclosed meadow, and the judgment creditor entered thereon two or three times for the purpose of showing the grass for sale, but took no actual possession: He afterwards advertised a sale of the grass, in a public newspaper, as grass growing on his land, and caused the same to be sold at auction, at a distance from the land, and the purchaser thereof cut and carried it away — the true owner of the land having no actual notice of the proceedings. Held, that these acts did not constitute such a disseizin or ouster of the true owner, as to prevent his maintaining an action of trespass against the purchaser of the grass. *Ib.*

EVIDENCE.

In an action by the indorsee against the maker of a negotiable note, the bur-

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den is on the defendant to prove that the note was negotiated after it was due and dishonored; and that burden is not removed by proof that the note was transferred and delivered to the plaintiff before it was dishonored, but was not indorsed until afterwards. *Ranger* v. *Cary*, 369.

EXECUTOR AND ADMINISTRATOR.

If an administrator suffers judgment to be recovered against him before he represents the deceased's estate insolvent, he must pay the full amount of such judgment, without regard to the assets of the deceased. And if, on demand made upon him to pay such judgment, or to show sufficient property of the deceased to be taken in execution to satisfy the same, he neglects or refuses so to do, he and his sureties are liable, on his administration bond, to a suit by the judgment creditor, in the name of the judge of probate, although the deceased's estate is in fact insolvent. *Newcomb, Judge* v. *Goss*, 333.

FRAUDS, STATUTE OF.

An agreement to make machines for a specified price, and to find the material therefor, is not within the statute of frauds. — Rev. Sts. c. 74, § 4. *Spencer* v. *Cone*, 283.

2. An oral agreement for the sale of mulberry trees growing in a nursery and raised to be sold and transplanted, to be delivered on the ground where they are growing, upon payment therefor being made, is not a contract for the sale of an interest in or concerning lands, &c., within the statute of frauds. — Rev. Sts. c. 74, § 1. *Whitmarsh* v. *Walker*, 313.

3. A license to enter upon land, and remove trees therefrom, passes no interest in the land, and, though not in writing, is valid, notwithstanding said statute. *Ib.*

4. Part performance of an oral contract for the sale of lands, &c., does not take such contract out of the operation of said statute. *Adams* v. *Townsend*, 483.

INSURANCE.

One who procures insurance to be made, in his own name, for another person, or for whomsoever it may concern, cannot maintain an action on the policy, in his own name, if his authority is disavowed or revoked, before action brought, unless there is some express provision, in the policy, authorizing him to sue, or he has a lien or other interest, which the party whose property is insured cannot defeat. *Reed* v. *Pacific Ins. Co.*, 166.

2. One who thus procures insurance on a vessel, not as a broker or general agent, but in pursuance of a specific order, and under directions to forward the policy to the party who gives the order, has no lien on the policy, nor interest in it. And though he be ship's husband for the general management of the vessel insured, yet he has no lien on the policy for the balance of his account. *Ib.*

3. When an underwriter, who has refused to accept an abandonment of a stranded vessel, takes possession of the vessel for the purpose of removing, repairing, and restoring her to the owner, he is bound to use due diligence and despatch, as well in removing as in repairing her; and want of such diligence and despatch in removing her, operates as a constructive acceptance of the abandonment, although the repairs are afterwards made with reasonable despatch. *Reynolds* v. *Ocean Ins. Co.*, 160.

4. The underwriter's duty and liability, in such case, are not varied by a clause in the policy of insurance, that "the acts of the assurer, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered an acceptance of an abandonment;" such clause being inserted *diverso intuitu*. *Ib.*

5. An insurance of "freight on board" a vessel means the same as "freight of the vessel." *Robinson* v. *Manufacturer's Ins. Co.*, 143.

6. Insurance was effected on freight of a vessel at and from Cadiz to a port in Sicily, and at and from thence to her port of destination in the United States. The vessel was lost in the Bay of Cadiz, after being ready to sail for Palermo in Sicily, having on board a very small quantity of goods on freight, and those shipped for her port of destination in the United States. The assured had chartered the vessel, except the cabin, deck, and necessary room for the accommodation of the crew, (reserving to the master the privilege of freight in the cabin,) from

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Palermo to New York, for $2500, and $35 *per diem* demurrage. Held, that the whole freight from Cadiz to Palermo, and from Palermo to the United States, was one entire subject of insurance; that the valuation was not so great as to raise a suspicion of fraud; and therefore that the underwriters were not entitled to have the policy opened, but were liable to a total loss. *Ib.*

LIMITATIONS, STATUTE OF.

A memorandum written on a note, by the maker, in these words, "for value received, I hereby acknowledge this note to be due, and promise to pay the same on demand," and signed in the presence of an attesting witness, is itself a "promissory note," within the fourth section of Rev. Sts. c. 120, and an action thereon is not barred by the statute of limitations. But if the original note was without consideration, or the consideration thereof had failed, and there was no new consideration for such memorandum, (or new note), the payee cannot recover thereon. *Commonwealth Ins. Co.* v. *Whitney*, 21.

PARTNERSHIP.

Under an authority, though by parol only, given to one partner by the others, after a dissolution of the partnership, to sell a negotiable note made to the firm before dissolution, he may indorse such note, "without recourse," in the name of the firm. *Yale* v. *Eames*, 486.

2. All the members of a firm are answerable for a fraud committed by one of them — or by their agent acting within the scope of his authority — in the sale of partnership property. *Locke* v. *Stearns*, 560.

PRINCIPAL AND AGENT.

The principal is liable, *civiliter*, for the fraud or deceit of his agent committed in the course of the agent's employment. *Locke* v. *Stearns*, 560.

PRINCIPAL AND SURETY.

A surety's cause of action against a co-surety or his representatives, for contribution, accrues when, and not before, he pays the debt of the principal. *Wood* v. *Leland*, 387.

PROMISSORY NOTE.

A note payable on demand is not regarded as dishonored within one month after its date. *Ranger* v. *Cary*, 369.

2. A note given for a premium of insurance cannot be recovered, if the vessel insured were unseaworthy at the time when the risk would have commenced — the consideration having failed. *Commonwealth Ins. Co.* v. *Whitney*, 21.

3. The indorsee of a note made and indorsed in another state, must do all that is required by the law of that state to charge the indorser, before he can maintain an action against him in Massachusetts. *Williams* v. *Wade*, 82.

REVERSION.

The reversion expectant on the determination of an estate tail is a vested interest, which may be devised, and which will pass to a devisee under a general residuary clause in a will. *Steel* v. *Cook*, 281.

2. When the owner of such reversion limits the same by way of executory devise, on the contingency of there being issue of a future marriage of one of the tenants in tail, the residuary devisee of the reversion may grant the same to a third person, subject to such executory devise. *Ib.*

SHERIFF.

An officer, who arrests a judgment debtor on execution, cannot lawfully hold him in custody against his consent, in order to procure an interview with the creditor, or his attorney, for the purpose of negotiating with the debtor, or for the purpose of the creditor's giving further directions to the officer as to service of the execution. *French* v. *Bancroft*, 502.

2. An officer, who is lawfully directed to arrest a defendant on a writ, is answerable to the plaintiff, if he take a bail bond to which the sureties' names are forged, and thereupon discharge the defendant from custody. *Marsh* v. *Bancroft*, 497.

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INTELLIGENCE AND MISCELLANY.

The Attorney General of Massachusetts and his Fees. An article appeared in the Boston Morning Post of October 11th, commenting on the amount allowed Mr. Attorney General Austin for professional services and fees, in the case of Rhode Island against Massachusetts, now pending in the supreme court of the United States. To this attack, the attorney general thought fit to reply, and his letter places this matter, about which so much has been said, in its true light, and thoroughly exposes the contemptible course of those members of both political parties, who, in the attempt to cast a stigma upon a meritorious public officer, have entered into two-penny calculations of his "family expenses," while at Washington, defending the rights of the state, in the highest tribunal of the country. The facts in the case appear to be these. By a resolve of the legislature, in 1832, before Mr. Austin was appointed attorney general, and while the commonwealth had an attorney general and solicitor general in full pay, the governor was authorized to retain and employ counsel to conduct the defence of the commonwealth, in its controversy with Rhode Island. Governor Lincoln immediately appointed the Hon. Daniel Webster, and accompanied the appointment with a warrant for a suitable retainer, of which we never heard that any body made complaint. In 1836, Governor Everett being in the chair, he determined, on the representation of Mr. Webster, and for very satisfactory reasons, to appoint additional counsel, and a special commission, of the same tenor with Mr. Webster's, was issued to Mr. Austin, bearing date the seventh day of December, 1836. Before accepting that commission, he was distinctly informed, that the duties it required were not considered as any part of his official acts, as attorney general, and would be paid for under the resolve of 1832, by a reasonable compensation. The commission was accordingly accompanied by a retaining fee of five hundred dollars, and followed the next year by the same amount. Both these payments were in due course reported from the treasurer to the legislature, and the accounts successively approved. It 1839, it was not necessary for Mr. Austin to attend the supreme court of the United States; but in 1840, it was supposed to be expedient that he should be present on the first day of the term. No prudent citizen, who had a private cause there, under the circumstances in which the Massachusetts case was situated, would have permitted his counsel to be absent at that time. Mr. Webster had recently returned from Europe, and could not be present on the day. Mr. Austin accordingly did attend. Before his departure from Boston, two hundred and fifty dollars were advanced to him, for which he was, in a form not before observed, expressly ordered "to account." The opinion of the supreme court was delayed until the last day of the term. Some further time was occupied in obtaining a copy of it, and in ascertaining the next steps to be taken; and, after an absence of eighty-one days, it was the attorney general's first business to comply with the order, by accounting for the money advanced. He did so. This accounting was very simple. He stated that he had spent the whole of it, and twice as much more; that, having a part of his family with him, he had expended $714 during his absence. When the report of the council was made to Governor Morton, he refused to sign the warrant. The only doubt he expressed was, whether, under a resolve

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authorizing the governor to appoint and retain counsel, the governor and council could pay any thing to any body. Governor Davis concurred in this doubt. The legislature, thereupon, by a supplementary resolve, after a short debate, authorized the council to pay for all services and expenses incurred, or to be incurred, in the case; and, after a year's delay, a warrant issued in favor of Mr. Austin, for $742. This debate in the legislature occurred at the last session, at the moment when it became necessary for the attorney general again to attend the supreme court at Washington. He declares, that he would immediately have relinquished all connection with the case, and thereby cut off all further cavils about money, if there had been time for other counsel to become acquainted with the case. Mr. Austin has since resigned the special commission under which he was appointed to act in the cause, and his place is occupied by Mr. Choate, the distinguished senator from Massachusetts, whose profound learning and brilliant talents are too well known, to leave any fear that the cause of the state will suffer while entrusted to his hands. We regret, however, that the state has not the continued benefit of the labors of the attorney general. We do not hesitate to adopt his own language, and venture to maintain that when the case is finally settled in favor of the commonwealth, as sooner or later it will be — although to share in this triumph, which is a lawyer's highest reward, is denied to the attorney general — the principles he propounded in the several addresses made to the court, and substantially recorded in its reports, and the result of the researches there developed, will be found to have been the directing course for the progress of the cause, as they are the immovable foundation of its success.

Foreign Law Intelligence. The recent political change in Great Britain, by which the tories have again come into power has had the usual effect upon those offices which depend upon political changes. Lord Lyndhurst is again lord chancellor. Sir Frederic Pollock and Sir William Follett are attorney and solicitor general. Sir Edward Sugden is chancellor of Ireland. — The Administration of Justice in Equity Bill was thrown over last year, because the whig government could not agree how the new judgeships were to be filled. It was thrown over this year because the whig ministry was not allowed to exercise the patronage. It was passed at once by Sir Robert Peel. This bill created two vice-chancellorships, to which Mr. Wigram and Mr. Knight Bruce have been appointed. Two committee rooms of the house of commons have been fitted up as temporary courts for the new vice-chancellors, who have already entered upon the discharge of their judicial business. — It is currently reported in the professional circles, that Lord Lyndhurst will relinquish the seals at the commencement of the January term, and that Sir W. Follett, the solicitor-general, will be his successor. In connection with this arrangement, it is also said that Lord Abinger will at the same time vacate the chiefship of the exchequer, and that Sir Frederick Pollock will be his successor therein. Probably these changes will make way for Mr. Cresswell, as solicitor-general. — In Ireland, chief justice Bushe, of the queen's bench, has resigned, and the place has been conferred on Edward Pennefather, the solicitor general. Mr. Sargeant Jackson is to be the solicitor general, and Mr. West the sargeant. — Lord Waldegrave and Captain Duff, having completed their term of six months' incarceration in the Queen's Bench, in consequence of being implicated in the attack on a policeman, have been released, under the full conviction that neither his lordship nor the captain had directly any part in the assault on the policeman, the inhabitants in the vicinity of Lord Waldegrave's estate at Strawberry-hill, prepared to welcome him home with a procession and fête, to be followed by illuminations in the evening.

Legal Reporter. We have before us a few numbers of a weekly law magazine of this name, which has been established in Dublin. In size and appearance it is similar to the (London) Legal Observer. In plan it is not unlike our own magazine, the principal object being to "afford the practitioner rapid reports of the latest decisions in the courts of law and equity." In one of the

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numbers, under the head of "American Jurists, No. I," there is a review of the English edition of Mr. Justice Story's Commentaries on Equity Jurisprudence. "There are few better books," the writer says, "on the subject of Equity Jurisprudence, than Mr. Justice Story's Commentaries. It is one of those specimens of modern legal literature, which are such decided improvements upon the mere black-letter compilations of principles and cases of an earlier date in our profession. It does not possess the abstruse lore of Gilbert, nor the scientific depth of Ballow; neither can it be said to have the elegance and grace which Blackstone has conferred on his brief discussion of the English jurisdiction of the Chancery. But the subject is fully discussed in a good style when original, and with well-chosen selections from the best authors when (and this not unfrequently) he becomes a compiler. What is commonly called originality, and which in mere literature is justly expected, is not, it appears, considered requisite in legal writing. The mutual debts of this kind due by writers to each other are innumerable, and certainly Mr. Story would appear in a less voluminous shape if Fonblanque, Ballow, and Mitford, reclaimed their own. At the same time, we are bound to say, that great research, profound knowledge, and correctness of taste, are so evident in this work, as to entitle him to rank very high as a legal writer."

NEW PUBLICATIONS.

Messrs. Little & Brown, of Boston, have in press and will soon publish, "Points in the Law of Discovery, by James Wigram, Esq., one of her majesty's counsel. First American, from the second London edition, with Notes and References to American decisions, by a member of the Boston Bar." This treatise of Mr. Wigram, modestly designated as "Points in the Law of Discovery," is able and profound. The author is eminently learned, and has recently received a distinguished appointment under the new act, to facilitate the administration of Equity. He discusses the subject of the present work in a clear and logical manner. The cases cited are examined with great care and fidelity, notwithstanding the author dissents, in some instances, from the principles deducible from them. The subject matter of the work is daily becoming more and more interwoven with our own jurisprudence, and ought to be examined by every member of the profession.

A third edition of Greenleaf's Overruled Cases has been published in New York. We learn, upon the best authority, that Mr. Greenleaf has no connection with this work whatever. He is responsible for the first edition only, which was published in 1821. We understand that the author formerly commenced legal proceedings against a New York publisher for infringing his copyright, and the matter was compromised by the latter's purchasing the copyright outright, from which time the connection of the author with his work has ceased entirely.

The October and November numbers of the Law Library contain a Treatise on the Law of Lien and Stoppage in Transitu, by John Cross; and a part of Eden's Practical Treatise on the Bankrupt Law, from the last London edition. Both of these are extremely useful to the practitioner. The latter is especially needed at the present time; and they are both furnished at less than the cost of importing one of them.

Commentaries on the Law of Partnership, as a branch of Commercial and Maritime Jurisprudence, with occasional illustrations from the Civil and Foreign Law. By Joseph Story, LL.D. Boston: Little & Brown. 1841. London: A Maxwell, 32 Bell Yard, Lincoln's Inn, Law Bookseller to His late Majesty; T. Clark, Edinburgh, Milliken & Son, Dublin.

American Criminal Trials. By Peleg W. Chandler. Volume I. Boston: Little & Brown. London: A Maxwell, 32 Bell Yard, Lincoln's Inn. 1841.

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MONTHLY LIST OF INSOLVENTS.

Name	Occupation
Boston.	
Albee, John,	Merchant.
Bosson, Charles P.	Seedsman.
Lilleyman, William,	Merchant.
March, Ichabod,	Housewright.
Trevett, Samuel R.	Bookbinders.
Scales, John,	Copartners.
Wales, Amasa,	Trader.
White, Willard C.	Auctioneers.
Hall, Oliver,	Copartners.
Bridgewater.	
Hooker, George,	Papermakers,
Warren, Silas,	Copartners.
Cambridge.	
Belcher, John G.	Painter.
Rice, Joseph H.	Yeoman.
Charlestown.	
Holt, Charles.	
Burrell, Seth,	Teamster.
Dracut.	
Jones, Charles H.	Innkeeper.
Gloucester.	
Griffin, John L.	Fisherman.
Phillips, Richard, Jr.	
Great Barrington.	
Peck, Nathan.	
Peck, Nathan, Jr.	
Hingham,	
Sprague, Samuel, Jr.	Cooper.
Hawes, Samuel, Jr.	Trader.
Lee.	
Loveland, Ambrose C.	Yeoman.
Benedict, Samuel E.	
Robbins, Job, Jr.	Clothier.
Lowell.	
Mace, Samuel F.	Cordwainer.
Lynn.	
Harris, Christopher,	Victualler.
Marlborough.	
Farwell, James M.	Yeoman.
Malden.	
Tufts, Nathaniel,	Tinplatework'r.
Medford.	
Brooks, Alden,	Housewright.
Milton	
Alden, Charles,	Laborer.
Nantucket.	
Barrett, George W.	Merchant.
Newburyport.	
Johnson, Francis H.	Grocer.
New Marlborough,	
Stevens, George H.	Husbandman.
Plymouth,	
Richmond, Micah,	Provis. dealer.
Rowley.	
Smith, Gorham,	Shoe manufac.
Roxbury.	
Brackett, De Wit C.	Trader.
Salem.	
Tibbets, Robert A.	
Springfield.	
Booth, Pomeroy,	Mechanic.
Stoneham.	
Dike, Solon,	Shoe manufac.
Green, Elijah H.	Cordwainer.
Topsfield.	
Phillips, Richard,	Shoe manufac.
Waltham.	
Dow, Philip B.	Carpenter.
Wareham.	
Hooker, William.	
West Cambridge.	
Whitney, Adam,	Laborer.
Wilbraham.	
Kent, William, Jr.	

TO READERS AND CORRESPONDENTS.

Our present number contains but few decisions, and those are principally of a commercial character. In the case of *Baring* v. *Lyman*, we depart from our general rule, and publish the arguments of counsel at length. The points in the case are novel and important; and the arguments are eminently able. It is a matter of regret to us, that we are not always able to do justice to the arguments of counsel in the reports which we publish; but our limits are such as leaves us no choice in the matter, and we are generally obliged to condense the opinions of the courts even, in order to give a proper degree of variety to our magazine.

At the commencement of the present term of the circuit court of the United States, in Massachusetts, Mr. Justice Story took occasion to pass a high eulogium on the life, services and character of the Hon. John Davis, the late district judge. It was a feeling, eloquent, and eminently proper tribute to this distinguished jurist, and commanded the profound attention of the bar. On making application for a copy for publication, we were sorry to learn, that it was entirely extemporaneous. No notes of it were taken at the time, and we should do the learned author a great injustice by undertaking to write it out from memory.

In the abstract of the case of *Hooper* v. *Day*, in our last number, there is an error, which the reader will readily correct by examining the whole case. The word *not* should have been omitted.

The communication of *S. P.* on the Law of Implied Warranty, is received.

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THE LAW REPORTER.

JANUARY, 1842.

REMARKABLE TRIALS. — No. VII.

MURDER — CASE OF MOSES CHAPMAN ELLIOT.

The trial of Moses Chapman Elliot, before the supreme judicial court of Massachusetts, at Springfield, in the county of Hampden, September 17, 1834, for the murder of Josiah Buckland, excited a degree of interest which has scarcely a parallel in the judicial proceedings of Massachusetts.

The prisoner was a lad of only twelve years of age. The deceased was three months short of thirteen years when he died. They were both children of very respectable parents, living in that village; and the sympathy of the community, strongly excited by the developments of the case, which, for five months, had been the constant theme of village conversation, unfortunately, though almost unavoidably, took sides with one or the other suffering families.

Most of the material facts were ascertained beyond contradiction or doubt. The two children were companions and playmates. On the 4th of April they slept in the same bed. On the morning of the 5th, they went out together, with a pistol belonging to Elliot, Buckland for some purpose taking a bundle of clothes with him, and having a quarter of a dollar, which was all the money they possessed. For an hour they amused themselves by firing at a mark, near the house where the deceased lived. They then went off together in the direction of a building called a hop-house, situated in an open field, at considerable distance from any habitation or public road. There they

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resumed their amusement, by firing at least nine bullets at the door of the hop-house. The firing was heard till about twelve o'clock, at noon, by a witness who was at work at some distance in the field, and who soon after saw a boy, of the appearance of the prisoner, running from the direction of the hop-house, alone. Young Buckland there received a mortal wound by a pistol bullet, which entered on the left side of the breast, an inch below the left pap, passed through both lobes of the lungs, and came out at the back, near the spine, two inches higher than the point at which it entered the body, carrying with it into the breast shreds of the garment worn by the deceased. The wound was not immediately fatal. The lad was found, the next morning, (Sunday) under a hedge, near some water, to which he had crawled during the night, to slake that burning thirst which always attends an injury of this description. He was taken to his parents' house, where he languished until the Thursday following, when he died.

It being perfectly certain that the wound was given by the prisoner, the only question in the case was, whether it was the result of accident or design. To this point the dying declaration of the deceased, made to his mother, and by her repeated in evidence, was adduced by the Attorney General, and heard by a crowded auditory, composed, in a great proportion, of ladies, with the most thrilling emotion.

Mrs. Elizabeth Buckland testified, that after her son was brought home, his wound was examined and dressed by the surgeons; and after the exhaustion consequent upon this painful operation had been somewhat relieved, he attended to the exhortations and instruction of the Rev. Dr. Osgood; and when all was still, and she was alone with him, and while his head lay upon her bosom, and she had given him a parting kiss, and told him he must die, she begged him to let her know how it happened, from beginning to end, declaring to him that it would be the only consolation she should have, to hear the entire truth. She said Josiah was then perfectly in possession of his reason; that he was calm and collected, and that slowly, but distinctly, he gave her the following account:

That Moses and he had agreed to go to Boston, to seek their fortune. That Moses told him they could easily get there, and find employment on board a ship. That he had packed up his clothes, but Moses came without any. That they were irresolute and undetermined how to proceed; that Moses had a pistol, and he (Josiah) got some powder and ball at his father's, and they practised some time at a mark near the house. They then went into the field, and began again the same sport. Moses loaded the pistol and told Josiah to fire it. He did, but it was loaded so heavily that it knocked him down. That Moses then told him that they must divide the clothes. Josiah consented; but Moses wanted the best coat, which Josiah refused to let him have. Words ensued, and, instead of going off, they recommenced firing. Moses told him to put up a mud mark on

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the hop-house, and, while he was doing so, fired and nearly struck him. Josiah said he would go home if he did so again, but Moses laughed at him, and said he should not go home. Moses then again loaded the pistol, and threw the ramrod from him, and told Josiah to pick it up; while he was so doing, Moses fired, and the ball entered his body. Moses then came up and asked if he had killed him? Josiah replied, "I don't know;" and Moses then struck him with the pistol on his arm. He then took out of Josiah's pocket a twenty-five cent piece, and said — "I may as well have this as any body else." Josiah asked him to help him home, but he refused; he begged him to tell his mother what had happened, but he made no reply; threw down the pistol and ran off. Josiah said he felt as if he could not live, and all he wanted was to see his mother; that in the course of the night he crawled to the water, and lapped up some to quench his thirst. He was sorry for his fault in running away; had prayed to God to forgive him, and since he heard what Dr. Osgood said, he felt he would forgive him. He hoped his mother would forgive him, for he was very sorry for his fault.

Other witnesses testified to other conversations, after this time, with more or less particularity, and of course with some variation of circumstances, but always with a distinct declaration that the wound was given while he was picking up the ramrod. It was manifest, however, that as his strength failed, his mind wandered, and though at times perfectly sensible, he was unable to tell a connected tale of events.

The conduct of the prisoner, after the mortal wound, was the next subject of inquiry. *It was certain he never mentioned the circumstance to any one until after Josiah had been found, on Sunday morning.*

Achsah Buckland, a sister of the deceased, aged ten years, testified that, about twelve o'clock, on Saturday, she was carrying dinner to her father, who was at the water shops, and passed Moses, who was running in a direction from the hop-house to his father's. He said nothing.

Solomon Mackary, about four o'clock on Saturday, was planting trees in the burying-ground. The prisoner came by him, having a spade in his hand. Witness asked what he was going to do with it? He said, to dig angle-worms. Witness said, the burying-ground was a good place for worms. Prisoner said, he knew a better; and passed on in the direction towards the hop-house.

James Hubbard saw the prisoner coming from the direction of the hop-house on Saturday afternoon, but thought the time was between two and three o'clock. Prisoner said, he had been after worms.

Thomas Warner, Jr., saw the prisoner on the same afternoon, and knew the time to be after four o'clock, and so much after as it took him to walk from the water shops to the place where he met the prisoner, which he judged would be four minutes. His attention was attracted to the prisoner because he was running when witness first

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saw him; but when the prisoner observed him, he changed to a walk. At this time the prisoner had no spade, and he saw no worms. Prisoner was not going in the direction of his father's house.

George B. Phelps met the prisoner, about four o'clock, on the same afternoon. He had a spade, and said he had been to get angle-worms, and that he had sold his pistol for four dollars.

Philo F. Cook testified to the same facts. The prisoner then joined Phelps, Cook, and other boys, and played ball for half an hour, and kept company with them until six o'clock.

In the evening, after his return from work, Epaphras Buckland, the father of Josiah, alarmed at his absence, went to the house of Mr. Elliot, the father, to inquire for him. There he saw the prisoner, whom he did not before know. The prisoner, in answer to Mr. Buckland's inquiries, said that he supposed Josiah had run away, had gone to Boston, to get on board some vessel; that he had twenty-five cents with him, which he had procured by selling some old iron. Being asked where he last saw Josiah, he would not give much of any answer. At this time, it must have been known to the prisoner that Josiah was wounded and perishing in the open field, and that a word of information might save his life.

On Sunday morning, before Josiah was found, Mr. Luther Hormer, and his son Chester, one of Moses Elliot's playmates, met Moses, half a mile from the hop-house. Moses had a pistol. He said he had lent it, the day before, to Josiah, to go shooting; that Josiah had run off; that he had found the pistol by the hop-house, and also Josiah's clothes.

Walter Buckland, aged sixteen, a brother of Josiah, was out on Sunday morning, and met Moses, at some distance from home. He reported the matter to his father, who sent him out again, to watch Moses. Walter found him, and asked him if he knew where Josiah was? He replied, "He has gone to Boston." Being interrogated where he had been himself, he said, to the hop-house, and that Josiah's clothes were there. Walter asked him to go and show him the place, but he refused, and said he must go home and prepare to go to meeting. Walter told him, he should go, and obliged him to go. Under the hop-house steps he found Josiah's clothes; on the steps he found the pistol, and at some distance the ramrod. Moses said the pistol was his, and Walter let him take it. Walter then proposed to go in search of Josiah, and wanted Moses to assist; but Moses declined, and went home. Walter proceeded to search, and called in a loud voice for Josiah, for some time, without effect. At last he found him, crawling along by the fence, near the running water, twenty or thirty rods from the hop-house. Josiah then said, Moses had shot him, and he should die; that Moses had loaded the pistol, and thrown the ramrod off, and told him to get it; that while he was getting it, Moses had fired, and shot him, and then ran away. Help was now immediately obtained, and the child was carried home.

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The examination and dressing of the wound then took place, as before stated; after which, and after a religious conversation with the Rev. Dr. Osgood, and when Josiah was fully impressed with his dying condition, the declaration was made to his mother which is above narrated.

The evidence produced by the prisoner related, first, to statements made by Josiah after the one testified to by his mother, with a view, from certain discrepancies between them, to raise a belief that he was not of sane mind after he was brought home; but the contrary to this plainly appeared from the testimony of the attending physician, and the Rev. Dr. Osgood.

It appeared from other evidence, that the boys had been together on Friday, and slept in the same bed, at the house of one Adams, on Friday night. It was hence inferred there was no unfriendly feeling between them. Some attempt was made to show a want of mental capacity in the prisoner, but the reverse was clearly established.

The defence — which was conducted by Messrs. Morris and Ashmun, of Springfield — rested mainly on the entire want of any adequate motive for so malignant an act; on the youth and inexperience of the prisoner, and the extreme probability that the pistol went off by accident, so that the death thereby occasioned was involuntarily caused by the prisoner. It was attempted, also, to show that, by the direction of the ball through the body of the deceased, the pistol could not have been discharged when the deceased was in the position represented by his dying declaration. Much evidence was given, on both sides, to this point, showing the nature of the ground and the direction of the other balls fired upon the hop-house. It appeared that the ground, at the hop-house, was at twenty inches elevation from certain bushes, which, from the appearances about them, was the position taken by the boys when they were firing; and if the ramrod had been thrown in that direction, the inclination of the wound would correspond with the course of the other balls, which, by an accurate measurement, were found from five feet eleven inches, which was the highest, to four feet one inch, which was the lowest. From the appearance of the body, it could be seen that the ball entered in front; but, except from the declaration of the deceased, which was full to this point, it could not be proved in what position he was when he received the wound.

The conduct of the prisoner, after the fatal wound, was attributed by his counsel to fear and ignorance.

On the last day of the trial, which was occupied by the arguments of the counsel, the court was in session from eight o'clock, A. M. until eleven o'clock at night, during all which time the house was thronged with an unmoving, compact mass of the female population of the county.

The jury acquitted the prisoner.

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RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, October Term, 1841, at Boston.

Hilliard, Gray, & Co., *v.* Harper & Brothers.

Construction of a contract in relation to the sale of books.

Conversations between parties, at the time of making a contract, are competent evidence to show the sense they attached to a particular term used in the contract.

This was an action of assumpsit, to recover the sum of $841,39, the balance of an account, alleged to be owing by the defendants to the plaintiffs, for sundry volumes of Sparks's American Biography. The plaintiffs, in order to maintain their action, produced in evidence the following agreement: "Boston, May 22, 1839. We agree to take of Hilliard, Gray, & Co. any volumes of Sparks's American Biography, bound or unbound, that they may ship to us, within three months from this date, at the cost thereof, and pay for the same in six months from date of shipment. Harper & Brothers." The plaintiffs contended, that the cost of the books in question consisted of four items of expense: 1st, paper; 2d, press-work; 3d, binding; 4th, amount paid by the volume to the owner of the stereotype plates to produce the books.

To prove these items, they introduced in evidence a letter written by the plaintiffs to the defendants, as follows:

"Boston, August 10th, 1839.

"*Gentlemen:* — On the 22d of May you agreed to take of us any volumes of Sparks's American Biography, bound or unbound, that we might ship to you within three months from that date, *at the cost thereof;* we have accordingly shipped this day, as per bill of lading, to your risk, the books, as per bill, and on the same sheet have given a statement of the *cost of making the books,* with the amount paid Mr. Sparks for copyright; but we have added nothing for interest, which we shall claim the right to add hereafter, if you dispute the correctness of our estimate, or way of making up the cost, according to a legal construction of your contract, that would make the cost to us as much as the paper. We have put in, also, a large lot of back-titles and over-sheets for which we have made no charge; but we shall expect them to be returned to us, unless you will agree that if any of the books we have heretofore sold should be found incomplete, that you will supply the sheets wanted without charge to us. We have charged a lot of heads, title-pages and fac simile plates, at less than cost to us, they being valuable to you; but if not willing to pay the sum named, please return them to us. If we had time, many of

them might have been placed in the volumes sent, consequently not so much deducted from the volumes where they belong; but this is a small matter — you may take them, or not, at that price, as you choose. Having complied with our part of the contract with you, we shall expect you to send us your note at six months from this date, for 1641,39 — less 25 dollars for the plates, if you do not take them.

Yours, respectfully, HILLIARD, GRAY, & Co.

Messrs. Harper & Brothers, Booksellers, New York.

P. S. You will find all the copper and steel plates belonging to the work, in a bundle, in box No. 6."

On the same sheet with this letter, was a computation of the cost of the American Biography, made up by the plaintiffs, each volume separately, and specifying the number of volumes printed:

No. of copies.	Cost of paper.	Cost of printing.
Vol. 1, 2000	$255,50	$245,33
500	53,40	24,00
" 2, 2000	256,38	283,70
500	60,40	23,40
" 3, 3000	328,50	279,70
500	50,40	24,30
" 4, 2000	259,30	281,67
1000	128,45	140,83
500	60,20	24,30
" 5, 2500	295,43	118,45
" 6, 1500	174,15	73,00
500	53,40	21,60
" 7, 1500	218,25	81,00
" 8, 1500	195,75	78,00
" 9, 1500	152,25	76,00
" 10, 750	84,20	40,00
750	84,20	40,00
22,500	$2709,97	$1855,48
	Paper,	2709,97
	Binding,	2812,00
	Printing fac similes,	304,50
	" portraits,	196,87
	Paper for fac similes,	52,20
	" " portraits,	29,25
		$7960,27

being 35,37-100 cts. per vol.

Vols. 1, 2, 3 and 4 — cost of paper, &c.,	$35,37	
Copy-right paid Mr. Sparks on these volumes,	12,50 ——	$47,87
883 vols.,		421,59
Vols. 5, 6, 7, 8, 9 and 10 — cost of paper, &c.,	$35,37	
Copy-right paid Mr. Sparks on do.,	26,00	
2623 vols.	$61,37	1609,73
3506 vols.		$2031,32

being 57 cts. per vol.

The account of the volumes sent was also contained in the same sheet, by which it appeared that they had sent 3506 volumes, bound, unbound, and in sheets — some with and some without plates; among these was not a perfect set, and 1600 volumes were imperfect. The amount charged for the books was $1611,97; lot of portraits, title

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pages and fac similes, \$25; 4 boxes, \$4,42 — \$1641,39. The plaintiffs then produced the following letters:

[Harper to Gray.]

New York, August 30th, 1839.

Messrs. Hilliard, Gray, & Co.:

Gent'n: — Your favor of the 10th inst. has been received. Having several times, in person, demurred to your charges for *copy-right* on the odd volumes of Sparks's American Biography, we now do so formally, in writing, and at the same time propose leaving the question at issue between us to the arbitration of disinterested men.

We requested Messrs. Folsom, Wells, and Thurston, some time since, to forward the volumes of the work which they printed for us; but, as they have not done so, we take the liberty of asking you to request them to send them on without delay.

Respectfully, your ob't servants,

Harper & Brothers.

[Gray to Harper.]

Boston, December 9, 1839.

Gentlemen: — In our last we requested you to send us your two acceptances, of \$800 each, to balance the bill of Biography; but not hearing from you, and wanting that paper for immediate use, we have drawn on you for \$800, through the bank, which we trust you will not refuse to accept, on account of our bill for Biography, as it is only part of the amount, and will not compromise you in the question in dispute between us. We have made the draft payable in March, instead of February, when the amount is due; and we hope you will not hesitate to accept it and send us another for the balance soon, and thus end this disagreeable affair without any more words on the subject.

Yours respectfully,

Hilliard, Gray, & Co.

Messrs. Harper & Brothers, New York.

The plaintiffs upon these letters contended that the only question left open was the question of copy-right. They abandoned the claim for amount of copy-right paid on the first four volumes. They then produced an agreement made between the plaintiffs and Mr. Sparks, for publishing the last six volumes, by which it appeared that the plaintiffs agreed to pay Mr. Sparks \$650 per volume for the right of publishing 2500 of each of said volumes, and the use of the stereotype plates. This agreement bore date April 26, 1836. They also produced the receipts of Mr. Sparks for \$650 for each of said volumes. The receipt for last volume was dated Nov. 15, 1838. They then called Charles Folsom, who proved the price of printing to be as stated in the account rendered by the plaintiffs. He also made the following statement of the number of volumes published, the time of publication, and cost and time of stereotyping each:

Vol.	Copies			From		Date			Cost
Vol. 1,	2000	copies	from	movable types —		1834, Jan. 27.			
	500	"	"	stereotype plates —		1838, Dec. 26 —	cost of plates,		\$238,91
Vol. 2,	2000	"	"	movable types —		1834, April 11.			
	500	"	"	stereotype plates —		1839, Jan. 27 —	cost of plates,		276,33
Vol. 3,	2000	"	"	movable types —		1855, Jan. 3.			
	500	"	"	stereotype plates —		1839, Feb. 14 —	cost of plates,		230,76
Vol. 4,	2000	"	"	movable types —		1835, Aug. 12.			
	500	"	"	stereotype plates —		1839, April 16 —	cost of plates,		279,89
Vol. 5,	2500	"	"	"	"	1836, May 28,	"	"	275,50
Vol. 6,	1500	"	"	"	"	1836, Sept. 6,	"	"	264,04
	500	"	"	"	"	1839, April 26.			
Vol. 7,	1500	"	"	"	"	1837, March 3,	"	"	305,00
Vol. 8,	1500	"	"	"	"	1837, Sept. 25,	"	"	281,16
Vol. 9,	1500	"	"	"	"	1838, March 16,	"	"	294,89
Vol. 10,	750	"	"	"	"	1838, Dec. 20,	"	"	362,41
Vol. "	750	"	"	"	"	1839, Feb. 8.			

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The defendants admitted, for the purpose of this trial, that the cost of paper and binding of said volumes was correctly charged in the plaintiffs' account.

The plaintiffs here rested their case.

The defendants' counsel then opened the defence, and introduced the following evidence:

1. A deed of the copy-right of the whole ten volumes, and the stereotype plates of the last six volumes, from Jared Sparks to Hilliard, Gray, & Co, dated October 15th, 1838, and recorded November, 1838, for the consideration of $2400 — reserving to Mr. Sparks the right of publishing the lives written by himself.

2. A deed of the copy-right of stereotype plates of the whole ten volumes, from Harrison Gray and Charles Brown to Harper & Brothers, dated May 22d, 1839, acknowledged June 27, 1839, and recorded July 15th, 1839 — reserving to Mr. Sparks the same rights as the deed to Hilliard, Gray, & Co., and subject to a contract made with Messrs. Folsom, Wells, and Thurston, and a contract made with Marsh, Capen, & Lyon, by Hilliard, Gray, & Co.

3. A deed from the plaintiffs to the defendants, (which had been cancelled on account of informality of execution,) dated May 22, 1839, of the same copy-rights and plates as preceding, and in every respect like it, except that it was made and executed in the firm name of Hilliard, Gray, & Co., and contained no reference to the contracts with Folsom, Wells, & Thurston, and Marsh, Capen, & Lyon.

4. The following correspondence between the parties:

[Harper to Gray.]

New York, June 29, 1839.

Harrison Gray, Esq.

Dear Sir: — The deed of copy-right for "Sparks's American Biography," which you have substituted for the one which I obtained from you when I made the purchase, *is not satisfactory*. At the time I received it of you, you *promised*, in the presence of Mr. Wells, that you would have another executed, with the individual signatures of your firm, if required. My brother understood that you declined giving such a deed; but I am in hopes that he misunderstood you. Permit me, therefore, to inquire whether you will, or will not, have such an instrument executed, without *any* variation, other than that of substituting the individual signatures of your house, instead of the general signature of your firm?

Please let me hear your definite and conclusive decision by return of mail, and much oblige

Your ob't. servant,

F. Harper.

[Gray to Harper.]

Boston, July 2, 1839.

Fletcher Harper, Esq.

Dear Sir: — I duly received yours of the 29th, and must confess that I am quite surprised at its contents. When your brother presented our deed, signed by me for our firm, no objection was made as to a new one; my partner, Mr. Brown, who had never seen the paper before, suggested that, as we had conveyed to you two contracts with Marsh, Capen, & Lyon, and Folsom, Wells, & Thurston, they should have been added or recognised in the contract or conveyance, and it was agreed to by your brother, and made part of the new conveyance; now, as this was an agreement with the senior partner of your house, and only recognises the two contracts, which made part of the contract or conveyance to you, I cannot see why you have any reason to

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be dissatisfied with it, and I would respectfully ask you to state where it differs from our original agreement. Respectfully, &c.

H. Gray.

[Harper to Gray.]

New York, July 9th, 1839.

Harrison Gray, Esq.

Dear Sir: — My brother Fletcher has just shown me a letter from you, in which you state that I agreed to a change in the deed of copy-right which you gave him for Sparks's American Biography. In this you are mistaken, as I distinctly informed you that I had paid no attention to the subject of the contract, and did not feel myself at liberty to interfere therein; and it was entirely upon your representations that all should be right and satisfactory, that I consented to the destruction of the original deed. Having since heard my brother's views, objections, &c., I now concur with him in opinion, that the present deed *is not satisfactory*, and such as under the circumstances it should be; and that you are bound in honor to execute the deed as originally agreed upon between him and yourself. Hoping that you will not refuse to do so, I remain Yours truly,

James Harper.

[Harper to Gray.]

New York, July 9, 1839.

Harrison Gray, Esq., Boston.

Dear Sir: — I have yours of the 2d inst. By the annexed letter of my brother, you will at once perceive that the ground you assumed, of there having been "an agreement made with the senior partner of our house," is not correct.

Permit me, therefore, again to inquire whether you will, or will not, fulfil the agreement you made in relation to the original deed of copy-right, which you gave me?

Please let me hear from you by return of mail.

Your ob't servant,

F. Harper.

[Gray to Harper.]

Boston, July 11, 1839.

Dear Sir: — Yours of the 9th, with your brother's of same date, is before me. I am more surprised at his letter than I was at your last, as I can prove all I stated in my last, that your brother cheerfully agreed to the change we made in the conveyance of the copy-right, and read the same over carefully with our book-keeper, after he had copied the original memorandum agreed upon; and I cannot see why you, or he, or any one else, should be dissatisfied with it, as I can prove by Mr. J. Brown, that you agreed to fulfil those contracts, and if you will refer to the transfer of them on the back, you will find that in Folsom, Wells, & Thurston's it was so expressed; and you must be aware that we could not legally give you a deed of the copy-right without reference to those contracts; and as I am unwilling to suspect that you wish to have the deed with that omission, to make a question of your liability to fulfil those contracts, you will please inform us, as I requested in my last, what you are dissatisfied with, or send us the form of a deed such as you want, and if not inconsistent with my agreement with you, and has reference to the fulfilment of those contracts, I have no doubt my partner will cheerfully sign it with me. Yours respectfully,

Harrison Gray.

Fletcher Harper, Esq., New York.

[Gray to Harper.]

Boston, July 20, 1839.

Gentlemen: — When your Mr. James Harper was here, we gave him a letter to your house, with a list of the volumes of American Biography on hand, and proposed an exchange of vol. 5 for vols. 1, 2 and 3, to complete sets. If this is done, we must have the vols. 1, 2 and 3 immediately, or we shall not be able to complete the sets in season to answer our purpose, and the consequence will be that we shall have a larger lot of odd volumes to send you, at a high price, according to the contract with us. Let us have your order, by return of mail, on Messrs. Folsom, Wells, & Thurston, for the volumes, according to our letter, and much oblige

Your ob't. servants,

Hilliard, Gray, & Co.

Messrs. Harper & Brothers, New York.

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[HARPER TO GRAY.]

New York, July 23, 1839.

Messrs. Hilliard, Gray, & Co.

Gent: — Yours of the 20th instant is at hand. We are unwilling to comply with your request therein. You need not fear but that any "contract" you have with us, whether at a "high price" or low price, will be fulfilled to the letter.

Respectfully,

HARPER & BROTHERS.

5. A copy of the agreement made for the purchase of the volumes of the Biography in the handwriting of plaintiffs' clerk in all respects like the one produced by plaintiff, except at the foot of the same was a memorandum of three acceptances of $2000 each.

6. Three acceptances of the defendants, which they had taken up, for $2000 each, dated May 22, 1839, payable to plaintiffs in six, nine and twelve months. Also, three acceptances (taken up) for $800, dated December 9, 1839, in three months.

7. The assignment from plaintiffs to defendants of the contract with Marsh, Capen & Lyon, dated May 22, 1839, and the contract with Folsom, Wells & Thurston of the same date.

Here the defendants rested their case.

The plaintiffs then called Jared Sparks, who testified to the payments being made as stated in his receipts.

John G. Roberts, who testified that many of the volumes sent were deficient only in engravings, title pages and portraits.

James Brown, who testified that he was a secret partner of the firm of Hilliard, Gray & Co. at the time of the transfer of the copyrights and plates to the defendants; that he recollected the transaction; that he was present at Gray's store when the negotiation was going on between Gray and Fletcher Harper; that he understood that the defendants had agreed for the copyright, plates, and all the odd volumes. He could not say that the written contracts had then been signed. He did not recollect that any thing was said as to the cost of the odd volumes; something was said about completing of sets; the defendants were to fulfil the contract with Marsh, Capen & Lyon, and Folsom, Wells & Thurston. Witness could not state what was said in regard to Gray's retaining the plates for that purpose. They had some difficulty, but he could not state what, as his attention was not specially called to it at the time. Soon after Gray and F. Harper came to the store of the witness; they differed as to the details of the bargain, and came there to settle in some way or other. The difficulty was, what constituted the cost of a volume. Gray wished to include copyright. Harper thought it ought not to be included, as he had already purchased the copyright. Harper offered to refer the question to me to decide; this Mr. Gray declined. Witness did not hear Gray tell Harper what the cost would amount to. He said the cost would be high. At the time of the last conversation, witness *supposed* the contracts had not been signed, as it was so soon after the first conversation. He did not, however, *know* whether they had or had not then executed the contracts.

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The defendants then introduced the following note from the plaintiff.

TREMONT HOUSE, 8 o'clock P. M., May 24, 1839.

I called to see you in hopes we should be able to settle the price of the volumes of Biography. If it is not correct to include the plates in the cost, something should be added for their use. At any rate, I think if you will stop until the afternoon train for Worcester to-morrow, you and I can settle the question without the *sin* of giving any wine to referees for what we can settle ourselves. I cannot ship the books until this question is settled. We shall lose the chance of selling them to others.

Yours truly, H. GRAY.

Rand and *Fiske* for the defendants, contended;

1. That the plaintiffs' account as made up by them, was erroneous upon their own principle. That all the volumes sent were printed from plates, and that in computing the cost the plaintiffs had charged for what is technically termed *composition* on the first four volumes. That the amount to be recovered by the plaintiffs, if the charge of copyright on the last six volumes was correct, was $633 23. If the copyright was not included correctly, then the defendants had overpaid $49 75. That from the above sum, at all events, should be deducted the amount charged for the copies of the sixth and tenth volumes sent, which had been printed since the plaintiffs became proprietors of the copyright and plates.

2. That the charge for copyright, or use of plates, was not to be reckoned as part of the cost of the books under the circumstances of this case. That whatever might be the true meaning of the terms "cost thereof" under ordinary circumstances, under the circumstances of this case they could only include the "*cost of making*" the books. That the plaintiffs owned the copyright, and therefore stood precisely in the same position as the author, and he might as well include what he had expended in writing the book, as the defendants could, in this case, include what they had charged; and the plaintiffs might with equal propriety here include the cost of the stereotype and altered plates. That the sale of copyright and plates having been made to the plaintiffs at the same time, or just prior to the making the contract for the books, it was most manifest that the defendants never could have intended to pay the plaintiffs a second time for the copyright; that they could only have intended to mean by the word *cost*, the cost of "*making the book*," and that the plaintiffs could not have intended any more, nor could they in justice recover any more. That the defendants having purchased the copyright and plates of the plaintiff, were in fact doing the plaintiffs a great favor to take, at the cost of manufacturing, the odd and imperfect volumes which they might have on hand after three months further sales. That the defendants' view of this matter was aided by the consideration, that as they owned the copyright and plates, they could produce the books for the simple cost of making them; and it could hardly be supposed possible that they should be willing to pay for odd and imperfect volumes to the plaintiffs twenty-six cents per volume more than what it would cost to produce them.

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John A. Bolles for the plaintiffs, contended that the contract of the defendants for the purchase of the volumes of Biography and the sale of the copyright and plates by the plaintiffs, were separate and independent contracts, as much so as though they had been made with different persons. That from the evidence it was certain that the plaintiffs had paid Mr. Sparks twenty-six cents per copy for each of the last six volumes, and that, therefore, the same was part of the cost to them, and to be included in the sum to be paid by the defendants. That it was certain, from the contract with Mr. Sparks, and the number of volumes published, that the plaintiffs had paid Mr. S. thirty-seven cents per volume, and therefore were entitled to recover $959 41. That if they were precluded by the account rendered by them from recovering beyond twenty-six cents per volume, they were entitled to recover $674 18, the whole number of copies of the last six volumes sent by the plaintiffs to the defendants, being 2593. That the defendants, in their letter of August 30th, 1839, having excepted only to the charge for copyright, were presumed to be satisfied with the order of cost as made up by the plaintiffs, and the sum paid by them was intended to apply to those items only. The plaintiffs farther contended, that from the last letter of the plaintiffs, introduced in evidence by the defendants, it was to be presumed that the whole question had then been settled between the parties, and that the assent of the defendants to the charge for copyright was to be presumed therefrom.

Story J., in summing up to the jury, said: It appears to me, that the words of the written contract, "at the cost thereof," ought to be construed, "all the cost of the copies," including the allowance to Mr. Sparks, unless it is clearly made out in the evidence, that the parties, in the use of this language, adopted a different construction, and limited the "cost" to the mere expense of the paper, press work, and binding. I do not think, that it is absolutely incompetent for the parties to show from the conversations between them at the time of making the contract, what was the sense in which they then understood the word "cost" as used in the contract, as it is a word capable of a larger or narrower construction according to the subject matter, and the circumstances of the particular case. Those conversations may be deemed a part of the *res gestæ*, and thus may be referred to, as explanatory of the real intentions of the parties in the use of the word. It appears, however, that the parties at the very time differed as to the very point, whether the money paid to Mr. Sparks ought to be included in the "cost" or not; and there is no evidence to establish in direct terms, how the disputed item was settled between them. If the contract was signed after the dispute, it would go far to show, that the word "cost" ought to include the money paid to Mr. Sparks, since in its general meaning the word "cost" would certainly comprehend that expense. But the learned counsel for the plaintiffs

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insist, that the contract at the time of the dispute had been actually signed and completed; and if so, then every inference of this sort is repelled. On the other hand, if the contract was not signed at the time of the dispute, it is singular, that the ambiguity should not have been removed by the addition of some explanatory language.

The whole point in the argument turns upon this. The plaintiffs say, that "cost" includes all the items of cost, there being no qualifying words to limit the meaning. The defendants on the other hand say, that this could not have been the intention of the parties, because the defendants had then purchased all the stereotype plates from the plaintiffs, and consequently could publish complete copies of all the volumes, instead of taking broken series, at the mere cost of the paper, press work, and binding; and this is certainly true. If the purchase of these volumes had constituted a part of the original bargain for the purchase of the copyright and plates for $6000, then it would be easy to see, that the taking these copies at the enhanced price of the money paid to Mr. Sparks might have been included. But this construction also is repudiated by the plaintiffs' counsel, who insists, that the bargains were independent of each other. There is, therefore, great difficulty in arriving at a satisfactory conclusion, and the jury will decide the matter upon a close review of all the circumstances.

The jury retired at half past one o'clock in the afternoon, and after remaining together until the opening of the court on the next morning, came in and stated they could not agree. The judge gave them some farther instructions on their application, and they again retired. At half past ten o'clock they again came into court, and said there was no prospect of their coming to any agreement, and they were then discharged.

Reed *v.* Robinson.

Under the patent laws of the United States, the applicant for a patent must be the *first*, as well as the *original*, inventor; and a subsequent inventor, although an *original* inventor, is not entitled to a patent, if the invention is perfected and put into actual use by the first and original inventor; and it is of no consequence, whether the invention is extensively known or used, or whether the knowledge or use thereof is limited to a few persons, or even to the first inventor himself, or is kept a secret by the first inventor.

The decision in *Dolland's* case, that a *first* and *original* inventor, who had kept his invention a secret, so that the public had no benefit thereof, could not defeat the patent of a subsequent *original* inventor, may be a correct exposition of the Statute of Monopolies, (Stat. of 21 James I. ch. 3, § 6), but it is not applicable to the Patent Law of the United States.

The language of the Patent Act of 1836, ch. 357, § 6, "not known or used by *others* before his or their discovery thereof," was not designed to show a plurality of persons by whom the use should be, but that the use should be by some other person or persons than the patentee.

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The Patent Act of 1836 (ch. 357, § 15) provides among the special matter to be given in evidence, that the party "had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same." Under this clause an inventor, who has first actually perfected his invention, will not be deemed to have surreptitiously or unjustly obtained a patent for that which was in fact invented by another, unless the latter was at the time using reasonable diligence in adapting and perfecting the same; and he, who invents first, shall have the prior right, if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has in fact first perfected the same and first reduced the same to practice in a positive form.

An imperfect and incomplete invention, resting in mere theory or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not patentable under the laws of the United States. He is the first inventor, in the sense of the Patent Act of the United States, and entitled to a patent for his invention, who has first perfected and adapted the same to use; and until the invention is so perfected and adapted to use it is not patentable.

In a race of diligence between two independent inventors, he who first reduces his invention to a fixed and positive form, is entitled to a priority of right to a patent therefor.

A disclaimer, to be effectual for all intents and purposes, under the act of 1837, ch. 45, (§ 7 and § 9), must be filed in the patent office before the suit is brought; if filed during the pendency of the suit, the plaintiff will not be entitled to recover costs in such suit, even if he should establish at the trial, that a part of the invention, not disclaimed, had been infringed by the defendant. And where a disclaimer has been filed, either before or after the suit is brought, the plaintiff will not be entitled to the benefit thereof, if he has unreasonably neglected or delayed to enter the same at the Patent Office; but an unreasonable neglect or delay will constitute a good defence and objection to the suit.

Case for infringement of two patent rights; one for "A new and useful improvement in the pump;" the second for "A new and useful improvement in the cast-iron pump." The declaration contained two counts, one applicable to each patent.

The first patent was to Jesse Reed, the plaintiff, and was dated August 5th, 1831. The improvement claimed by this, and which it was alleged the defendants had infringed, was described in the specification as follows: "Under the flange is a plate about twelve inches in diameter, of suitable thickness for the strength required; near the circumference of the plate are a sufficient number of holes for wood screws or bolts, that said plate may be attached to any board or plank in whatever place said pump may be used." . . . . "The lower valve is attached to the lower plate by copper screws or rivets, so that the pump may be taken off to come at the lower valve without disturbing the lower plate or pipe." The words of the claim of that part alleged to have been infringed by the defendants, were as follows: "The bottom plate in a horizontal manner with a valve attached to it, and playing upon said elevation, and the manner of connecting it with the plate, as set forth in the specification."

The second patent was to Jesse Reed and Josiah Reed, and was dated 19th Nov. 1833. Subsequently, Josiah assigned his interest to Jesse. Among other improvements claimed by this was that, which is now in such general use in metal pumps, of letting off the water

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from the cylinder of the pump, by throwing up the handle. The lower valve is armed with a projection which, when the handle is thrown up to its greatest extent, opens the valve of the piston, at the same time that the lower valve itself is opened by means of the pressure of this projection against the internal sides of the piston. In this way water in the cylinder may be let off readily, and the important object attained of guarding effectually against the effect of frost in the cold season of the year. It was alleged that the defendants had infringed this part of the plaintiff's patent. Plea, the general issue, with special matters of defence filed.

At the trial evidence was offered tending to show that the improvement, claimed in the second patent, of letting off the water, had been invented and reduced to practice by Anthony D. Richmond, of New Bedford, some time in 1828, and that he had made several pumps containing this improvement, before the date of the plaintiff's patent. It was suggested by the counsel for the plaintiff, that there was evidence tending to rebut this evidence; and a question was raised as to the degree of use and publicity of a prior invention, which would operate, in point of law, to defeat a *bona fide* original invention, which had been patented.

Charles Sumner insisted for the plaintiff;

1. That the object of the exclusive privilege of a patent is to secure to the *public* the communication of a species or mode of industry which it did not before possess. Therefore, the patent of a *bona fide* original inventor will be valid, unless an invention be shown, which, anterior to the invention of the patentee, *was reduced to practice in such a way and to such an extent, as to give the public knowledge of its existence.*

The statute of the United States of 1836, cap. 357 § 6, provides that "any person or persons having invented any new and useful art, machine, &c., *not known or used by others*, before his or their discovery or invention thereof," and who makes oath that he verily believes that "he is the *original* and *first inventor* or discoverer," &c., shall be entitled to a patent. In another section of the same statute, § 15, it is provided that the defendant may give in evidence "that the patentee was not the *original* and *first* inventor or discoverer of the thing patented," &c. If we were to consider the first clause by itself, without reference to that in the sixteenth section, it would seem clear, that an invention must have been *known and used by others*, before the discovery of the patentee, in order to defeat the patent. The term *others* would seem to imply general and *plural* knowledge, in contradistinction to knowledge by an individual. Unless this effect is given to this word, it loses much of its significance. The word, however, is borrowed from the English Statute of Monopolies, out of which the English Patent Law is carved, which secures a patent to the first and true inventor of an art "which *others* at the time of making such letters patent and grants *shall not use.*" These words have

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received repeated constructions in England. It has there been decided that a prior invention, in order to defeat the patent of a subsequent true and original inventor, must have been "*generally known;*" that it must have been in "*public use and operation;*" "*used openly in public,*" and *not abandoned as useless* by the first inventor. See *Lewis* v. *Marling*, 10 Barn. & C. 22; S. C., Godson's Supplement, 6, 7, 8; *Jones* v. *Pearce*, Godson's Supplement, 10, 12. Mr. Godson's own language (p. 4 of the Supplement) admits the above cases to be law.

The statute of the United States of 1793, cap. 55, § 1, says, "not *known or used* before the application," &c. These words have received a construction from the Supreme Court of the United States. Story J., in delivering the opinion of the court, in *Pennock* v. *Dialogue*, 2 Peters, S. C. R. 19, said: "We think, then, the true meaning must be *not known or used by the public* before the application. McLean J., in delivering the opinion of the court, in *Shaw* v. *Cooper*, 7 Peters, 319, said, "the knowledge or use spoken of in the act of 1793 could have referred to the *public only.*" The words used by the court are broad, explicitly declaring that the knowledge and use must be by the *public.* It appears that in the cases actually before them, the knowledge and use had been derived *from* and *under* the patentee, having crept abroad before he had secured his invention by letters patent; but, it is submitted that, in view of the language employed by the court and afterwards in the statute, the difference between those cases and the present does not authorize a different construction. How can the court restrain the word "*others*" to mean only those who have derived their knowledge *from* the patentee? Particularly, when this word is employed in the English statute, and has there received the construction now contended for.

The clause in the sixteenth section can hardly throw doubt upon this construction. The clause in the first section is the *granting* part of the statute, which is to be construed amply for the citizen, particularly in an act of the present nature. The whole act must be construed so as to give each clause its fullest effect; and no word or phrase is to be curtailed of its proportions, unless it is essential to a reasonable construction of the whole statute. If in the present case, it is necessary to abate from any clause of the statute any of the just effect which such clause would have, if taken by itself, we must restrain the clause in the sixteenth section; in other words, it must be construed by reference to the *granting* clause in the first section. He must be considered the *first* and *original* inventor, who has invented an art or machine not known or used by *others* before his discovery thereof.

In confirmation of this view is Dolland's case, (2 H. Black. R. 487; Phillips's Patents, 165,) where the first inventor reduced his invention to use, but kept it secret, and showed an intention not to give the public the benefit of it. It was the case of an improvement

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in the object-glass of telescopes, invented by Mr. Hall, but suppressed by him till Mr. Dolland had subsequently made the same invention, and procured a patent for it, the validity of which was disputed on the ground that he was not the first inventor. But the patent was held to be valid. Mr. Phillips (Patents, 165,) says, this case must stand on the ground that, as the first inventor did not give *the public* that advantage which it was the intention of the patent laws to secure, he should not stand in the way of a subsequent inventor who should be ready to give the public such advantage, at the end of the period provided for by the patent laws. This doctrine was recognised in a subsequent case. *Forsyth* v. *Pearce*, Chitty, Jr., Crown R. 182, n.

The object of the patent law is to promote *the progress of useful arts;* 1st, by stimulating ingenious minds to make inventions; 2nd, to secure to the public the benefit of the invention, by having the secret fully *divulged* on the expiration of the patent. It is said, indeed, that the future *divulging* of the secret is the *consideration* of the grant of exclusive privileges. Let us bear these in mind in construing these words — "*known and used.*" If the thing be *known and used*, the public good does not require the interference of the patent law; either to stimulate inventors, or to secure the divulging of the secret, for the invention is already made, and the secret is divulged. If the thing, however, be not so *known and used*, that the public will eventually have it, as if it be kept an entire secret like Dolland's glass, or if it be thrown by as useless, or if it be used in private and in a corner, then it will justify the protection of the patent law — *dignus vindice nodus.* It is effectually reached by its spirit and is not discarded by its letter. The *original* inventor, who afterwards *bona fide* hits upon it, and matures it into something useful, deserves well.

The *Patent* Laws of Austria (§ 27, (a), (d), Phillips on Patents, 516, 517,) provide that "every discovery, invention, improvement, or change, shall be held as new, if it is not known in the monarchy, *either in practice*, or by a description of it contained in a work publicly printed."

II. The counsel for the plaintiff submitted another point, in the words of Mr. Phillips, in his work on Patents, (page 395) — being a construction which this acute and learned author has put upon two clauses of the 15th section of the Patent Law of 1836. It was as follows: "If the patentee is the *original* inventor of the thing patented, his patent shall not be defeated by proof that another person had anticipated him in making the invention, *unless it also be shown that such person was adapting and perfecting his invention.*"

Benjamin Rand for the defendants, *e contra.*

Story J. overruled these points, and said, under our patent laws no person, who is not at once the *first* as well as the *original* inventor, where the invention has been perfected and put into actual use by him, is entitled to a patent. A subsequent inventor, although

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an original inventor, is not entitled to any patent. If the invention is perfected, and put into actual use by the *first* and *original* inventor, it is of no consequence, whether the invention is extensively known or used, or whether the knowledge or use thereof is limited to a few persons, or even to the first inventor himself. It is sufficient, that he is the first inventor, to entitle him to a patent; and no subsequent inventor has a right to deprive him of the right to use his own prior invention. The language of the patent act of 1836, ch. 357, § 6, § 15, and of the patent act of 1837, ch. 45, § 9, fully establish this construction; and indeed this has been the habitual, if not invariable interpretation of all our patent acts from the origin of the government.[1] The language of the act of 1836, ch. 357, § 6, "not known or used by *others* before his or their discovery thereof," has never been supposed to vary this construction, or to require that the invention should be known to more than one person, if it has been put into actual practical use. The patent act of 1790 used the language, "not before known or used," without any adjunct; (act of 1790, ch. 34, § 1,) and the act of 1793 used the language, "not known or used before the application," (act of 1793, ch. 55, § 1); and the latter act (§ 6) also made it a good matter of defence, that the thing patented "had been in use" anterior to the supposed discovery of the patentee; and it early became a question in our courts, whether a use by the patentee himself before his application for a patent, would not deprive him of his right to a patent. That question was settled in the negative; and the language of the first section of the act of 1793, ch. 55, was construed to be qualified and limited in its meaning by that of the sixth section; and the words "not known or used before the application," in the first section, were held to mean, not known or used *by the public* before the application.[2] The case of *Pennock* v. *Dialogue*, (2 Peters R. 1, 18 to 22,) is a direct authority to this effect. And it was probably in reference to that very decision, that the words "by others" were added in the act of 1836, ch 357, § 6, by way of explanation of the doubt formerly entertained on the subject. The words "by others" were not designed to denote a plurality of persons by whom the use should be, but to show, that the use should be some other person or persons than the patentee. It would be strange, indeed, if because the first inventor would not permit other persons to know his invention, or to use it, he should thereby be deprived of his right to obtain a patent, and it should devolve upon a subsequent inventor merely from his ignorance of any prior invention or prior use; or that a subsequent inventor should be entitled to a

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[1] See Phillips on Patents, ch. 6, § 4, p. 65, 66, edit. 1837. *Woodcock* v. *Parker*, 1 Gallis. R. 438. *Gray* v. *Osgood*, Peters Cir. R. 394. *Rutgen* v. *Kanowers*, 1 Wash. Cir. R. 168. *Evans* v. *Eaton*, 3 Wheat. R. 454. *Pennock* v. *Dialogue*, 2 Peters R. 1, 16, 20, 21, 22.

[2] See *Morris* v. *Huntingdon*, Paine Cir. R. 348. *Pennock* v. *Dialogue*, 2 Peters R. 1, 18, 19, 21, 22. *Miller* v. *Silsbee*, 4 Mason R. 108.

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patent, notwithstanding a prior knowledge or use of the invention by *one* person, and yet should be deprived of it by a like knowledge or use of it by *two* persons. In *Pennock* v. *Dialogue* (2 Peters R. 1, 23,) the Supreme Court expressly held, that the sixth section of the patent act of 1793, ch. 55, then in force, (and on this point the law has not undergone any alteration,) "gives the right to the *first* and *true* inventor, and to him only; if known or used before his supposed discovery, he is not the *first*, although he may be the true inventor; and that is the case to which the clause looks."

I am aware of Dolland's case; but I do not consider it to be a just exposition of the patent law of this country, however correctly it may have been decided under that of England. In that case it seems to have been held, that Dolland was entitled to his patent, because he was an inventor of the thing patented, although there was a prior invention thereof by another person, who, however, had kept it a secret, so that the public had no benefit thereof; and perhaps this was not an unjustifiable exposition of the Statute of Monopolies, (Stat. of 21 James I. ch. 3, § 6,) under which patents in England are granted. But the language of our patent acts is different. The patent act of 1836, ch. 257, (§ 7, § 8, § 13, § 15, § 16,) expressly declares, that the applicant for a patent must be the *first* as well as the *original* inventor.

The passage cited from Mr. Phillips's work on Patents, (p. 395) in the sense in which I understand it, is perfectly accurate. He there expressly states, that the party claiming a patent must be the original and *first* inventor; and that his right to a patent will not be defeated by proof, that another person had anticipated him in making the invention, unless such person "was using reasonable diligence in adapting and perfecting the same." These latter words are copied from the fifteenth section of the act of 1836, chapter 357, and constitute a qualification of the preceding language of that section; so that an inventor, who has first actually perfected his invention, will not be deemed to have surreptitiously or unjustly obtained a patent for that, which was in fact invented by another, unless the latter was at the time using reasonable diligence in adapting and perfecting the same. And this I take to be clearly law; for he is the first inventor in the sense of the act, and entitled to a patent for his invention, who has first perfected and adapted the same to use; and until the invention is so perfected and adapted to use, it is not patentable. An imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufacture or composition of matter, is not, and indeed cannot be, patentable under our patent acts; since it is utterly impossible, under such circumstances, to comply with the fundamental requisites of those acts. In a race of diligence between two independent inventors, he, who first reduces his invention to a fixed, positive, and practical form,

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would seem to be entitled to a priority of right to a patent therefor.[1] The clause of the fifteenth section, now under consideration, seems to qualify that right, by providing, that, in such cases, he, who invents first shall have the prior right, if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has, in fact, first perfected the same, and reduced the same to practice in a positive form. It thus gives full effect to the well known maxim, that he has the better right, who is prior in point of time, namely, in making the discovery or invention. But if, as the argument of the learned counsel insists, the text of Mr. Phillips means to affirm, (what I think it does not) that he, who is the original and first inventor of an invention, so perfected and reduced to practice, will be deprived of his right to a patent, in favor of a second and subsequent inventor, simply because the first invention was not then known or used by other persons than the inventor, or not known or used to such an extent as to give the public full knowledge of its existence, I cannot agree to the doctrine ; for, in my judgment, our patent acts justify no such construction.

In respect to another point stated at the argument, I am of opinion, that a disclaimer, to be effectual for all intents and purposes, under the act of 1837, ch. 45, (§ 7 and § 9) must be filed in the patent office before the suit is brought. If filed during the pendency of the suit, the plaintiff will not be entitled to the benefit thereof in that suit ; but if filed before the suit is brought, the plaintiff will be entitled to recover costs in such suit, if he should establish, at the trial, that a part of the invention, not disclaimed, had been infringed by the defendant. Where a disclaimer has been filed, either before or after the suit is brought, the plaintiff will not be entitled to the benefit thereof, if he has unreasonably neglected or delayed to enter the same at the patent office. But such an unreasonable neglect or delay will constitute a good defence and objection to the suit.

The cause was then continued on the motion of the plaintiffs.

District Court of the United States, Massachusetts, November, 1841, *at Boston.*

THOMPSON AND OTHERS *v.* SHIP OAKLAND.

Shipping articles described the voyage to be from Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States : *Held,* that the description was sufficiently certain to bind the parties to the performance of the voyage.

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[1] ***Woodcock* v. *Parker,* 1 Gallis. R. 438.**

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A parol understanding that the vessel was not to complete the voyage described in the shipping articles, is not admissible.

Inability to obtain freight is not such a necessity as absolves the owner from his contract to perform the voyage described in the articles.

Where owners refused to perform the voyage to Europe, and the ship returned with the seamen on board to the home port, a sum equal to one month's wages was allowed to each seaman as compensation for the loss of the voyage to Europe.

THE facts in this case sufficiently appear in the opinion of the court, which was substantially as follows:

SPRAGUE J. The libellants were mariners on board the ship. The voyage, as described in the shipping articles, was "from Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States." They sailed from Boston on the 21st of June, and arrived in Hampton roads about the 3d of July. The captain proceeded to Petersburg, and endeavored to obtain freight for Europe. He also, by correspondence, made inquiries at Charleston, Savannah, and Mobile, but did not succeed in obtaining business. About the 7th of August the captain determined to return to Boston, and on that day the whole crew went aft and inquired of the captain whether he meant to get other men in the place of those (four or five in number) who had been discharged, from sickness. He replied, no; that, as the ship would return to Boston, he did not intend to procure other hands. They then asked for their discharge, saying they thought the articles broken by not going to Europe. The captain refused to discharge any of them, and declared that they should all return with him to Boston. They were then ordered by the mate to go to work, and they obeyed. On the next day (the 8th of August,) the ship sailed for Boston and arrived on the 14th. The crew were discharged the same day. The libellants were paid their wages, at the rates stipulated in the articles, up to the time of their discharge. They now claim compensation for the loss of the voyage to Europe, and for being refused their discharge at James river.

To this claim it is objected on the part of the respondents, —

First, that the articles are not obligatory, because it is said that the voyage is not sufficiently described; that there is no description of ports, no prescribed terminus, and no limitation of time. It is argued that the articles admit of any number of voyages between ports south, and then between ports in Europe. To this the libellants' counsel replies, that the fair understanding of the articles is, that the ports south shall be visited only for the purposes of the European voyage, and the ports in Europe only for the purposes of the home voyage. This, I think, is the true interpretation, and makes the voyage sufficiently definite to be obligatory upon the parties.

In *Brown* v. *Jones*, (2 Gall. 477,) cited for the libellants, the voyage described was "from the port of Boston to the Pacific, Indian

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and Chinese oceans and elsewhere, on a trading voyage, and from thence to Boston." There no ports were designated, nor any time limited, yet it was held that the oceans must be visited in the order in which they were mentioned, and wages were decreed to the crew, who deserted the vessel at Canton, whence she was about to return to the north-west coast.

In the case of the *Saratoga*, (2 Gall. 164,) the voyage described was "from Boston to Amelia Island, at and from thence to port or ports in Europe, and at and from thence to her port of discharge in the United States." The suit was for wages, and was zealously defended by most eminent counsel, yet no question was made, either by counsel or by the court, of the sufficiency of the description of the voyage.

In the case of the *Crusader*, (Ware's R. 437,) which has been pressed upon the court by the counsel for the respondent, there were no written articles, and the vessel was to be employed in the coasting trade, from place to place, without any limitation of time or restriction of places. If this contract was obligatory, it would bind the libellant to perpetual service, at the will of the master; while, on the other hand, the master might terminate it at pleasure, by giving up the trade, and there was, therefore, no mutuality. On these grounds the court was of opinion, that the libellant might terminate the contract at any reasonable time and place. The difference between that case and the present is manifest.

The next ground taken in the defence is, that it is the usage of the port of Boston for ships which go south in search of freight for Europe to return, if freight cannot be obtained. Without pausing to inquire how far a usage of any port can vary the written articles so carefully prescribed by acts of congress, it is sufficient that no usage has been proved which can affect the present case. Respectable ship owners have testified that they have long been engaged in this trade, and that they know of constant instances of vessels returning when they fail of procuring freight, and that they never knew an instance of a claim for compensation for the loss of the voyage to Europe. They admitted, however, that the original crews very seldom returned in the vessels; and we have, moreover, no evidence that the articles did not, in those cases, provide for the return to Boston.

The next objection is, that there was, in this case, an understanding between the libellants and the owner that the vessel might return, and that some of the libellants received additional advance in consideration of this chance. This is not sufficiently proved, and even if the evidence of it were much stronger than it is, it would not be permitted to control the written articles. This would be inconsistent with well-established principles of law, and with the statutes of the United States, which have sought with much solicitude to give to seamen the protection of a written contract. (Act 1840, ch. 23, § 3.)

It is further contended, that the voyage was abandoned from ne-

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cessity, because freight for Europe could not be obtained. It is replied on behalf of the libellants, that this is not the kind of necessity which will excuse the owner from performing his contract; that it must be *vis major*, or an inevitable, overpowering necessity, in the nature of a common calamity; while this is a mere contingency in trade, one very likely to occur, and which could have been foreseen and provided for in the contract. The only authority adduced for the respondents' view is a remark of Sir Christopher Robinson, in giving his opinion in the case of the *Cambridge*, (2 Hagg. 247,) in which he says that he finds in Sir Edward Simpson's notes, cases in which the necessity of going to St. Petersburg for a cargo, which the master had been disappointed in obtaining at Hamburgh, and detentions arising from the stress of weather, or the order of the government, have been held not to be deviations amounting to a breach of the mariners' contract, such as would entitle them to their discharge. The terms of the contract do not appear, and they are most material to be known, in order to understand a question of mere deviation, as that was; nor are we enlightened by any particulars of the case or reasons of the court. On the other hand, Sir John Nicholl states that very case of inability to obtain freight as not discharging the owner from his contract with the mariners; "a mariner, it is true, may be entitled to wages, even if no freight is earned, as when a vessel is sent out on a seeking voyage, in search of freight, and obtains none," the *Lady Durham*, (3 Hagg. 202). In the case of the *Mary*, (Paine C. C. R. 180,) the mariners shipped for a voyage from New York to New Orleans and back to New York or such other port as the ship might take freight for. Freight was earned to New Orleans, but the ship remained there a year without obtaining freight for any other port, and then the master discharged the seamen. It was contended, that, as the ship did not earn freight after her arrival at New Orleans, the crew were not entitled to wages; but the court gave them wages for the whole time the vessel lay at New Orleans, and up to the time of their return to New York.[1]

The only remaining question is the amount of compensation to be awarded. This is governed by no fixed rule. The court is to give as much as, under the circumstances of the case, it shall deem proper. There is nothing in the conduct of the owner that calls for exemplary damages. There has been no wanton violation of the contract, and the men have been brought to a home port and paid their wages to the time of their discharge. He has also made some offer of additional compensation. On the other hand, the conduct of the libellants has been exemplary. When their requests to be discharged were refused, they went quietly back to their work, and faithfully performed their duty until discharged.

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[1] In addition to 3 Hagg. 202, and Paine 180, the counsel for the libellant cited, to this point, 2 Gall. 164; Curtis's Merchant Seamen, 295, and 1 Hagg. 347.

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In a case in which the voyage was broken up at the home port, Judge Peters allowed one month's pay in addition to the wages actually earned. What the voyage was, and where begun, is not stated, (*Wolf* v. *The Oder*, 2 Pet. Ad. 261). The same judge in *Hindman* v. *Shaw*, (2 Pet. Ad. 265,) says that in voyages broken up in the West Indies, or distant ports in the United States, he has given seamen one month's pay, although this has been sometimes refused.

On the whole, I am of opinion that the libellants are entitled to one month's pay each, as damages, and to the costs.

R. H. Dana, Jr. for the libellants.

Wm. Dehon for the respondents.

Rees v. Brig Planet.

Costs in Admiralty. Settlement with the libellant without the knowledge of his proctor.

The libellant, a boy of about nineteen years of age, shipped at St. John, N. B., his native place, for a voyage described in the articles as being from St. John to the West Indies, thence to Sydney, and thence to St. John. Instead of returning to St. John, however, the vessel came to Boston. On arriving here the boy demanded his discharge and wages; both which were refused him. The master also refused to give up his clothes. He then applied to the British consul, who refused to aid him, and told him he would be arrested as a deserter. (This was owing to a set of articles, different from those signed by the boy, and which included Boston in the voyage, having been left at the consul's office.) In this situation he applied to a counsellor, who immediately commenced admiralty process. As soon as the process was served, the master and agents sent for the boy, and without consulting or notifying the proctor, paid him his wages and took a receipt in full, but paid him nothing for costs. It appeared that the boy told them he should have little left from his wages after paying his costs. The question for the court was, whether process should go against the vessel for costs. The respondents produced the libellant's receipt in full, in defence.

Nutter, for the respondents, offered, in defence, the receipt in full of the sailor, and the testimony of the agent who paid him that at the time of settlement he agreed to pay all the costs which had accrued, himself; and it was contended, that, since no evidence appeared to impeach the fairness of the compromise, or to show that any advantage was taken of the seaman, the claimants were clearly not liable for the costs.

R. H. Dana for the libellant.

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Sprague J. said, that the court of admiralty was, in a manner, the guardian of seamen. The proctor, especially in cases of seamen's wages, is an officer of the court; and the practice in admiralty has always been to allow process for costs, and sometimes even to allow a settlement to be opened and inquired into, if there is reason to believe the seaman has been designedly induced to settle, after service of process, without his proctor's knowledge. He has a disadvantage in dealing with the other party, and especially as to costs and other matters of law, is entitled to the aid of his proctor. In this case, the libellant, being a minor, was peculiarly under the protection of the court. He had also been brought on a voyage, contrary to his agreement, to a place in which he was an entire stranger; denied his legal right to a discharge and his wages; and, on applying to the consul, his proper protector, had been refused all aid (through a misapprehension on the consul's part, however;) and, as a last resort, applied to a lawyer. He was then clearly entitled to his costs as well as his wages; and obliging him to pay his own costs was, in fact, deducting so much from his wages. There might be cases of settlements made with a seaman, after service, without consulting his proctor, which would stand; but in this case there seemed good reason for enforcing the rule.

Decree for costs.

Supreme Judicial Court, Massachusetts, October Term, 1841, *at Worcester.*

Perry *v.* Adams.

A member of a manufacturing corporation may sue and recover judgment for his debt against the company and satisfy the same by levying upon the company's property, although he is personally liable for the debts of the company, and by reason of the levy of his own execution, other attaching creditors of the company are prevented from satisfying their debts out of the company's assets.

In levying executions, where simultaneous attachments have been made, an officer may properly seize the whole estate, but should only return a moiety (in case of two such executions) of the estate upon either of the executions.

Where a creditor of a corporation for whose debts the corporators were individually liable, levied upon a parcel of land both as the estate of the company and of one of the corporators, by two distinct levies and returns, it was held, that such levy upon the estate of the corporator was valid.

This was a writ of entry to recover possession of a parcel of land in Athol. The defendant disclaimed as to all but one undivided half of fifteen-sixteenths of the land, and to prove title to the remainder, offered in evidence a levy of an execution upon the premises, as the estate of Adin Holbrook, upon a judgment recovered against the Athol

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Manufacturing Company, a corporation for whose debts its members were personally liable under the statute of 1808, chapter 65, the said Adin having been a member of the company. It appeared, that both demandant and tenant were creditors of said company, and that the said Adin was also a creditor of the company; that each had served out writs upon which the real estate of the company was attached, said Adin being first in order, and the demandants, the last. Judgments having been recovered in each of said three suits, said Adin and the demandant caused the estate in controversy to be seized on their executions, while such proceedings were had both upon the demandant's and tenant's executions, as to render the corporators liable in their individual capacities. The said Adin, having completed the levy of his execution and received seisin of the estate levied upon, the same was seized upon the demandant's and tenant's executions simultaneously by different officers. The tenant proceeded and levied his execution on one undivided half of the estate, and the demandant levied his upon the whole of the estate, as the estate of said Adin, and, at the same time, caused his execution to be levied upon the estate as the estate of the company which had become insolvent, and the whole of whose estate, except this parcel, had been levied upon to satisfy previous attachments. Both levies upon the demandant's execution were completed and seisin taken under each, simultaneously.

The demandant claimed to recover the estate on two grounds; *first*, that it was not competent for Adin Holbrook, who was a member of the company and personally liable for its debts, to appropriate the property of the company to satisfy his own private debt, and thereby preclude another creditor of the company from recovering his debt, any more than for one partner to apply partnership property to satisfy his own debt against the company, to the exclusion of a company creditor.

In the *second* place, he contended, that the tenant having made a simultaneous seizure with him as the property of Adin Holbrook, and having disclaimed as to one half of fifteen-sixteenths, he could only hold an undivided half of the half not so disclaimed.

The tenant contended, that, by the levy upon the estate as the property of the company, the execution of the demandant was *functus officii*, and that the levy upon it as the property of Holbrook was void.

The case was argued by *Washburn* and *Stevens* for the demandant; and by *Brooks* for the tenant.

The Court held, that the levy by Adin Holbrook was valid, because, the company being a corporation, it was as competent for any member of it as for a stranger to sue and attach its property, and that Holbrook's priority of lien by virtue of his attachment was not divested by anything that occurred in regard to the demandant's execution. If he were to be postponed, as contended for by the demandant, he

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would be without remedy over upon the other members of the company for having thus indirectly paid one of the debts of the corporation.

In regard to the form of the levy upon the estate as the property of Holbrook, the demandant had contended, that each creditor should have levied upon the whole of the estate, and that the law would then give to each a moiety. But the court were of opinion, that the levy by the tenant upon one half was properly made. The officer did right in seizing the whole estate, but he proceeded correctly in levying upon such share only as the creditor was entitled to hold under his levy. *Durant* v. *Johnson*, (19 Pick. 544.)

In regard to the double levy made by the demandant, the court held, that if any objection existed to it the tenant could not take advantage of it in this suit, as he was not thereby disturbed in what he himself claimed. But there was in fact no objection to the sufficiency of the levy. It was not like a levy upon two distinct parcels of land, the creditor could not thereby receive but one satisfaction for his debt, he could derive title from only one of the two levies, and these having been made upon the same parcel of land, the title of the demandant to an undivided half of the estate was held to be valid.

Pierce *v.* Partridge.

If a creditor, knowingly, takes judgment for a larger sum than is due to him from the debtor, he will thereby vacate any attachment made upon the original writ, as against subsequent attaching creditors.

An officer holding a bond of indemnity from a party is regarded as standing in the place of such party.

It is not necessary that adverse claimants of money, in an officer's hands, should disclose to him the ground of their claims in order to hold him responsible for misapplying such moneys.

This was an action of the case against the defendant, a deputy sheriff, for having neglected to apply the proceeds of certain property attached and sold as belonging to the Athol Manufacturing Company, upon the plaintiff's execution against that company. It appeared that one Henry Holbrook, a member of said company, as well as the plaintiff, sued out writs against the company returnable at the June term of the court of common pleas for the county of Worcester. Each of them recovered judgment at the September term of the court, the actions having been continued at the return term. Before judgment had been recovered, Holbrook assigned his debt and action to A. B. After the recovery of their judgments, both the plaintiff and A. B. put their executions into the defendant's hands, with directions to levy them upon the same property, and each offered him a bond of indemnity for so doing. He accepted that of A. B., and levied his

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execution upon the property, Holbrook's attachment upon mesne process having been made prior to that of the plaintiff.

One of the grounds on which the plaintiff rested his claim to recover was, that Holbrook, being a member of the company and personally liable for its debts, could not withdraw the company funds to satisfy his own debt, when he thereby prevented a creditor of the company from satisfying his debt. But this point was ruled against him by the court for the same reasons that were given in the case *Perry* v. *Adams*, (previous case, *ante* page 354.)

The second ground of the plaintiff's claim was, that Holbrook or his assignee, had taken judgment for a larger sum than he knew was due, and had thereby vacated his attachment as against subsequent attaching creditors.

Holbrook's judgment was for about $1800, embracing a note and the amount of an account for services. It was proved that he had received about $400 of the company, which was charged to him on their books, towards paying for his services, and that he so understood it when he received the items constituting the amount against him. It appeared also that, after commencing his suit and before it was entered, he showed to the officer a memorandum of the debts due from the company, in which his own was stated at about $1350 — (the difference between their indebtedness to him and their amount against him.) And when he assigned his debt in suit, he took a note from the assignee for a sum just equal to such balance, which recited, "it being for his demands against the Athol Manufacturing Company," though it did not appear that the assignee knew that the charges against Holbrook were received in part payment for his services.

The defendant objected, that if such a proceeding would vacate an attachment of a creditor, the plaintiff could not avail himself of it in this cause, because, when he demanded of the defendant that he should pay over the proceeds of the property to him, he did not disclose the grounds upon which his claim rested.

Washburn and *Stevens* for the plaintiff.

Allen for the defendant.

DEWEY J. The attachment of Holbrook was vacated by his knowingly taking judgment for a larger sum than was due. Courts hold parties to great strictness in respect to the amounts for which they shall take judgment in cases like this, where the debtor suffers default. If a party sues a well defined claim, and sees fit to add to that claim before taking judgment upon it, he will thereby vitiate it altogether so far as after attaching creditors are concerned. Here it has been shown, that the judgment was for more than $400 more than the amount originally claimed by the creditor in his suit, and the facts disclosed bring the case within the principle of that of *Fairfield* v. *Baldwin*, (12 Pick. 388.)

As to the objection that these facts were not known to the assignee

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of Holbrook, he must be regarded as having taken the suit charged with the consequences of the facts connected with its prosecution to final judgment. Nor can the objection prevail, that the particular grounds on which the plaintiff claimed to have the application of the money made upon his execution, were not disclosed to the officer. An officer holding a bond of indemnity from a party interested in the attachment of property made by such officer, is regarded as standing in the place of such party with no better rights in regard to the property so taken or held by him than the party himself would have.

Judgment was accordingly rendered for the plaintiff.

Howe *v.* George Bishop.

Where A. purchased lands with the money of B. and took a deed running to himself for the purpose of keeping the estate from B.'s creditors, it was held, that a creditor of B. could not levy upon the estate and hold it against A.

This was a writ of entry. The demandant claimed under a levy of an execution upon the demanded premises as the estate of Harrison Bishop, who was in possession of the estate when the levy was made. The defendant offered, as evidence of his title, a deed from one L. to him, and that Harrison was occupying the same under a lease from him at the time of the levy. The demandant alledged and offered to show, that the purchase from L. by defendant, was made with the money of Harrison and for his benefit, and that the deed was taken in the name of George to keep the estate from the creditors of Harrison, who was insolvent, and contended that the lease and contract, as to holding under George, was fraudulent as to creditors.

Washburn for the demandant.

Allen for the tenant.

The Court held, that the demandant could not recover. He must show a sufficient legal title, and has endeavored to do so by claiming to hold the premises under the possession which Harrison had at the time of the levy. This might be sufficient, if Harrison had claimed to hold independent of another, but the act of seising Harrison's possession could not affect the possession or title of another. According to the facts in the case there was no legal estate in Harrison, to be required by the demandant's levy. The case of *Goodwin* v. *Hubbard*, (15 M. R. 210,) was much relied upon by demandant's counsel as sustaining the principle on which he rests his case. But the question then presented itself in a somewhat different aspect — the situation of the parties was exactly the reverse of that of the parties in

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the present action. The court do not mean to express any opinion upon the correctness of the decision in that case. They only remark that it turned upon the want of title in the plaintiff, and not a defeat of title in the tenant. *Kempton* v. *Cooke*, (4 Pick. 306.)

In the case under consideration, the one claiming to hold under the alleged fraudulent conveyance, is actually in possession, and can only be disturbed by one having a better title; so that the demandant, if he did acquire whatever possession Harrison had, cannot avail himself of that against the tenant in possession. Whether the demandant is without remedy in recovering his debt of Harrison under these facts, or in what form, if any, he is to recover it, the court decline expressing any opinion.

Wood and others *v.* Bard.

A receipt given by an heir or distributee to an administrator, even though expressed to be in full for his share out of an intestate estate, is no bar to requiring such administrator to render and settle an account in the probate court. The validity, or effect of such receipt, can only be tried upon an issue growing out of a suit by such distributee to recover his share of the estate which shall have been decreed to him by the judge of probate.

In this case Bard was cited before the judge of probate to settle his account as administrator of the estate of David Wood, father of the complainants. He appeared and rendered his account, in which he charged himself with a balance of $421 — but upon the hearing before the judge he was charged with a balance of $1497, from which decree he appealed. At the hearing at *nisi prius*, before Wilde J., the respondent objected to being held to account because he held receipts from the several heirs of the intestate or their assignees, six in number, purporting to be for the sum of fifty dollars each "in full for their portions of the estate." The complainants, two of the heirs at law, objected to the validity of these receipts, and insisted, that the administrator, even if they were genuine, was bound to settle the account of his administration in the probate office. The judge reserved the question for the whole court whether the respondent should be held to account further, notwithstanding the production of these receipts.

Washburn for the complainants.

Wood for the respondent.

Shaw C. J. delivered the opinion of the court. The respondent contends, that these receipts shall have the effect of estoppels to his being held to settle any further accounts. But it appears to the court, that such a claim, if allowed, would interfere with the law in relation to the settlement of estates of deceased persons, which is rather a process *in rem* than one between adverse parties. The jurisdiction of

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this matter is peculiar to the probate court. By law an administrator is bound to render an account, in that court, within one year after taking letters of administration, and from time to time, after that, as he shall be required. But the administrator here contends that he ought not to be held to comply with this provision of law, because he holds receipts for a certain sum of money. The effect of adopting such a principle would be that the parties in interest would lose the benefit of the administrator's oath as to facts within his knowledge, for if the receipt were regarded as a bar, he could not be held to submit to any examination under oath. If regarded as a bar, the question might be raised, whether the receipt is or is not genuine or valid, and a difficulty would at once arise in what manner that question could be tried in a probate court, where questions are ordinarily settled without a jury and always must be, when tried by a judge of probate. The trial of such a question, too, might involve the rights of third parties, which a court of probate may not be competent to settle; as in this case one of these receipts purports to be made by a person claiming to be the assignee of one of the distributees and heirs to this estate. No greater effect can be given to these receipts because they purport to be "in full," than if they had been for merely a certain sum, for a receipt is never regarded as conclusive between the parties. The respondent must go on and render and settle his account, and upon this the judge will decree to each distributee his share, and the question as to the validity or effect of these receipts, can be tried when he shall be called on by the distributees for the respective amounts decreed to be paid them. It is upon his settlement with distributees that an administrator may avail himself of receipts given by them for portions of their shares which he may have advanced to them pending the settlement of an estate. Another objection exists against the respondent's availing himself of these recepts in this stage of the proceedings, which is, that he did render and settle an account in the court below without having produced them, and it is not competent for him after that, to appeal, as appears by one of the reasons filed by him, because the judge of probate held him liable to account.

Supreme Court of Pennsylvania, July Term, 1841.

ANONYMOUS.

[The *name* of this case was accidentally omitted by the learned judge who sent us the report.]

Equity refuses to execute a contract which is not mutual as regards obligation and remedy.

Under the Pennsylvania statute of frauds, which does not require a written memorandum of the bargain to have been signed by the party to be charged, an action to enforce a verbal sale of land by recovery of the purchase money, cannot be maintained though such action is, by the practice of that state, a substitute for a bill in equity.

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DIGEST OF ENGLISH CASES.

Selections from 9 Dowling's Practice Cases, part 4; 1 Gale & Davison (in continuation of Perry & Davison), part 1; 7 Meeson & Welsby, parts 3 and 4; 8 Meeson & Welsby, part 1; 4 Perry & Davison, part 2.

ARBITRATION.

1. An arbitrator to whom a cause was referred, the costs to abide the event, disposed of each of the issues, and then, (although no power was given to him for that purpose,) awarded a stet processus: *Held*, that although this was an excess of authority, the award was only bad as to that part, and good as to the rest, and the parties might proceed to tax their costs upon it. *Ward* v. *Hall*, 9 D. P. C. 610.

2. The court refused to set aside an award, on the ground that the arbitrators had improperly received evidence in the defendant's absence, and had been guilty of improper conduct in holding meetings, and conferring with the plaintiff's attorney upon the matters in difference, in the defendant's absence, as it appeared that the defendant was aware of the existence of these irregularities many days before the award was made, but made no objection before the arbitrators, and had notice of the meetings at which the evidence was received, and had been summoned to produce documents at such meetings, but had omitted to attend. *Bignall* v. *Gale*, 9 D. P. C. 631.

BASTARD.

A woman who was married in 1812, in 1818, her husband being alive, went through the form of marriage with another man, with whom she cohabited till 1832: *Held*, that the quarter sessions, in 1840 (the husband being still alive) were not justified in finding, upon these facts alone, and without any evidence of the non-access of the husband, that her child, born in 1821, was illegitimate. *Reg.* v. *Inhabitants of Mansfield*, 1 G. & D. 7.

BILLS AND NOTES.

1. An instrument was in the following terms: "I undertake to pay to R. I. the sum of 6*l.* 4*s.* for a suit of, ordered by D. P.:" *Held*, that it was not a promissory note, but good as a guarantee, as the consideration could be collected by necessary inference from the instrument itself. *Jarvis* v. *Wilkins*, 7 M. & W. 410.

2. A bill of exchange having been drawn upon A. B., was accepted by him, and was afterwards indorsed by the drawer to the plaintiffs, who indorsed it to the Birmingham and Midland Counties' Bank, who indorsed it to one W. The bill having been dishonored when due, W. gave notice of it to the bank, who gave notice to the plaintiffs, one of whom wrote the following letter to the drawer: "Dear Sir. To my surprise I have received an intimation from the Birmingham and Midland Counties' Bank, that your draft on A. B. is dishonored, and I have requested them to proceed on the same:" *Held*, that if there was more than one bill to which the letter could apply, it lay upon the defendant to prove that fact, in order to show its uncertainty. *Held*, also, that the letter was a good notice of dishonor. *Shelton* v. *Braithwaite*, 7 M. & W. 436.

3. In an action by the indorsee against the drawer of a bill of exchange, it is enough for the plaintiff to show, to the satisfaction of the jury, that the letter containing the notice of dishonor was posted in such time as that, by the

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due and usual course of the post, it would be delivered on the proper day. The post-office mark is not conclusive of the time when the letter is posted. *Stocken* v. *Collin*, 7 M. & W. 515.

4. In an action on a bill of exchange, alleged in the declaration to have been indorsed by M. to the plaintiff; the defendant pleaded, that the bill was drawn and accepted without value, and that there never was any consideration for indorsing the bill by any of the parties, nor for the indorsement by M., nor for M. paying the amount. Replication, that the indorsement by M. was in blank, and that R., who appeared to be, and whom plaintiff believed to be, the lawful holder, of the bill, indorsed it to the plaintiff for value, to wit, &c. Special demurrer, for want of a statement of consideration for the drawing and accepting of the bill, and for departure, as to the allegation of the indorsement to the plaintiff: *Held*, that the replication was good, as the plaintiff, against whom there was no allegation of fraud, sufficiently established his own title by alleging an indorsement to him for value by a person whom he believed to be the lawful holder of the bill. *Ashbourn* v. *Anderson*, 9 D. P. C. 595.

DEBTOR AND CREDITOR.

By the release of a debt, by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt. Therefore, the relinquishment of such security, for the benefit of the debtor, forms no consideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed. *Cowper* v. *Green*, 7 M. & W. 633.

DEVISE.

On a devise to M. B., widow, for life, and her three daughters, Mary, Elizabeth, and Ann, in fee, an illegitimate daughter, named Elizabeth, claimed as being the only Elizabeth answering the description at the time of the will being made, a legitimate daughter Elizabeth having been dead six years previously: *Held*, that parol evidence was admissible to show that the testator intended his legitimate daughter as devisee, and that he did not know of her death. *Doe* d. *Thomas* v. *Beynon*, 4 P. & D. 193.

EVIDENCE.

1. Letters more than thirty years old, produced from the proper custody, prove themselves. The defendant produced letters thirty years old, purporting to be addressed to her mother, and proved that she was living with her mother at the time of her death, when her papers and keys were given up to her: *Held*, that the custody was proper. *Doe* d. *Thomas* v. *Beynon*, 4 P. & D. 193.

2. Where a deed purported to convey a messuage with the appurtenances, purchased at an auction, it was *held* that neither the conditions of sale at the auction, signed by the purchaser, nor his own declarations as to the extent of his purchase, were admissible in evidence, to show that a garden which had been usually enjoyed with the messuages was expressly excepted from the sale. (2 Saund. 401; 1 Bos. & P. 53; 4 Ad. & E. 76). *Doe* d. *Norton* v. *Webster*, 4 P. & D. 270.

3. Where a sold note expressed "18 pockets of hops at 100*s*.," held that parol evidence was admissible to show that the 100*s*. meant the price per cwt. (3 Camph. 426). *Spicer* v. *Cooper*, 1 G. & D. 52.

4. Where a witness, called to prove the signature of the attesting witness to a bond, swore that the signature was not in the supposed attesting witness's handwriting, another paper (not in evidence in the cause) was put into his hand, which he also stated was not that person's writing: *Held*, that the plaintiff was not at liberty to prove, for the purpose of contradicting the witness in the box, that this paper was actually written by the attesting witness to the bond. (11 Ad. & E. 322.) *Hughes* v. *Rogers*, 8 M. & W. 123.

LARCENY.

A person purchased, at a public auction, a bureau, in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale, no person knew that the bureau contained anything whatever: *Held*, that if the buyer had express notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no reason to believe that anything more

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than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau, with its contents, if any, he had a colorable right to the property, and it was no larceny. (2 East, P. C. 664; 8 Ves. 405). *Merry* v. *Green*, 7 M. & W. 623.

MINING COMPANY.

The resident agent, appointed by the directors of a mining company to manage the mine, has not an implied authority from the share-holders of the company to borrow money upon their credit, in order to pay arrears of wages due to the laborers in the mine, who have obtained warrants of distress upon the materials belonging to the mine, for the satisfaction of such arrears, nor in any other case of necessity, however pressing. *Hawtayne* v. *Bourne*, 7 M. & W. 597.

PRINCIPAL AND AGENT.

A club was formed, by the regulations of which the members paid entrance-money and an annual subscription, and cash was paid for provisions supplied to the house. The funds of the club were deposited at a banker's, and a committee was appointed to manage the affairs of the club, and to administer the funds, but no member of the committee had authority to draw cheques, except three who were chosen for that purpose, and whose signatures were countersigned by the secretary: *Held*, in an action brought against two of the committee by a tradesman who had supplied wine on credit, ordered by a member of the committee for the use of the club, that the tradesman was not entitled to recover without proving either that the defendants were privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club. *Todd* v. *Emly*, 7 M. &. W. 427.

SHIP.

Where A., the charterer of a vessel, by the charter-party agreed that on the arrival of the ship at the outward port, he would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the owner; and on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain money demands made on the master, but did not advance any actual cash: *Held*, that although it was not shown that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold and delivered and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charter-party. *Weston* v. *Wright*, 7 M. & W. 396.

SLANDER.

Slander for speaking of the plaintiff the following words: "I will bet 5*l*. to 1*l*. that Mr. J. (the plaintiff) was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." And in answer to the following question from a bystander, "Do you mean to say, that M. J., brewer, of Rosehill, has been to a sponging-house within this last fortnight for debt?" the defendant said, "Yes, I do." The jury found that the words were spoken of the plaintiff in the way of his trade: *Held*, that the action was maintainable, and that the verdict was right, as it was plain from the conversation that the words were spoken of the plaintiff in his character of a brewer. *Semble*, also, that the words were actionable independently of that, because they must necessarily affect the plaintiff in his trade and credit. *Jones* v. *Littler*, 7 M. & W. 423.

USE AND OCCUPATION.

Where an upper floor of a house was occupied at a rent payable quarterly, and during the currency of a quarter the house was burnt and rendered uninhabitable, it was held that the landlord was nevertheless entitled to recover, in an action for use and occupation, *at least* the amount of rent for the occupation up to the time of the fire from the quarter-day preceding. *Packer* v. *Gibbons*, 1 G. & D. 10.

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INTELLIGENCE AND MISCELLANY.

Judicial Changes in Maine. The people of Maine, not contented with the slow process which the constitution provided for making changes in the judicial office, adopted, in 1839, a resolution proposed by the legislature to reduce the tenure from "good behavior, not exceeding the age of seventy years," to the narrow term of *seven* years. By the operation of this amendment, the period of two of the judges of the Supreme Court, viz.: Chief Justice Weston and Justice Emery, expired in October last, and their places have been supplied by Ezekiel Whitman, of Portland, as Chief Justice, and John S. Tenney, of Norridgewock, as an Associate Justice.

On the organization of the court in 1820, the late Chief Justice Mellen was placed at its head, and Mr. Weston, and William P. Preble were appointed associates. In October 1834, Mr. Mellen having reached the age of seventy years, when he was constitutionally disqualified, retired from the bench, and was succeeded by Mr. Weston as chief; Nicholas Emery, Esq., was raised to the vacant place. Judge Preble had previously resigned his seat, on his appointment as minister to the Hague in 1829, and Albion K. Parris, who had formerly been governor of the state and senator in congress, was appointed his successor. In 1836, he also, yielding to stronger influences, resigned this situation on receiving the appointment of second comptroller of the treasury of the general government, and Ether Shepley, then a member of the United States Senate, was appointed his successor on the bench. The court now consists of Ezekiel Whitman, chief justice, Ether Shepley and John S. Tenney, associates, each with a salary of $1800.

These gentlemen are all natives of Massachusetts. Mr. Whitman was born in Bridgewater, in 1776, and was educated at Brown University. He pursued his legal studies with the Hon. Nahum Mitchell, in his native town, and after making a tour of business and observation in the then uncultivated and thinly peopled regions of the west, he came to Maine in 1799. After remaining about six months in Turner, where he first pitched his tent, he established himself in New Gloucester, in the county of Cumberland, and enjoyed there a very extensive practice until 1806, when he removed to Portland, the shire town of the county, and commercial capital of Maine.

Mr. Mellen came to Portland the same year, and it is not claiming more than was awarded to it from competent and disinterested sources, to say, that the bar of Cumberland, at that day, was among the first, if not *the* first in the state. It contained Mellen, Whitman, Symmes, Longfellow, Orr, Hopkins; Chase had just died, Emery soon joined it, and Greenleaf and the elder Fessenden were entering upon their successful and honorable career.

Mr. Whitman shared largely in the business and confidence of the people with whom he had now connected himself. In 1808 he was elected to represent the district in Congress, but in consequence of political changes, his reelection for the subsequent term was defeated. In 1815 and 1816, he was chosen a member of the executive council of Massachusetts; and in the latter year he was again elected a representative to Congress. The duties of this office he continued to discharge, by repeated election, with great fidelity and honor to his constituents and himself, until his resignation in 1822, on receiving

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the appointment of chief justice of the court of common pleas, then just established in the new state. While a representative in congress in 1819, he was chosen a member of the convention which formed the constitution of the state, and took an active and influential part in its laborious and important duties. He continued to occupy the situation of chief justice of the common pleas, until the court was modified by the introduction of the district system in 1839, when he received the appointment of judge of the western district, embracing the counties of York, Cumberland, Oxford and Franklin. He is now elevated to the highest judicial office in the state, with the general approbation of the bar and the public, and is commended to this honorable position by long and faithful services, sound legal judgment, clear and penetrating discrimination, and uncompromising integrity.

Judge Shepley is a native of Worcester county, in Massachusetts; he was graduated at Dartmouth college in 1811, and soon after his admission to the bar, established himself at Saco, in Maine, where he continued pursuing a very successful business until his appointment as judge. In 1820, on the promotion of Judge Preble, then district attorney of the United States for Maine, to the bench, he was selected by President Monroe for that office, and held it till his election to the senate of the United States in 1833. In 1836 he received the appointment of judge, the duties of which he has continued to discharge with ability and acceptance to the present time.

Judge Tenney was born in Essex county, in 1796, and was graduated at Bowdoin college, with the highest honors of his class, in 1816. He pursued his professional studies partly with Mr. Bond, of Hallowell, and partly with Mr. Boutelle, of Waterville. Since his admission to the bar he has resided at Norridgewock, and has taken the lead in that county for several years in the business of the courts. The specimen he has given, since his appointment, of good sense, judicial manner, and legal sagacity, has fully justified the discrimination which selected him for his present high and responsible station.

In conclusion, we have pleasure in believing and affirming that this court will take a high and honorable position among the judicial tribunals of our country. Learning integrity, dignity of manners, and public confidence, ensure to it, honor, to the public, security, and to its decrees, respect.

Mr. Goodenow, who has succeeded Judge Whitman on the bench of the district court, is a graduate of Dartmouth, of the year '13 or '14. He is a native of Maine, studied his profession with the Hon. John Holmes, at Alfred, and has ever since remained in practice in that place. He has the reputation of being a sound lawyer, a good advocate, and an honest man; he has been a representative to the legislature, speaker of the house, and, at two different periods, attorney general of the state. He brings to the office a well-furnished and well-regulated mind, and will undoubtedly discharge the duties of his office with ability and honor.

Chief Justice Weston. For the foregoing interesting account of the recent judicial changes in Maine, we are indebted to our attentive correspondent at Portland. There are some other facts which have come to our notice, which, we think, are deserving of attention. The first nominations made by Governor Kent, for the vacant places on the bench, were the Hon. Nathan Weston, as chief justice, and John S. Tenney, as associate justice. The nomination of the latter was confirmed by the council, but that of the former was *rejected*, there being but one vote in its favor. Mr. Weston was a justice of the court many years, and, in that situation, was a popular magistrate. He was appointed chief justice on the retirement of the late chief justice Mellen. It is no secret, that, for a few years past, Mr. Weston has not been a very acceptable judge, especially with the bar in the eastern part of the state. His nomination by Governor Kent was undoubtedly an unpopular act. The causes of this state of things are variously stated, but we do not propose to discuss them. There have, however, been some statements in the newspapers since his rejection by the council, to which we feel at liberty to refer. One is, that Mr. Weston, at the

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time of the alteration of the constitution, limiting the judicial term to seven years, proposed to Governor Fairfield to resign his office, in order that he might be reappointed, and thus have his term of seven years commence from that time. It is said, that Governor Fairfield declined to accede to the proposition.

Another statement which we find in the Waldo Signal, newspaper, is, that Mr. Weston, after his rejection by the council, and before any new nomination was made, went before that body and argued his case for the space of three hours, expressing strong hopes that his nomination would yet be confirmed! This is the statement of a partisan press, opposed in politics to Mr. Weston, and should be received with caution. But if it be true, it is a powerful commentary on the whole system of judicial and other appointments at the present day. Lord Mansfield loved that popularity which *followed*, not that which was run after; and formerly, in this country, at least in New England, high judicial appointments sought those individuals who were best fitted for the stations. At the present day there is scarcely a vacancy in the judiciary, for which there is not a list of *applicants*, for whom every sort of interest is made, directly and indirectly; but such efforts are expected to be secret. The opinions and feelings of men on this subject are not dissimilar to those of the Italians on female chastity. Every married lady is expected to have her lover, but the outward proprieties of life must be strictly observed. The lover may live in the house of his mistress, under such circumstances as leave no doubt of crime, and the laws of fashionable society are not offended in the least; but if the wife desert her husband and live with her lover, she immediately loses *caste*. Adultery is nothing, but separation and divorce are terrible crimes. The only difference between the course taken by Mr. Weston and many others, is, that he preferred the frank and open course of arguing his own case to the more secret measures which are often adopted by candidates for office. Perhaps he tried both! But the moral is no less instructive, and those who are indignant at his conduct would do well to point out the real difference between secret and open *supplications* for judicial appointments.

Lord Chancellor of Ireland. The mutations in this office, consequent upon political changes, are somewhat curious. Sir Edward Sugden held the place during the short-lived administration of Sir Robert Peel in 1835, by which he necessarily sacrificed his position at the head of the English chancery bar. In one hundred days the triumphant return to power of Lord Melbourne brought back Plunckett as Lord Chancellor of Ireland, and Sir Edward Sugden, having once sustained the dignity of judge, could not, consistently with the long established usage in England, again descend into the arena of the bar Of late years he has been known to the public only as a powerful and influential tory politician. Recently Sir John Campbell, the whig attorney general since 1834, (with the exception of Peel's short administration.) was appointed Chancellor of Ireland. He held the office but a short time, for, upon the return of Peel to power in 1841, Sir Edward Sugden is again Chancellor of Ireland, and Sir John Campbell is Lord Campbell, with a peerage to spare, which he would doubtless be quite glad to exchange for a pension. He must retire from the bench and the bar, and "bide his time."

Dublin Law Institute. We have before us the first report of the Dublin Law Institute on the progress of legal education in Ireland, and several other papers having reference to this institution and the objects for which it was founded. The institute was commenced more than a year ago, and bids fair to prove highly beneficial to the legal profession of Ireland. It started under high auspices, the attorney and solicitor general, among other distinguished members of the Irish bar, being on the council. The principal of the institute is Tristram Kennedy, Esq., and there are five professors. The

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equity department is filled by Echlin Molyneux, Esq.; that of the law of property and conveyancing by James J. Hardy, Esq.; that of common law by Joseph Napier, Esq., and that of medical jurisprudence by Thomas Brady, M. D. We have seen a letter, addressed to the Royall professor of law at Cambridge, on the part of the institute, with a statement, that any literary or scientific contributions emanating from any of the law professors in Harvard University, calculated to interest those engaged in legal pursuits or to promote the common objects of both institutions — the advancement of the science of the law — will be received with thanks, and read with much gratification by the fellows and associates of the institute at their general meetings.

London Police. We find the following curious report in a late London paper:— Joseph Jones, a tailor, about twenty-five years of age, with a profusion of hair combed down in long, straight locks, was brought before Sir Peter Laurie, at Guildhall, charged with being drunk and disorderly in Fleet street. A policeman stated that the prisoner assaulted several persons by striking them over the head with a blue bag, containing a pair of trowsers. He struck women as well as men, and drew blood from the noses of some. Sir Peter Laurie was not surprised that he was charged with striking females, for he took persons who wore their hair in that manner to be capable of doing anything. Nothing could make a man look more contemptible than this womanish fashion of letting the hair grow till it reached the shoulders. He supposed the prisoner wished to be mistaken for a German student. The prisoner, in excuse for his conduct, said he was rather fresh. Sir Peter Laurie said he would fine him five shillings for being tipsy, but if he would cut off his hair he would forgive him. The prisoner bowed, stepped down from the bar, and immediately sent for a barber, who speedily performed the operation of cropping. The jailer then put the prisoner to the bar to show that he had brought himself within the allowed exemption from fine. Sir Peter Laurie told the prisoner he now looked much better and more like a man. The tailor, who enjoyed the fun as much as any body in the room, was then discharged. The worthy alderman paid for the man's hair cutting out of his own pocket.

Story on Partnership. This long expected work is at length published in Boston by Messrs. Little & Brown. It makes an elegant royal octavo volume of 711 pages. It is dedicated to the Hon. Samuel Putnam, LL. D., one of the justices of the supreme judicial court of Massachusetts, in whose office the learned author was a pupil in the close of his preparatory studies for the bar. The contents of the volume are as follow: Chap. I. Partnership — What constitutes. II. Who may be Partners. III. Partnership between the Parties — Community of Interests. IV. Partnership as to Third Persons. V. Partnership — Different sorts of. VI. Rights and Interests of Partners in Partnership Property. VII. Powers and Authorities of Partners. VIII. Liabilities and Exemptions of Partners as to Third Persons. IX. Rights, Duties, and Obligations of Partners between themselves. X. Rights, Duties, and Obligations of Partners under the articles thereof. XI. Remedies between Partners. XII. Remedies of Partners against Third Persons. XIII. Dissolution of Partnership, when and how it may be. XIV. Effects and Consequences of a Dissolution, as between the Partners. XV. Effects and Consequences of a Dissolution as to the Rights of Creditors. XVI. Part Owners of Chattels — Rights, Powers, and Liabilities of. Index. In the course of this work more than nine hundred decisions in the different reports have been cited.

Insanity of a Witness. In one of the inferior Boston courts, a witness was recently called to testify, who is a man of respectability, and whose sanity would never be doubted by those who merely transact business with him; but it is nevertheless true, that he supposes himself to be the prophet Elijah. The party who called him was not aware of this fact, and, after the witness had testified, rested his cause with great confidence. To his astonishment and the amusement of the audience, the opposite counsel asked the following question; "Mr. Witness, are you the prophet Elijah?" And the surprise of all parties was equally great at the prompt reply of the witness; "To be sure I am!" After a long examination, the witness remained firm on this point, and the defendant lost his cause. He took an appeal, however, contending that a witness who is perfectly sane on all points but one, is competent to testify to any facts not relating to the particular subject upon which he is insane.

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MONTHLY LIST OF INSOLVENTS.

Abington.
Ramsdell, Martin — Gentleman.

Boston.
Burgess, Isaac
Demerritt, Albert C. — Merchant.
Foster, Isaac — Stable keeper
Goodwin, Elisha, Jr. — Truckman.
McLoud, John — Laborer.
Munroe, Charles A. — Jeweller.
Paul, Rufus — Merchant.
Peyton William H.
Stearns, Charles J. — Merchant.
Wells, Thomas G. — Printer.
(Folsom, Wells & Thurston.)

Charlestown.
Bridge, James — Trader.
Sanborn, Noah — Trader.

East Bridgewater.
Keen, William W. — Shoemaker.

Gloucester.
Griffin, Gustavus — Trader
Haskell, George — Yeoman.

Hanson.
Howard, Cheleias — Yeoman.

Lynn
McIntire, Benjamin — Housewright.

Malden.
Lynde, George — Cordwainer.

Medford.
Coates, John H. — Carpenter.

Montgomery.
O'Neil, Michael.

Nantucket.
Parker, Robert F. — Merchant.

New Bedford.
Robinson, Thomas T.
Winslow, Job C.
Wilbur, George R.

Oakham.
Harwood, Harrison — Trader.

Pembroke.
Ramsdell, Bartlett — Gentleman.

Taunton.
Crocker, Samuel } Esquires.
Richmond, Charles } Copartners,

Templeton.
Merritt, Dexter P. — Chairmaker.

Townsend.
Barrett, Oliver } Manufactur's.
Barrett, Oliver S. } Copartners.
Barrett, John O. }

Tyringham.
Stevens, Moses — Yeoman.

Worcester.
Bryant, Morgan M. — Confectioner.
Collier, Jason — Shoe dealer.

COLLECTANEA.

A work has been published in New York, entitled, "An Alphabetical List of Attorneys and Counsellors," from which it appears that the number of practising lawyers in that state is 2012. In the city of New York there are 893 — enough to form a full regiment in the United States army. The number of lawyers in the whole state is undoubtedly estimated too low. There are probably more than 4000. A writer in the New York American says it would be a curious and useful inquiry to ascertain the actual amount of profits received and realized by the larger half of these learned practitioners. He is inclined to think that many of them would have enjoyed more comforts, a more certain income, and less of the mortifications of this life, if their good fathers had brought them up to their own trades instead of thrusting them, without classical or other necessary acquirements, into a profession in which it is next to impossible that they can ever rise above mediocrity.

In the legislature of South Carolina, Mr. Dudley, one of the members, recently introduced a resolution impeaching Judge R. S. Gnatt, of incompetency to discharge his duties Subsequently the judge sent into the House his resignation of the office which he had held for twenty-six years; whereupon the house immediately passed resolutions expressive of their high appreciation of his motives, and appropriating to him another year's salary of $3500. It is said that intemperance is the cause of Mr. Gnatt's incompetency. Hon. D. L. Wardlow has been elected to fill the vacancy.

Charles Sumner, Esq., the accomplished reporter of the circuit court of the United States for the first circuit, has resigned his office, and William W. Story, Esq., son of Mr. Justice Story, has been appointed in his place. Mr. Story is now engaged in preparing his first volume of reports for the press.

The second American edition of Beames's "Brief View of the Writ of Ne Exeat," has been published in New York by Collins, Keese & Co., with notes by Henry Nicholl, counsellor in chancery.

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THE LAW REPORTER.

FEBRUARY, 1842.

REMARKABLE TRIALS.—No. VIII.

MURDER — CASE OF THE CREW OF THE PITT PACKET.

In the month of April, 1769, a brigantine, the Pitt Packet, of Marblehead, was boarded as she was coming in from Europe, seven leagues from land, by a boat from the Rose, man of war, the Boston station ship, then cruising in order to impress seamen. The seamen of the brigantine, four in number, determined not to be impressed, and, having provided themselves with harpoons and other weapons, they shut themselves up in the fore peak, declaring that they preferred death to slavery, and would sacrifice their lives sooner than be taken out of the ship. Panton, the lieutenant of the Rose, seeing the desperate determination of the men, at first endeavored to persuade them to surrender, and at length promised that he would be content with one of their number. Finding that mild measures were of no avail, he informed them that he should make use of force, and they declared that they would resist unto death. A pistol, charged with powder, was then fired at them, which burned the face of Michael Corbett, and immediately afterwards another of the number received a shot in the arm. The seamen now became desperate, and repeatedly asserted that they would kill the first man who offered to approach them; and a man sent in by the lieutenant was considerably wounded, and retreated.

Lieutenant Panton then declared that he would lead the way him-

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self. Corbett warned him not to approach, and called God to witness that if he advanced one step towards them, he should instantly die. The lieutenant, who was a resolute and brave officer, coolly remarked that he had seen many a brave fellow in his life, but would take a pinch of snuff and consider the matter, which, having deliberately done, he moved towards the seamen, when Corbett, agreeably to his threat, struck him with a harpoon, which cut the jugular vein. The unfortunate officer gasped out that they had taken his life, and immediately expired. The seamen continued to defend themselves, but having provided themselves with rum, they became intoxicated and were taken to Boston. Their names were Michael Corbett, Pierce Fenning, William Courier, and John Byan.

They were brought up before a special court of vice admiralty, consisting of crown officers, "commissioners for the trial of piracies, robberies, and felonies on the high seas," which court had always proceeded without a jury. But James Otis and John Adams,[1] counsel for the prisoners, insisted upon a trial by jury as a matter of right. The point was elaborately argued by counsel. Governor Bernard, the president of the court, was inclined to favor the trial by jury, and the king's counsel acceded to it; the only point remaining was the manner of summoning the jurors. But Hutchinson, the chief justice, who was one of the commissioners, being well satisfied that the decision was directly against law, drew up a statement of the case, which convinced the court that they ought to proceed without a jury.[2]

Accordingly, on Tuesday, the nineteenth of June, 1769, the trial commenced in Boston, before the following commissioners: — Sir Francis Bernard, governor of Massachusetts; John Wentworth, governor of New Hampshire; Samuel Hood, commodore and commander of his majesty's ships; Thomas Hutchinson, lieutenant governor of

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[1] We are informed by the venerable John Davis, late judge of the United States District Court for Massachusetts, that he often conversed with John Adams respecting this trial, who took great pride in the success of his exertions in the defence of the prisoners.

[2] A statute of William III. authorized the court of admiralty to try cases of piracy. The design of the statute was to prevent the trials of piracies by juries in the plantations, at a time when the verdicts of juries had been very partial towards the buccaneers. It was the opinion of the chief justice in the present case, that, according to this statute, the trial must be without a jury. This decision, however correct it might be, was very unpopular at the time, and was one of the many things which served to bring Hutchinson into popular odium. But whatever may be thought of him as a politician, as a judge his character is deserving of the highest commendation. Although a graduate of Harvard College, he was engaged in mercantile pursuits, until he abandoned them for law and politics, but his legal knowledge was highly respectable; he expressed his ideas clearly, and administered the law without fear or favor, according to his knowledge and ability. As a historian, too, his memory must always be regarded with respect. The impartiality and candor, with which he discusses occurrences in which he held a painful position, are worthy of all admiration, while the laborious research, the accuracy, and faithfulness of detail, of which his history gives evidence, entitle it to the high consideration with which it is universally regarded at the present day.

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Massachusetts; Jonathan Warner and George Jaffrey, of his majesty's council in New Hampshire; Robert Auchmuty, judge of the court of vice admiralty for Massachusetts; John Andrews, judge of the court of vice admiralty for Rhode Island; Andrew Oliver, secretary of the province; Robert Trail, collector of the port of Portsmouth; John Nutting, collector of Salem; Joseph Harrison, collector of Boston.[1]

The trial occupied a week. The fact of the homicide was clearly proved; but it appeared that neither the lieutenant nor any of his superior officers were authorized to impress, by any warrant or special authority from the lords of the admiralty; and the court was unanimously of opinion, that the prisoners had a good right to defend themselves, and that they ought to be acquitted of murder, with which they were charged; and that, at common law, the killing would not have amounted to manslaughter.

The prisoners were accordingly discharged, and a midshipman of the Rose was immediately arrested in an action for damages for the wound inflicted in the arm of one of them, and gave bail in the sum of three hundred pounds.

RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, October Term, 1841, at Boston.

UNITED STATES *v.* ZEBEDEE HUNT.

The authority of the officers in a merchant ship, to compel obedience and inflict punishment, is of a summary character, but is not of a military character.

The right of the mate or other officers of a ship to inflict punishment on the seamen, when the master is on board and at hand, can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal, or flagrant misbehavior on the part of the seamen, or to compel obedience on the part of the seamen to orders, or other duties which require prompt and instant action and interference on the part of the officers, and admit of no delay. In general, it is the duty of the officers to consult the master as to the infliction of punishment.

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[1] It was with great difficulty that the court was formed, a great part of the gentlemen named in the commission being at a distance; and the inhabitants had the mortification to perceive, that the members of his majesty's council of this province, all of whom had been included in former commissions, were excluded from the present; while not only the council of a neighboring colony, but even *pro tempore* collectors, helped to constitute this court. [Boston Evening Post, July 24, 1769.

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If the master of a vessel sets sail on a voyage, with a crew in such a state of intoxication, as disables them at the time for the proper performance of the ship's duty, and any disaster arises therefrom, it seems, that any loss from that disaster would not be recoverable from the underwriters, under the common form of policies of insurance.

THIS was an indictment against Hunt, founded upon the Crimes Act of 3d of March, 1825, ch. 276, § 22, for assaulting with a dangerous weapon (viz. a cutlass) one Thomas Coombs, on board of the American brig called The Havre, within the waters of Massachusetts Bay, and the admiralty and maritime jurisdiction of the United States. Plea, not guilty.

At the trial the facts appeared to be as follows. The defendant (Hunt) was mate of the ship, and Coombs was a seaman on board. On the 19th of October, 1841, the brig sailed from the inner harbor of Boston bound on a voyage to Savannah.

It appeared, that the vessel sailed from the wharf at Boston in the afternoon, and was standing out to sea, having reached Nantasket Roads, when it became necessary to secure the anchors, and to heave to, for the purpose of discharging the pilot. Three or four of the crew had been intoxicated ever since they came on board, and had caused the pilot and officers a good deal of trouble; sometimes remaining below and refusing to come on deck. After reaching the roads, Captain Carpenter gave orders to heave the brig to, and asked Hunt, where the rest of the men were. Hunt answered, that he had called them several times and they had refused. (One of the crew testified, that Hunt had called these men up and received very insolent answers.) The captain then called them up, and they answered, that "they'd be d—d if they would come until they were a-mind to." The captain then said, "I 'll come down to you, then." The men answered, "Come down;" and upon Capt. C.'s stepping down a few steps, they held out their hands towards him, (as he testified,) in a threatening manner. He then went aft, but one of the men, Coombs, came up and followed him to his windlass end, and struck at him with his fist. The blow was spent, but reached the captain's breast. Capt. C. took up a handspike, but Coombs got it away from him. At this moment Hunt seized Coombs, but received from him a blow in the face, which gave him a black eye. Hunt then ran aft to the round-house, and came forward with his cutlass drawn, and the scabbard left behind. As he went forward, the pilot told him to be careful, how he used his cutlass.

Up to this point there was no discrepancy in the testimony. It appeared, also, that it was rather squally, and there was a hail squall soon after the vessel came to anchor.

Hunt then went forward and struck Coombs two or three blows with the *flat* of his cutlass (as all the witnesses agreed) over the head and shoulders. The captain, second mate and cabin-boy here testified, that after these blows the mate retreated, and Coombs followed him, striking at him with his fists and daring him; that they saw no

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blows given with particular force by the mate, but that Coombs seemed to be wounded in the *melée* and confusion of the mate's defence and attempt to reduce him to obedience. The same witnesses testified, that the *melée* ended several feet further aft than it began. The rest of the crew testified, that after two or three blows with the flat of the cutlass, Hunt seized the weapon and brought it down several times, with great force, upon the sharp edge, upon the hands and wrists of Coombs, who was only attempting to defend himself.

According to the evidence of the crew, Coombs stood between the windlass end and the bow of the longboat, when Hunt first struck him, and was in the same, or nearly the same place, when the affair ended.

The pilot did not see the fight, being on the other side of the boat. Some of the rest of the crew interfered, though it appeared, that one of them took hold of Hunt just as he was first attacking Coombs, before he got his cutlass, but, as was admitted, with no hostile intention.

Doctors Ayres and Otis testified, that the left wrist of Coombs was nearly cut off, the right hand and arm badly wounded, and that amputation of the left might be necessary, though there were hopes of saving it. The other facts in the case sufficiently appear in the charge of the judge.

R. H. Dana, jr., for the prisoner, rested the defence upon the following grounds: The repeated and deliberate acts of disobedience, accompanied with insolent language, and finally with an attack upon the captain, constituted, or might have appeared to Hunt to constitute, a mutiny. The taking forcibly from the captain a weapon of defence, which he had seized, and the attack upon Hunt when he came to the captain's aid, aggravated the case; and another of the crew taking hold of Hunt at the moment, from whatever motive, might, in the excitement, have reasonably given the prisoner a fear of a general mutiny. His striking with the flat of the cutlass several times, showed the moderation of his proceedings, and the fact, that Coombs met him unarmed, and neither retreated nor sought a weapon of defence would seem to be evidence of no violence on the part of Hunt. It should be remembered, too, that Coombs did not even retire to the forcastle, the proper place for a seaman. Although there should turn out to have been no mutiny in fact, yet if the state of things was such as, under the circumstances, might reasonably have led the prisoner to suppose, that there was a mutiny, he must be excused for acting under that supposition, if his acts were moderate and reasonable for a person honestly so supposing. In mutiny, revolt, &c. the maritime law permits, and if necessary, enjoins, the use of dangerous weapons. The master and officers must be their own protectors, and the protectors of the lives and property under their charge. If the prisoner came lawfully in possession of the dangerous weapon, and then used it in a moderate, or, under the circumstances, excusable manner, he must be acquitted.

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Franklin Dexter, district attorney, admitted the right of an officer to use dangerous weapons, in cases of necessity; but here was no mutiny; no one interfered in behalf of Coombs; and Coombs was known to be drunk. There were the master, pilot, and the mates to manage him, and the vessel had not left the harbor, but might have come to, and sent up to town or made a signal for aid. There was no necessity for using the cutlass. Hunt asked for no aid from any one, and no one offered to help him, showing that there could have been no serious danger. Coombs was alone, unarmed and unsupported by any one. The pilot cautioned Hunt as to his cutlass. The wounds, as testified to by the surgeons, could not have been received by Coombs striking at Hunt. They must have been given by a downward and a strong blow. There is no sufficient justification for using a dangerous weapon, and inflicting therewith a severe and maiming wound. He must be found guilty of the fact.

Story J. In summing up the case to the jury, among other things said; There is no doubt in this case, that the defendant, (the mate), committed an assault with a dangerous weapon, (a cutlass), upon Coombs, (the seaman), in the manner stated in the indictment; and, that the place where the offence was committed was within the admiralty and maritime jurisdiction of the United States, on board of the brig Havre, owned by citizens of the United States. The wounds inflicted by Hunt upon Coombs were exceedingly severe, and it will not be surprising, if it shall turn out, according to the suggestion made by Dr. Otis, that amputation of the right hand should become necessary, although he yet hopes, that it may not be required. Under such circumstances, the offence is clearly established, unless the infliction of these wounds with the cutlass was justified on account of some positive necessity really then existing, or on account of some supposed necessity, then honestly and reasonably believed to exist by the defendant, either justifiable or excusable in point of law. If there was no such necessity, then the act was unlawful, and the defendant ought to be found guilty. So, if there was any such real or supposed necessity, and yet the punishment was excessive, either in kind or degree, the same result ought to follow. It will be important, therefore, for the jury to examine the whole circumstances of the case with scrupulous diligence and care. And here I may say, that where facts, sufficient to constitute the offence are established *primâ facie* by the evidence, the burthen of proof is upon the defendant himself to show, that such a real or supposed necessity existed, which either justified or excused the acts, unless so far, indeed, as the attendant circumstances in the evidence offered by the government, do, of themselves, go to establish such a legal justification or excuse. If the defendant fails to satisfy the jury, that there was, in point of fact, any such legal justification or excuse from such a real or supposed necessity, or he leaves it in doubt, then their verdict ought to be for the government.

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It is apparent from the evidence, that the crew were, at the time when this affray occurred, in a state of intoxication, from the use of spirituous liquors. Under such circumstances, they could scarcely be said to be fit for the due performance of the ship's duty, and were in a state, which might readily lead to disobedience of orders, and even to a mutiny and revolt. The path of prudence, therefore, clearly was, on the part of the master and officers, to avoid, as much as possible, all undue causes of excitement. This seems to have been the notion of the master himself. Indeed it might, perhaps, have been well for the master to have remained in Nantasket Road, until the crew were, in a great measure, recovered from their intoxication, before he sailed on the voyage. And, I desire to say, that it may be a matter of great doubt, whether, if the master sets sail on a voyage with a crew in such a state of intoxication as disables them, at the time, from the proper performance of the ship's duty, and any disaster arises therefrom, any loss from that disaster would be recoverable from the underwriters under our common policies of insurance. The ship, under such circumstances, could scarcely be deemed, in the sense of the law, seaworthy for the voyage.

In respect to the right of the mate and other officers of the ship to inflict punishment on the seamen, when the master is on board, and at hand, it can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal or flagrant misbehavior on the part of the seamen, or to compel obedience to orders or other duties, which require prompt and instant action and interference on the part of the officers, and admit of no delay. If the circumstances are not urgent and imperative, it is the duty of the mate and other officers to consult the master as to the infliction of punishment; for he, being in the command of the ship, is alone ordinarily entrusted with the regulation of the ship's discipline; and no other person has any right to inflict punishment without his express or implied sanction thereof. Cases indeed, may, and do often arise, where instant obedience to the orders of the mate is necessary; such as orders to take in sail in a sudden squall, or to cut away the rigging or spars, or to go aloft on a sudden and emergent duty, where the mate may instantly enforce obedience, by the application of positive force, and indeed of all the force required to produce prompt obedience. But, then, every such case is justifiable only from necessity, and the force so used is not so much a punishment, as it is a means of compelling the performance of a pressing duty, admitting of no delay. One question, therefore, in the present case, is, whether any such necessity did exist, which either justified or required so harsh and severe a punishment. I must confess, that I have great difficulty in saying, that it is clearly made out by the evidence, and unless it is, the verdict of the jury ought to be against the defendant.

It is certainly true in this case, that the conduct of Coombs (the seaman) was of a grossly mutinous and improper character. The

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master, in his testimony, states, that when Coombs followed him on deck, he (the master) seized a handspike, not, (as he asserts,) with intent to strike Coombs, but to intimidate him. Coombs immediately struck him, (the master) which was a most unjustifiable act, unless done in necessary self-defence, in order to repel an attack meditated by the master with the handspike, a weapon of great and dangerous power. The master says, that he did not return the blow, but put down the handspike; and immediately the defendant (the mate) came and took hold of Coombs. Coombs then struck the defendant, and gave him a black eye; upon which the defendant became greatly excited; and said; "I am not here to be pounded; give me my cutlass;" and immediately went into a house on the deck, at about thirty or forty feet distance, and got his cutlass, and came back and struck Coombs two or three blows with the back of the cutlass. Coombs was at that time holding up his hands, and making passes at the mate. After this the mate and Coombs closed. The master did not see the blows struck by the mate with the edge of the cutlass; nor did he see Coombs take hold of the mate. Such is the substance of the master's testimony upon this point. He does not pretend, that he was under any immediate fear of other blows being struck upon himself by Coombs; nor did he in any manner authorize or require the interference of the mate in his defence. But that interference was a sudden impulse and voluntary act of the mate without any call for his aid.

From the other evidence in the case, it is abundantly clear, that the blows inflicted by the mate upon Coombs, with the edge of the cutlass, were (as has been already suggested) exceedingly severe, and violent. Coombs's right hand was (as the physicians state) half cut off, the edge of the cutlass having cut directly through the bones of the wrist, and divided the joint to the external muscles. Both of the arteries were cut off; and the wound bled profusely. The fleshy part of the left hand also had a deep gash cut across it; and the left thumb also was severely cut. There were, then, three large wounds; and it is as yet uncertain, whether an amputation of the right hand may not become necessary. The physicians also testify, that the wounds could not, in their judgment, have occurred by an attempt merely to ward off blows.

There is a great deal of other testimony in the case by several of the crew, to establish, that Coombs did not attempt to strike the mate after he got the cutlass; but merely to defend himself; that he put up his hands to ward off the blows of the mate; and that the mate struck Coombs three times with the edge of the cutlass. On the other side, the second mate testifies, that Coombs struck the captain more than one blow, and that when the mate came with his cutlass, Coombs ran towards him, and the latter retreated five or six feet; that a scuffle then ensued; that he (the second mate) saw none of the blows struck with the cutlass; but he saw Coombs immediately afterwards bleeding. As soon as the affray was over, the defendant (the mate)

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helped bind up the wounds of Coombs. The character of the defendant, for general humanity and moderation, is also testified to in a favorable manner.

It is certainly difficult to reconcile the testimony of the second mate with that of the master. But the latter stands strongly confirmed by the testimony of the rest of the crew, as well as by that of the pilot, as far as he saw the transactions, and has spoken to the facts. It will be for the jury, however, to judge of the credibility of the witnesses, and to compare and weigh their testimony.

But, under all the circumstances, it appears to me, that the burthen of proof is upon the defendant to establish, by clear and determinate evidence, that the wounds thus inflicted upon Coombs, (of the nature and full extent of which there is no controversy,) were inflicted by the mate in justifiable self-defence, or on an occasion of some real or supposed urgent necessity, admitting of no delay, and indispensable to the ship's service, such as I have already adverted to. Has such a case been made out? If it has not been made out beyond any reasonable doubt, then the defendant ought to be pronounced guilty of the charge in the indictment. If it has been, then he ought to be acquitted. It will not be sufficient for the defendant to prove, that he had a strong cause of provocation, or that Coombs was acting in an unjustifiable manner, or was guilty of gross misconduct. He must go farther, and show, that the acts done by himself were absolutely or apparently required by the pressing exigencies of the occasion, and that in their character and degree there was no excess beyond these exigencies. Seamen are not to be treated like brutes, simply because they misbehave themselves; neither has any officer of a ship a right to indulge his own passions or resentments by inflicting upon them cruel, or harsh, or vindictive punishments. If he does, he is amenable to the justice of his country for his misconduct. Undoubtedly, the mate, upon this occasion, acted under strong excitements: but he was bound by his duty to circumspection and moderation; and, indeed, he had no right, (as has been already intimated) while the master was present, to inflict any punishment upon the crew without his consent, unless there was some imperious necessity, which required instant action, and justified the use of the cutlass to the full extent and degree, in which it was used.

The learned counsel for the defendant has asked the court to direct the jury, that the officers of the ship are clothed, not merely with a civil, but with a military power over the seamen on board. In my judgment, that is not the true relation of the parties. The authority to compel obedience and to inflict punishment is, indeed, of a summary character, but in no just sense of a military character. It is entirely civil; and far more resembles the authority of a parent over his children, or rather that of a master over his servant or apprentice, than that of a commander over his soldiers. Properly speaking, however, the authority of the officers over the seamen of a ship is of a pecu-

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liar character, and drawn from the usages, and customs and necessities of the maritime naval service, and founded upon principles applicable to that relation, which is full of difficulties and perils, and requires extraordinary restraints, and extraordinary discipline, and extraordinary promptitude and obedience to orders.

It has been also suggested, that the crew were in a state of mutiny; and that the immediate interference of the mate was necessary to suppress it. But that does not seem to be made out by the evidence; for there is no proof of any general disobedience by all the crew, or of any general combination and coöperation with each other to resist orders, or indeed of anything but of mere tardiness and reluctance to go to work, probably in some measure superinduced by intoxication. Nor am I able to perceive in the evidence, if believed, any distinct proofs, that the wounds were accidental or unintentional. On the contrary, all the witnesses, who speak directly to the point of the manner and circumstances, under which the wounds were inflicted, treat them as voluntary acts, and as not accidental, or required in self-defence, or from any real or apparent necessity. However, this is a matter of fact, upon which the jury will exercise their own sound judgments in deciding upon the credibility of the evidence, and the conclusion, to which it ought to lead them.

Verdict for the defendant — not guilty.

Supreme Court of Pennsylvania, September Term, 1841.

Loury and others *v.* Hale and others.

Chattels delivered to the plaintiff after a claim of property by the defendant in a replevin issued out of the supreme court of New York, cannot be counter-replevied in Pennsylvania in the prior replevin.

The record of such prior replevin may be given in evidence on the plea of payment, without having been specifically pleaded.

This was an action of replevin, in the common pleas of Warren county, for ninety thousand feet of lumber, valued at nine thousand dollars, which had come from the state of New York by the Conewango river, on its way to a market below. The defendants pleaded property in themselves, and gave in evidence the record of an earlier but pending replevin, issued out of the supreme court of New York, at the suit of Loury, one of the defendants in error, and two others; all being inhabitants of New York; on which the sheriff of Chatauque county had delivered the lumber to the plaintiff, after an unsuccessful claim of property by the defendants, while the rafts were descending the part of the river which is in that state. As soon as they were brought into Pennsylvania, the present replevin was brought to

regain the possession; and the parties claimed respectively under the parties to the replevin in New York. Upon a prayer for specific direction, the judge charged that an adjudication of the question of property in New York, would have been conclusive; but that the mere pendency of an earlier replevin in that state was not. The jury found a verdict for the plaintiffs; and the point was argued on a writ of error to this court by

Galbraith and *Marvin* for the plaintiffs in error, and by

Pearson and *Hazeltine* for the defendants.

Gibson C. J. delivered the opinion of court. The case of *Johnson* v. *Hunt*, (23 Wendell, 87) so confidently relied upon, does not touch the point before us. It rules no more than that an insolvent debtor's voluntary assignment of property abroad, is not to be affected by process of attachment in the nature of a commission of bankruptcy which operates, as it must, only upon his property at home. The assignment in that case was not by operation of the law of Pennsylvania where the property happened to be at the time. The absconding debtor assigned it to discharge a debt for which he was arrested in execution; and the payment was, in contemplation of law, a voluntary one. The property, being beyond the confines of the state, was neither attached nor subject to attachment, and might well be dealt with as if the owner of it were domiciled at the place of the actual situs. The court, therefore, very properly disregard any supposed lien upon it by the attachment in New York; and held the transfer good by the law of Pennsylvania. The principle of that case is much the same as the principle of *Mulliken* v. *Aughenbaugh*, (1 Pennsylvania R. 117) in which an inhabitant of Maryland was not allowed to attach a debt in Pennsylvania, which the creditor in Maryland had assigned to obtain a discharge from arrest under the insolvent law of that state; and the same prohibition would have been applied to an attachment by an inhabitant of Pennsylvania, because the proceeding to insolvency, unlike a commission of bankruptcy, which is *in invitum*, was sought by the debtor as a remedy, of which a general assignment of his effects was the price; and because the voluntary transfer of a chattel, if not forbidden in other respects by the law at the place of the situs, is to be as much regarded there or elsewhere, as it would be at the place of the domicil. The scope of the American cases is that an involuntary transfer by process abroad of effects within our jurisdiction at the time, operates against all interests but those of our own citizens; and in *Abraham* v. *Plestoro*, (3 Wendell, 538) the principle of comity was so far narrowed as to allow the court to hold such an assignment void under a British commission of bankruptcy, so as to let in a British subject not domiciled here. This constitutes the difference between the American measure of comity and that of the British, which allows a foreign assignment to operate on effects in England, whether it were voluntary or by operation of law.

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But movable property, whose actual situs is in the country of the owner's domicil, is so far subject to the law in force there, that no foreign tribunal will question the validity of an involuntary transfer of it; nor was this principle doubted even in ***Abraham* v. *Plestoro***, for the senators who overruled the chancellor and law judges, seem to have thought the property was beyond the reach of the British bankrupt laws at the time material to the question. Indeed, without that, the case would not have a foot to stand on; and even conceding the fact, it is not easy to understand how the principles of comity could be dispensed with in favor of those who had no claim to the court's protection. As a precedent set by the highest judicial authority in New York, the decision will rule the law in that state; but elsewhere the dissenting opinion of Mr. Justice Marcy will probably command more respect. To sustain a title under a foreign judgment, it is sufficient that the court had jurisdiction of the cause and the parties, whether the proceeding were *in personam* or *in rem;* and it cannot be said, in regard to the latter, that there is want of jurisdiction where the thing is subject to the law of the forum, and all men are parties to the proceeding. In the case before us, not only the thing but the litigants were subject to the jurisdiction at the *locus contestationis litis*. It is emphatically remarked by Mr. Justice Story, that the law protects nothing which it has not a right to regulate; and therefore it is, that he who sends his property abroad submits it before hand to all the regulations of the country to which it is sent. The law of the actual situs, therefore, not only defends the ownership of movable property, but also prescribes the mode of its transfer; and I take it that neither a British nor an American creditor could contest the validity of an assignment under a British commission, if the property had been in England at the time of the assignment, or perhaps even at the act of bankruptcy. That such assignees are allowed to maintain an action in our courts on their foreign title for any purpose, shows that foreign bankrupt laws are allowed to have an operation on property here, at least to some extent; and the proper limitation of it would be to prevent them from withdrawing the effects of the bankrupt from our jurisdiction before our own citizens, or perhaps domiciled aliens, were served. In all beside, I see no impropriety in suffering those laws to operate here on the rights and property of those who would be bound by them at home.

Cannot, then, a defendant in replevin here, avail himself of a delivery to him, pursuant to a writ of replevin issued out of a court of competent jurisdiction in a neighboring state, when not only the litigants but the thing delivered, were subject to the laws at the place of delivery? The pendency of a prior suit in a foreign county cannot be pleaded in abatement of a suit for the same cause; and it has been held by the supreme court of New York that the states of the federal union stand in the relation of foreign states in regard to municipal matters not regulated by the federal constitution, or acts of congress pursuant to it.

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In some particular aspects they certainly do; and conceding, for the moment, that they do so in all, it follows not that the pendency of a proceeding *in rem* may not be so pleaded, and the same thing may, for the like reason, be said of what, in the civil law, are called mixed actions, or those in which not only performance of a personal obligation, but a specific thing, is demanded. Such, in all respects, is the action of replevin, in which not only damages for the taking, but the thing itself, is sought to be recovered. But though there was no attempt in this case to plead the New York replevin in abatement, it was given in evidence; and does it not support the plea in bar? It is necessary not only that the plaintiff in replevin, have property, general or special, in the thing taken, but also an immediate right to possess it. (2 Saund. Pl. and Ev. 760.) For that reason it was said in *Templeman* v. *Case*, (10 Mad. 25) that a plaintiff cannot maintain replevin for the goods of a stranger taken from his custody, though it was conceded that he might maintain trover, or trespass *de bonis asportatis*, and for the same reason it was said by Chief Justice Parsons, in *Ilsley* v. *Stubbs*, (5 Mass. R. 283) that goods attached by an original writ as a security for the judgment, cannot be replevied. After the execution of the first replevin, then, who had a right to possess the thing by the laws of New York? Unquestionably not the defendant from whom it was taken by the authority of the same law, and committed to the custody of the plaintiff to abide the event of the suit. It is easy to see, from *Morris* v. *De Witt*, (5 Wendell, 71) what would have been the fate of a counter-replevin in that state; and if its court had such jurisdiction of the thing as warranted a particular disposition of it, its authority must be respected here: consequently the pinch of the case is to determine whether evidence of the prior delivery supports the plea of property, or whether the fact ought to have been pleaded specifically.

In that state, the action of replevin is regulated by a statute which, however, follows the leading principles of the action as it exists at the common law. Though the inquisition of a sheriff's jury is not evidence of the fact of property in the trial of the issue in court, it seems that a plaintiff who has received the property from the sheriff, has it in his power effectively to make it his own, as the *capias in withernam* is abolished. The writ *de retorno habendo* is retained; yet where the plaintiff carries the property out of the county, the writ of return cannot reach it, and the defendant is necessarily thrown upon his verdict for the value, or an action on the replevin bond. It is unnecessary to contend that the title becomes absolute in form by the eloignment, for it is enough that the ownership is taken to be in him till his title is disproved by the event of the issue. But the property has been delivered to him as his own on the basis, real or supposed, that it had been wrongfully taken from him; and as possession is *primâ facie* evidence of title, delivery to him after a claim of property, which admits the taking, must be so too: it settles a

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right in him to treat it as his own till it be adjudged to belong to another. The plea of *non cepit* admits the property to be in the plaintiff; and where the defendant claims it, his pretension is as fully rebutted by an inquisition, for the present, as if it were waived in the first instance. Such, I take it, would be the state of the case in New York; for the plaintiff in error would surely have been at liberty to maintain an action there against a stranger for an injury to the property during the pendency of the replevin; and *a fortiori* against the defendant, bound as he would be to respect the sheriff's delivery of it with or without an inquisition.

If such would be the plaintiff's relation to the property in that state, it must necessarily be the same here. The article might be a perishable one, and to preserve it, might require it to be consumed or sent to a market, and it would be insufferably inconvenient if the defendant in the replevin could follow it into the hands of a purchaser abroad: yet the purchaser of a chattel takes no more than the title of his vendor, except by sale in market overt, of which we know nothing in practice. But other inconveniences might ensue. Starting, as this lumber did, for a market, it might, on the principle of the plaintiffs' pretension, change masters in every state through which it should have to pass, and thus leave a lawsuit behind it at every stage, not only in New York, but in Pennsylvania, Virginia, Ohio, Kentucky, Tennessee, Illinois, Indiana, Mississippi, and Louisiana. Assuredly such a thing cannot be. The bare statement of it is decisive against it. Whatever be the rule between states which are bound to each other by no political ties, every member of the American union is bound, for its own sake, to adopt a rule of intercommunity which will avoid a consequence so disastrous. That a state is bound to protect the interests of its own citizens in the first place, is undeniable; but perhaps it best protects them when it acts on the basis of a liberal and extended reciprocity.

Judgment reversed.

District Court of the United States, Maine, December Term, 1841, *at Portland.*

The Waldo.

The master of a vessel is bound to secure the cargo under deck. If he carries goods on deck they are at his own risk, and if they are lost or damaged, he cannot protect himself under the usual exception of the dangers of the seas,—at least, unless the accident by which they are lost, would have been equally fatal if they had been under deck.

A shipper, whose goods are lost or damaged by the fault or neglect of the master, has for his damages a remedy against the owners, and a lien on the ship.

But it is only those acts of the master which are within the scope of his duty, as master, that bind the owners, and create a lien on the vessel.

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If the shipper consign his goods to the master for sale, the master in all that relates to the safe stowage and transportation of the goods, acts in his quality as master. He is the agent of the owners, and his acts bind the owners of the ship.

But in what relates to the sale and disposition of the goods after they are carried to the port of destination, he acts as the agent of the shipper, and neither the owners nor the ship are responsible.

This was a libel *in rem*, brought for the non-performance of a contract entered into with the master, by a bill of lading. The libellant shipped at Bath, on board the schooner Waldo, bound for Atakapas, in Louisiana, one hundred and forty-four barrels of potatoes, to be delivered at that port, at the freight of fifty cents a barrel, and consigned to T. H. Merrill, the master, who signed the bill of lading. It was in the common form, and was dated November 23, 1840. The potatoes were stowed on deck, and well secured there, and covered with boards. About the time they were laden the master was taken sick, and was unable to go the voyage, and after the vessel was prepared for sea, she was delayed some days before another master was engaged. She sailed December 2, under the command of W. C. Wyman, the new master. A few days after leaving port, they met heavy gales. The sea run high, and broke over the vessel, and wet every thing that was exposed to the water on deck. When about ten days out, the weather having become more moderate, the potatoes were partially overhauled, and found to be wet, and many of them rotten. On their arrival at Key West there was a more thorough examination; the rotten potatoes were separated from the sound and thrown away, and forty barrels of sound ones were repacked. With these, and forty barrels more, which had not been examined, they sailed for Atakapas. When they arrived there, it was found that all the potatoes were rotten and spoiled, except fifteen barrels, which were sold at two dollars a barrel, and pay taken in molasses. On the return of the vessel, no account of sales was rendered to the shippers, and this libel was brought against the vessel for the non-performance of a contract.

Howard and *Sewall* for the libellant.

Groton for the respondents.

Ware J. In a contract by a bill of lading for the transportation of merchandise, the master and owners of a vessel take upon themselves the responsibilities of common carriers. They can excuse themselves for the non-delivery of the goods, only by showing that it was prevented by some fatal accident, against which human prudence could not provide, — by an act of the public enemy, or by some event expressly excepted in the instrument itself. (3 Kent's Comm. 216.) The master is bound to take the greatest care in the stowage of the goods, so that they shall not be liable to injury by the motion or leakage of the vessel, or exposed to damage by the weather. (Abbot on Shipping, 224.) In respect both to the lading and carriage of the

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goods, he is chargeable with the most exact diligence. In all cases he is bound to have the cargo safely secured under deck, unless he is authorized by some local or particular voyage, or by the consent of the shipper to do otherwise. In all other cases, if he carries goods on deck, he does it at his own risk, and he becomes an insurer against the usual perils excepted by the bill of lading.

If the goods of the shipper are lost, or receive any damage through the fault or neglect of the master or of the crew, his remedy is not confined to a personal action against the master or owners. The ship in specie stands as his security, and is, by the maritime law, hypothecated to him for his indemnity. But then it is not every wrongful act of the person, who acts as master, that will bind the owners or will operate an hypothecation of the ship. It is only those, which fall within the legitimate range of his authority, as master, that have this effect. While acting within these limits he binds the owners, because he is their authorized agent, and he binds the ship directly, because the policy of the maritime law has given to the shipper this additional security. The duties of the master as carrier extend to all that relates to the lading, transportation and delivery of the goods. But when they are carried to the place of destination and delivered, his duties and responsibilities as carrier terminate. His functions as master are then accomplished.

If the shipper consigns his goods to the master for sale and returns, in proceeding to dispose of them, he does not act under any authority derived from his appointment as master, but in an entirely new character, that of supercargo or factor. And his duties and liabilities under these two characters are as distinct and independent, as they would be if the trusts were confided to different persons. (Story's Agency, § 36. Livermore on the Law of Agent and Principal, 2d vol. 215.) In all that relates to the transportation of the goods and navigation of the ship, he acts as master, and all that he does, in relation to the disposition of the merchandise, is referred to his character as factor. In these characters he is the agent of different principals; in the first he is the agent of the ship owners and his acts are imputable to them, in the second he is a stranger to them, and they are no more responsible for his acts, than they would be for those of a third person, to whom the shipper should consign his goods. In the transaction of that business he is the agent of the shipper.

In the present case the goods of the libellants were consigned to the master, Capt. Merrill. It is true that he was prevented from going the voyage by sickness; but that portion of the potatoes, which arrived at the port of destination in good condition, were sold by the new master not by virtue of his general authority as master of the vessel, but under the authority of that consignment. In the sale therefore, he acted as the agent of the libellants and not of the ship owners. It is clear then upon principle that the owners cannot be chargeable for so many of the potatoes as were sold. With respect to them, all

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was done, which the master had contracted to do, as master. They were carried to the port of destination and delivered; that is, the master had transported them as the agent of the ship owners and he sold them as the agent of the shippers. The precise question which arises in this part of the case, was presented in the case of *Williams* v. *Nichols*, (13 Wendell R. 58), and it was decided, on the grounds that have been stated, that when goods are consigned to the master for sale, and he sells them, and neglects to account for the proceeds, no action will lie against the ship owners. It is an affair exclusively between the shipper and the master, to which they are strangers.

If no action will lie against the owners *in personam* for an equally good reason, none will lie *in rem* against the vessel. It is only those acts of the master which come within the scope of his duty as master, that bind the vessel. When a new character is superinduced on that of master, by his being made by the shippers the consignee of the cargo, his responsibilities in this capacity are entirely distinct from his obligations as master. In the latter case he is a common carrier, in the former, a factor. And for any want of fidelity in that trust, his employers have the same remedies against him, that they would have against any other person, and no other. As consignee he neither represents the vessel nor its owners.

Perhaps, when by a known custom of a particular trade, the master is intrusted with the disposal of the cargo, a different rule may apply. This was the case in *Kemp* v. *Coughtry*, (11 Johns. R. 107). That arose in the trade between New York and Albany. It was proved to be the usual course of the trade to send goods with orders to the master to sell either for cash or on credit, and for him to return the proceeds to the shipper. No commissions were allowed the master for this service, nor to the owners, beyond what was involved in the freight. It was decided when the master had sold the goods, and failed to pay over the proceeds to the shipper, that the owners of the vessel were liable. The liability in that case was not founded on the general maritime law, but arose out of the particular custom. Under that custom the ship owners undertook to act in the character of factors, as well as carriers, and entrusting the whole business to the master as their servant, they would be answerable for him personally in one character or the other. It is another question, whether for his defaults in the character of factor, the shippers would have a remedy against the vessel *in rem*, which it is unnecessary to consider in the present case, as in this trade no such custom is proved. The case of *Emery* v. *Hersey*, (4 Greenleaf, 407), turned upon the same principles, and was decided upon the ground of a similar custom, prevailing in the trade between Saco and Newburyport. See also, *Emerigon Contrats a la Grosse*, ch. 4, sect. 11, and *Des Assurances*, ch. 12, sect. 3.

As to that portion of the potatoes which perished on the passage, the evidence leaves no room for doubt that the loss arose from the damage they received by exposure on deck. They appear to have

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been as faithfully secured in that place as they could be, but nothing could protect them from wet, when the sea was breaking over the vessel. It appears probable also, that they were injured by the frost. The double injury of frost and wet, will, in a short time, destroy so perishable an article as the potatoe. And it was accordingly found, when they were overhauled at Key West, that out of one hundred and four barrels examined, only forty remained sound and fit for use; and when they arrived at Atakapas there were but fifteen sound and merchantable barrels left out of the whole one hundred and forty-four. They were undoubtedly lost by sea damage, and although the damages of the seas are excepted by the bill of lading, the master, by carrying the goods on deck, waives the exemption in his favor, and takes the responsibilities of sea damage upon himself; at least of any damage that would not have happened to them, if they had been secured under deck. It was the right of the shipper to have his goods stowed under deck, and it was the fault of the master that they were placed above. And it is a general rule of law, that a party will render himself liable for loss or damage, to which he would not usually be subject, by the law of the contract, when this loss has been preceded by some fault on his part, without which it would not have happened. *Toullier Droit Civile*, vol. 6, No. 227. *Pothier Des Obligations*, No. 142. Upon general principles, therefore, there is no room for questioning the liability of the master, and through him that of the vessel for the potatoes that were lost, unless the respondent can bring the case within some special exception to the general rule.

The defence set up in this case claims the benefit of such an exemption. It is contended that the goods were carried on deck with the consent of the shippers. This does not appear by the bill of lading. That is what is called a clean bill; that is, it is silent as to the mode of stowing the goods, and contains no exceptions to the master's liability, but the usual one of the dangers of the seas. The usual and only safe mode of carrying goods is under deck, and when the contract is entered into, it is presumed to be the intention of the parties, that the goods shall be stowed and carried in the usual way, unless there is a special agreement to the contrary. This is a condition that is silently understood by the parties, and implied by the law. A bill of lading therefore imports, unless the contrary appears on its face, that the goods are to be safely secured under deck. The written contract, therefore, not only fails to show any such consent, but impliedly negatives it. (3 Kent Com. 206; 3 Sumner R. 405; Curtis's Rights and Duties of Seamen, 212.)

The respondents then proposed to prove this consent by parol evidence. The general rule is that parol evidence cannot be received to contradict, vary or control, the effect of a written instrument. It is true that the bill of lading does not say, in express terms, that the goods shall be stowed under deck. But this is a condition tacitly annexed to the contract by operation of law; and it is equally binding

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on the master, and the shipper is equally entitled to its benefit as though it was stated in express terms. The parol evidence is offered then to control the legal operation of the bill of lading, and it is as inadmissible as though it were to contradict its words.

But admitting this rule of evidence, it is contended that the bill of lading was executed under such circumstances that it is not legally binding upon the master as a written contract. The testimony is that when he signed it, he was confined to his bed by sickness, and was so feeble as to be unable to sit up, but was supported by others while he wrote his name; and that he had been delirious before and was after it was signed. The papers were brought to his house filled up, and ready for his signature. His friends objected to his being called upon to execute them on account of his sickness, but when he was informed that the shippers were in the house and of the purpose for which they had come, he said it was proper that the papers should be signed by him, and they were accordingly brought to him and signed. It is not pretended that he was in a state of mental alienation at that time. On the contrary his physician, who was present, states that he was in the possession of his faculties, and that he perfectly understood the nature of the business he was doing. The agreement had been made with the shippers before he was taken sick, and he had himself directed the manner in which the goods should be stowed. It appears that at the time when he executed the papers, he recollected and understood what had been done.

Although upon the whole evidence, it does not appear that the master was laboring under such a degree of mental debility, as to be legally incompetent to an act of this kind, yet it is true that he was in a state of extreme weakness, with the powers of his mind, probably enfeebled by disease. And if there was any thing in the evidence which looked like a design on the part of the shippers to take advantage of his condition and draw him into different engagements from what had been understood and intended, I have no question but it would be the right of the court and I think its duty, to look into the matter with great care. A court of admiralty is not in such cases governed by the narrow doctrines of the common law, which will not allow a man to plead his own disability, or in the ungracious language of that law, to stultify himself. (Coke Litt. 237, a, b. 2 Black. Com. 291. 1 Story's Equity, § 225.) But the only circumstance that has the slightest tendency to awaken such a suspicion is, that the shippers brought the bill of lading ready filled up, and this alone, when the state of the master's health is considered, would be a very narrow foundation for supporting a charge of fraud. But still, under the circumstances of the case, the court may have a right to look into the evidence, as it will probably be most satisfactory to the parties that it should. It seems hardly proper for a court, which is by its constitution required to decide between parties *ex æquo et bono* upon the most liberal principles of equity, to close its ears against evidence

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on technical objections, if it be doubtful whether the objection be fairly applicable to the facts; and being less restrained in its course of proceedings by technical and arbitrary rules, it is perhaps its habit to be less rigorous in upholding such objections.

I have, therefore, looked into the whole evidence, to see if there is any satisfactory grounds of belief that there was any agreement or understanding between the parties that the goods should be carried on deck. In the first place it is to be observed that the presumption, in every contract of affreightment is, that the goods shall be secured under deck. It is for the master, who would exempt himself from the risks of a deck passage, to remove that presumption. The ordinary and proper evidence would be a memorandum to that effect on the face of the bill of lading. But in the present case, the only evidence which has any tendency to prove the fact is the testimony of the mate and one of the crew. The mate says that the libellants were on board the vessel on the 23d of November, after the goods were laden; that they were then on deck carefully covered with two thicknesses of boards on the top and at the sides, and as well secured from the weather as they could be in that situation, and that the libellants expressed themselves satisfied with the manner in which they were secured. On a further examination he said that he did not understand them as expressing themselves satisfied with the fact that the potatoes were on deck, but only that he had done his duty in securing them well in that place. The other witness said merely that they knew that the potatoes were on deck, and made no objection to it. It appears also that when the bill of lading was executed, no complaint was made to the master on this subject. If this evidence stood alone, it might justify the inference that the shippers assented to their goods going on deck, and in that case the risk of a deck passage would be shifted from the master to them. But although there is no testimony directly contradicting it, there is evidence leading to an opposite conclusion. The contract of affreightment was made several days before the goods were actually received and laden, and the price of the freight settled. The potatoes were taken by the master in his boats at Bath and carried to Phipsburg, where the vessel lay, several miles from the residence of the shippers. When they went to get their bill of lading the vessel was completely loaded and ready for sea, and it was evident that the goods must go as they were or not go at all. Now there is no evidence that when the agreement was made, any thing was said of the goods being carried on deck, or that any thing was said between the master and shippers at any subsequent time. The bill of lading was executed in pursuance of this previous agreement, and no objection to it was made by the master. And if it be said that the state of the master's health will account for his not giving particular attention to the form of the bill of lading, it will equally account for the shippers not making the lading on deck a matter of discussion at that time. Now it is very material to be remarked that the full under deck

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freight was agreed to be paid and was secured by the bill of lading. Certainly it is not easily to be believed that any prudent merchant would consent to take upon himself all the risks of a deck passage after agreeing to pay full freight. The most then that can be said of the parol evidence is, that part of it leads to the inference that the shippers may have consented that their goods should go on deck, and another part of quite as much stringency leads to an opposite conclusion. Indeed it seems to me that it would be putting the case quite as favorably to the master as the facts would warrant if it stood on this testimony alone, to say that it was a balanced case. And then the common presumption, which arises in the absence of any special agreement, that the goods are to be secured and carried in the usual manner, turns the scale in favor of the shipper; because this presumption must prevail until it is removed by the master.

There can be no doubt from the evidence that the potatoes were destroyed by being wet by the sea breaking over the deck of the vessel, and in part probably by being touched by frost. The bill of lading contains the usual exceptions of the master's liability for the dangers of the seas. But, as has been already observed, this will not excuse him if he carries the goods on deck, unless the calamity by which they are lost would have been equally fatal if they had been properly secured below deck. But if this had been done it is plain that they would have gone safely, as was the case with the rest of the cargo. Some evidence was introduced to show that potatoes are as liable to rot under as above deck. That may be the case if the vessel has uniformly moderate and dry weather, but it cannot be if they are exposed, as these were, to wet and frost. It is to secure goods from such dangers as well as for other reasons that the master is required to have the cargo put under deck. If, after filling the hold, he chooses to encumber his deck with goods in order to increase the amount of his freight, he voluntarily assumes the responsibility upon himself. The additional expected profits of the voyage constitute the premium for the risk of the deck load.

The damages which the libellants have sustained, is the value of the potatoes which were lost at the port of delivery, deducting the freight. The testimony of the mate is, that the potatoes which arrived sound were sold for two dollars a barrel, and one hundred and twenty-nine barrels, the amount that perished on the voyage, after deductiug fifty cents for freight, will amount to $193.50.

Supreme Judicial Court, Massachusetts, October Term, 1841, *at Worcester.*

Burden *v.* Thayer.

Rent in arrear and due before executing a deed by the lessor of the reversion, is a chose in action, and does not pass by such deed to the grantee of the reversion.

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A mortgagee of an estate under a lease made by the mortgagor, may demand and recover any rent falling due after the date of his mortgage.

But if the lessee pays the lessor before any demand made or notice given by the mortgagee, the mortgagee cannot recover it of such lessee.

This was an action of debt to recover rent of certain leased premises, for one year, ending April 1, 1837, under a lease made some years prior to that for the term of ten years. The plaintiff claimed as assignee of the lessor, under a mortgage deed, dated April 5, 1837, conveying the leased premises to him, conditioned to pay a certain sum in one year from date. The mortgage deed also contained a clause, that, if the condition should be broken, all rents, dues and demands should be paid to the mortgagee, who was authorized to receive the same, and appropriate them to the payment of the mortgage. The plaintiff demanded the rents of the defendants after the condition in the mortgage was broken and before the commencement of the suit. who paid him that which fell due in 1838 and 1839, but refused to pay the amount that fell due April 1, 1837.

Barton for the plaintiff.

Washburn for defendants.

Shaw C. J. delivered the opinion of the court. Two questions have been made here. 1. Whether the assignment to the plaintiff took effect at all until after a breach of condition of the mortgage, or even until after a demand made by the plaintiff as mortgagee which may be regarded as tantamount to taking possession to foreclose. 2. Whether, if it did take effect as an assignment, it authorized the plaintiff to maintain this action in his own name. The first question it becomes unimportant to settle, because the court are of opinion that the plaintiff cannot recover on the second ground above stated. The rent sued for had become due five days before the assignment was made. It had thus become a chose in action and would not pass with the estate so that the assignee of the reversion could recover it in his own name. The case of *Moss* v. *Gallimore*, (Doug. 279), has been cited by the plaintiff's counsel, but in that case the mortgage was made years before the rent accrued, while in the present case it was due before the mortgage was executed.

Upon the first point, the general principle is well settled, that a mortgagee in fee has a right to enter upon the estate and take the rents and profits, and for those he will be accountable. If the estate, when mortgaged, is under a lease, the mortgagee cannot actually enter upon the estate, but he may give the lessor notice and may demand the rent of him, and that is all he can do towards making an entry upon the premises. He cannot, however, have a right to any rent until he gives the lessee notice, and if in the meantime the lessee shall have paid any rent that shall have fallen due, to the mortgagor, the mortgagee cannot recover it again of the lessee. Had the rent, therefore, for

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1838 been the subject of controversy, it would have been necessary to inquire into the nature of the notice given by the plaintiff during that year to the defendants, for if they had not paid the lessor, the plaintiff, by giving notice, could have recovered the rent of that year. As the rent for 1837 only is in controversy, it becomes unnecessary to inquire into the notice given in 1838. And, therefore, judgment must be for the defendant.

Dresser Manufacturing Company *v.* Waterston and others.

What amounts to a conditional contract of sale, and the rights of strangers arising under it.

In trover for a quantity of printed cloths which had been conditionally sold in a brown state to the printers, and by them printed and wrongfully consigned to the defendants who made advances upon them, the plaintiffs were held entitled to recover only the value of the goods in a brown state, the taking not having been tortious.

This was trover for a certain number of yards of printing cloths, part of a larger quantity which were delivered to the Home Print Works, and by them consigned to different individuals to sell — the parcel in controversy having been received by the defendants on consignment, who advanced moneys upon them as commission merchants. The goods were in the defendants' hands in the form of printed chintses and furnitures, and were demanded by the plaintiffs before the commencement of this action. It appeared, that the goods were originally the plaintiffs', who consigned them, in a brown state, to S. and M., their selling agents, to sell on commission. S. and M. employed G., a merchandise broker, who made a contract with the agent of the Home Print Works, the substance of which he entered in a memorandum book, kept by himself, as follows: "Dec. 4, sold R. Sibly, agent of Home Printing Co., 3 to 5000 P's. printing cloths, at five and one fourth cents, six months for Hoyt and Bogart's acceptance, two thousand dollars by 25th inst. and balance in sixty days, the goods to be consigned in Sayles and Meriam's name, and insured by R. Sibly, agent, for their account, and payable to them in case of loss, and when paid for by said acceptance, a bill is to be given said Sibly, agent for the purchase." Signed E. Gerry. Said Gerry testified, that it was understood the property in the goods was not to pass to the Print Works until paid for.

Other testimony was introduced upon the subject of the contract, but it did not materially vary the terms of it from those contained in the memorandum above recited. The goods were delivered to the Print Works where they were printed, but no part of the purchase money was ever paid to the plaintiffs.

Washburn for the plaintiffs.

Allen and *Watts* for the defendants.

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Wilde J. delivered the opinion of the court. After reciting the memorandum made by Gerry, and remarking that there was no contradictory evidence as to the contract, he remarked that the court were of opinion that the construction of the contract contended for by the plaintiffs was correct, that it was a conditional sale, and that no property vested in the Print Works. The very stipulation in the contract, to *give a bill when paid for*, shows that payment was regarded as the condition on which the sale was to take effect, although no express condition is mentioned in the memorandum. It is, however, contended that if the sale was conditional, there having been no condition attached to the *delivery*, the condition was waived. And another ground taken is, that upon the Print Works failing to perform the condition, the plaintiffs ought to have reclaimed the property, and having neglected to do so, they must be considered as having waived the condition. The answer to these positions is, that the whole contract, including the delivery, was conditional, nor were the plaintiffs bound to insist upon a punctual performance on the part of the Print Works. The mere giving of time would not amount to a waiver. The cases on this point cited by the defendants' counsel, were those where a delivery of goods was made without the condition being insisted on at the time, and it was held that by neglecting to insist upon this within a reasonable time after such delivery, was a waiver of such condition. This point was considered by the court in *Smith* v. *Dennie*, (6 Pick. 262). The leading principle is the same in all these cases. If cash is to be paid or security given in advance, and this is not insisted on when the property is delivered, the condition will be considered as waived. But that principle does not apply in this case.

The defendants, however, contend that, under the circumstances of the case, the Print Works Company had a right to sell the cloths to a stranger. But the decision of this court in *Barrett* v. *Pritchard*, (2 Pick. 512) is directly opposed to this position. There was nothing in this transaction which would be charged as a fraud upon strangers any more than a loan of the property would be, and the principle "*caveat emptor*" properly applies. Indeed the cases on this point go to charge the party who intrusts another with property, with fraud, where he does some act to mislead the public in regard to the nature of the transaction, but they cannot be extended beyond this limit.

The only question remaining relates to the amount of damages which the plaintiff is entitled to recover. The plaintiff relies upon the principle that he shall recover the value of the property at the time when converted. This principle applies in all cases where the taking is tortious. But in this case the defendants have committed no tort in taking the property, nor is it equitable that they should be responsible for more than the value of the goods in the brown or unprinted state. And the case of *Green* v. *Farmer*, (Bur. 2214) is directly in point.

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Judgment was accordingly rendered in favor of the plaintiff for the value of the cloths in their unprinted state at the time of conversion, and interest.

Superior Court, Connecticut, September, 1841, *at New London.*

VALENTINE AND ANOTHER *v.* KELLEY AND ANOTHER.

If the vendee of goods purchase them with the preconceived design of not paying for them, it is a fraud, and no property passes, although no false representations are made.

THIS was an action for goods obtained by fraud, under color of purchase. The principal facts proved were these; that Kelley, one of the defendants, a trader in Norwich, Connecticut, knowing himself to be insolvent, but concealing it from the public, purchased goods of the plaintiffs, merchants in New York, at various times in the autumn of 1839, particularly on the 19th and 21st of November; that he bought the goods on credit, without, at any time, making any representations whatever concerning his condition or ability to pay; that on the 27th of November, 1839, three or four days after said last purchased goods were received at his store in Norwich, he assigned to the other defendant, Robinson, who is his father-in-law, all the goods in his said store, in satisfaction of an alleged preëxisting debt. Some other testimony was given tending to show a disposition, on the part of Kelley, during this period to make purchases to the full extent of his credit.

G. M. Brown, of Boston, and *Strong*, for the plaintiffs.

Foster and *Brainard* for the defendants.

WILLIAMS C. J., instructed the jury, that if Kelley obtained the goods with the preconceived design not to pay for them, it was a fraud, and no property passed by the transfer; and that the jury were to judge of Kelley's intentions by all the circumstances of the case.

Verdict for the plaintiffs.

Court of Common Pleas, Hamilton, Ohio, November Term, 1841.

SETTZER *v.* FRIEBER.

Where a creditor receives a negotiable note before its maturity, *bonâ fide*, although in payment of a precedent debt, he is not affected by the equities between the original parties.

ASSUMPSIT, on a promissory note, whereof the defendant was maker, and the plaintiff the indorsee. The note was at six months, bearing

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date January 1st, 1840, payable to John Moyer or bearer, and by him indorsed over to the plaintiff, January 14th, 1840. On the trial, the plaintiff's counsel offered the note in evidence, and rested his case.

Riddle and *Roll*, for the defendant, thereupon offered in evidence depositions of divers persons, tending to show, that the consideration of said note, as between the original parties, had entirely failed, — and also the deposition of the original payee, explaining the circumstances under which the paper was negotiated, and showing that it was received by the plaintiff in payment of a precedent debt due him from the indorser.

Groesbeck, for the plaintiff, moved the court to overrule this testimony, claiming that as between the present parties, the original consideration of the paper could not be inquired into — it having been taken in good faith, and before it was due.

The defendant's counsel insisted, that after proving that the note was received by the holder in payment of an antecedent debt, it was competent for him to impeach the original consideration, and that the defendant was thereby let in to all the equities that existed between the original parties. And in support of this position, cited *Rosa* v. *Brotherson*, (10 Wendell, 85) and other New York cases.

In reply, it was contended by the counsel for the plaintiff, that the authorities cited from the New York reports, even if they went to the extent claimed, were contradicted by the general current of English and American cases. That the doctrine maintained by the defendant's counsel would destroy the security which the trading community put in negotiable paper. The general principles of the law merchant, as applicable to the negotiability of paper, and impolicy of such a rule of law, as that which the defendant's counsel sought to establish, were urged with great ability.

Read J. delivered the opinion of the court. The question presented in this case is one of great importance to the mercantile communtiy, and it is not new. The books contain contradictory decisions, and even the case, in the New York Reports, have not escaped the review of their own courts. The statute of Ohio, in reference to negotiable instruments, provides, that when negotiable paper has been taken, after due, the holder has no more right than the original payee, and that the original consideration may be inquired into. When a man takes negotiable paper, *bona fide*, and before due, his rights are not to be affected by the equities which exist between the original parties — although the paper was taken by him in payment of an antecedent debt.

Testimony overruled, and judgment for the plaintiff.

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DIGEST OF AMERICAN CASES.

Selections from 5 Shepley's (17 Maine) Reports.

ACTION OF ASSUMPSIT.

Where the obligor in a bond, conditioned to convey an undivided moiety of a mill on the payment of certain sums of money, has disenabled himself from performing on his part by conveying the land to another, although the obligee may be excused from tendering performance on his part, he cannot maintain an action of assumpsit to recover back the money paid. *Goddard* v. *Mitchell*, 366.

ASSIGNMENT.

1. An order drawn by a creditor upon his debtor in favor of a third person, and accepted, may operate as a valid assignment of the debt, although it be not negotiable, or expressed to be for value received. *Johnson* v. *Thayer*, 401.

2. Where the plaintiff had agreed with his debtor to take a note payable in three months to himself or to T. and afterwards gave an order on the debtor to "let A. (the defendant) have the note as we agreed for the balance due me;" this does not as between them furnish presumptive evidence of an assignment of the demand to the defendant for value. *McNear* v. *Atwood*, 434.

ATTORNEY AT LAW.

1. The attorney of record, in a suit against the maker of a note, has no authority from his employment as attorney, to execute a valid release to an indorser of the same note to render him a competent witness. *York Bank* v. *Appleton*, 55.

2. The attorney of record, acting in a suit, has no power as such to release the liability of a witness to pay a part of the costs of the suit. *Springer* v. *Whipple*, 351.

BILLS AND NOTES.

1. A waiver by an indorser of a note of all right to notice, does not excuse the holder from making a demand upon the maker. *Burnham* v. *Webster*, 50.

2. Where a demand was made by the payee of a note upon the maker at eight o'clock in the morning of the day on which the note became payable, and payment not being then made, a suit was immediately commenced thereon; it was held, that the action was prematurely brought, and could not be maintained. *Lunt* v. *Adams*, 230.

3. A note made payable to a married woman, is in law a note to the husband, and becomes instantly his property; and her indorsement transfers no property in the note. *Savage* v. *King*, 301.

4. If the payee of a negotiable note give his assent by his signature to an assignment, wherein provision is made for the payment of the note, or of a part of it, this does not destroy the negotiable character of the note, or destroy a contract made in contemplation of a sale of it, and it may be afterwards legally transferred, although the effect may be to make the signature to the assignment ineffectual, unless adopted by the indorsee. *Hilton* v. *Southwick*, 303.

5. If a person direct the messenger of a bank to leave his notices at a certain place, a notice to him, as indorser of a bill, left by the messenger at that place, will be deemed sufficient, until the direction is countermanded, or the messenger is otherwise directed. *Eastern Bank* v. *Brown*, 356.

6. Where a bill is left in a bank for collection, although the bank has no interest in it, yet for the purposes of making a demand, and of receiving and transmitting notices, they are to be considered the real holders. *Warren* v. *Gilman*, 360.

7. In the negotiation of this business, the cashier is the regularly au-

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thorized agent of the bank; and any communications affecting them are properly addressed to him in his official capacity. *Ib.*

8. A notary employed for that purpose by the cashier of a bank, to which the bill has been indorsed and transmitted for collection only, has sufficient authority to make a demand, and to give notice. *Ib.*

9. If due notice of the presentment and non-payment of a bill be given to an indorser, it is not necessary that he should also be notified that the holder will look to him for payment. *Ib.*

9. Where a bill which was drawn, accepted and indorsed by residents of Bangor, and made payable at a bank in Boston, was indorsed to a bank in Bangor, and by that bank indorsed and transmitted to a bank in Boston for collection, and was by direction of the cashier of the latter bank duly presented there for payment by a notary, and notices thereof and of non-payment were immediately made out by him to all the prior parties, and transmitted by the first mail to the cashier of the Bangor bank; and where on the same morning the notices reached Bangor, the cashier took them from the post-office, and directed one to the indorser, then a resident of that city, and immediately replaced it in the post-office; it was held, that as the notice came from the notary in Boston, that this mode of transmitting it was sufficient. *Ib.*

10. Where the indorser of a note is notified of the demand and the default of the maker by mail, the notice must be put into the post-office on the day of the demand, or in season to be sent by the first mail of the succeeding day. *Goodman* v. *Norton*, 381.

11. If the indorser of a note, when he knows that no demand has been made upon the maker, promises to pay it, he will be liable. *Davis* v. *Gowen*, 387.

12. But the plaintiff must prove affirmatively that the indorser knew that there had been no demand. *Ib.*

13. Such knowledge cannot be inferred from the mere fact of the promise to pay. *Ib.*

14. If it be proved that the indorser knew, at the time of the promise, that no demand had been made, it is to be presumed that it was done with a knowledge of his legal rights. *Ib.*

BOND.

1. If a bond for the conveyance of land upon certain conditions be assigned by the obligee, and the obligor upon the back of the bond agree under his hand and seal with the assignee by name, to extend the time of performance limited in the condition of the bond; an action thereon cannot be supported by the assignee in his own name. *Cole* v. *Bodfish*, 310.

2. Where the penal part of a bond, signed by six obligors, is joint in its terms, containing nothing indicating a several interest, or a several liability, and the condition recites the several agreement of each to secure a certain proportion of a specified sum of money by certain notes, to be further secured by a mortgage on a township, subject to a prior mortgage, and concludes by saying, "if we shall well and truly keep and perform our said several agreements, then this obligation is to be void as to each one so performing, otherwise to remain in full force; it is the joint bond of all the obligors. *Clark* v. *Winslow*, 349.

CONTRACT.

1. Payments made under a parol contract for the purchase of land cannot be reclaimed so long as the seller is not in fault; but if he, without any justifiable cause, repudiate the contract and refuse to be bound by it, a right of action will accrue to the purchaser to recover back the money paid, to the extent required by the principles of justice and equity. *Richards* v. *Allen*, 296.

2. If the purchaser under such parol contract enter into the possession of the land, the amount of the benefit received by him from the occupation should be deducted from the money paid. *Ib.*

3. If the seller convey the land to a third person, and thus by his own act deprive himself of the power of fulfilment of such contract, it excuses the purchaser from the necessity of making a tender of the remaining purchase money, and demanding a deed. *Ib.*

4. The cause of action does not accrue to the purchaser under such parol contract, until the seller is in fault, and therefore the statute of limitations begins to run only from that time. *Ib.*

CONVEYANCE.

1. Where boundaries, length of lines

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and points of compass are all given in a deed, and the first-named monument cannot be found, but the others are ascertained; the first monument may be ascertained, in the absence of all other testimony, by beginning at the second monument and running back the number of rods mentioned in the deed in the direction there given. *Seidensparger* v. *Spear*, 123.

2. Where the owner of land flowed by a mill dam sells the mills and dam and retains the land, the right to flow the land to the extent to which it was then flowed, without payment of damages, passes by the grant; but where the owner sells the land flowed, and retains the mills and dam without reserving the right to flow, he is not protected from the payment of damages. *Preble* v. *Reed*, 169.

3. The grant of a saw-mill and grist-mill carries also the use of the head of water necessary to their enjoyment, with all incidents and appurtenances, as far as the right to convey to this extent existed in the grantor. *Rackley* v. *Sprague*, 281.

4. If such grant cannot be beneficially enjoyed without causing the water to flow back upon other lands of the grantor, a right to do this passes to the extent to which it has been flowed before the grant, by which all privies in estate under the grantor are bound. *Ib.*

CORPORATION.

1. Private corporations existing by the laws of other states have power to sue in their corporate name in Maine, but their existence must be proved by satisfactory evidence, like any other material facts. *Savage Manuf. Co.* v. *Armstrong*, 34.

2. If the defendant in an action brought in the name of a corporation would deny its existence, he must do it by plea in abatement, as pleading to the merits admits the competency of the plaintiffs to sue in the name assumed. *Ib.*

3. The books of a corporation are the regular evidence of its corporate acts. *Coffin* v. *Collins*, 440.

4. Where the records of a corporation are in existence and can be obtained, parol evidence is inadmissible to prove the acceptance of the charter, or to prove what persons are members of the corporation. *Ib.*

DEED.

1. Where two deeds, dated and acknowledged at different times, are recorded upon the same day, their priority of registry must be determined by the record alone, and no parol evidence is admissible to show which was first received. *Hatch* v. *Haskins*, 391.

2. The order in which deeds are entered upon the book of records furnishes no evidence that one was received prior to the other. *Ib.*

3. Where, so far as it respects the record, the rights under two deeds are equal, the title under the one first made is not defeated or impaired by such registry of the second; but to give the second deed priority, it must be first recorded. *Ib.*

4. As the possession and production of a deed by the grantee is *prima facie* evidence of its having been delivered, so if it be found in the hands of the grantor, the presumption arises that no delivery has been made. *Ib.*

5. The registry of a deed, without acknowledgment, is illegal, and confers no priority, and gives no rights. *De Witt* v. *Moulton*, 418.

6. Where a deed is legally registered, it is not constructive notice to third persons, and should not be admitted in evidence to affect their rights. *Ib.*

DONATIO CAUSA MORTIS.

1. It is essential to a good gift *causa mortis*, that the donor should make it in his last illness, and in contemplation and expectation of death; and if he recover, the gift becomes void. *Weston* v. *Hight*, 287.

2. Where the gift was made while the donee was in expectation of immediate death from consumption, and he afterwards so far recoved as to attend to his ordinary business for eight months, but finally died from the same disease; such gift cannot be supported as a *donatio causa mortis*. *Ib.*

3. The indorsement of a promissory note by the donee, cannot be the subject of a gift *causa mortis*, so as to render his estate liable on his indorsement. *Ib.*

DURESS.

1. A lawful imprisonment is no duress. *Eddy* v. *Herrin*, 338.

2. Where the defendant was induced, from the threat of a lawful imprisonment upon a warrant for an assault and battery upon the plaintiff, to

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submit to others the amount to be paid as a satisfaction for the injury, and also to give a note for the amount thus ascertained, such note cannot be avoided for duress. *Ib.*

3. But had the note been obtained from threats of an unlawful imprisonment, it might have been avoided. *Ib.*

EQUITY.

If one undertakes to procure a deed of land for another, who pays the consideration therefor in accordance with a previous agreement, but fraudulently takes the conveyance to himself, such agent may be compelled by bill in equity to convey the land to him who made the contract and paid the consideration. *Pillsbury* v. *Pillsbury*, 107.

EVIDENCE.

1. The rule that a party cannot discredit his own witness, by proving that he had made contradictory statements at other times, does not apply to those cases where the party is under the necessity of calling the subscribing witnesses to an instrument. *Dennett* v. *Dow*, 19.

2. Where the party in favor of establishing a will calls a subscribing witness to the execution thereof, who on examination expresses an opinion unfavorable to the soundness of mind of the testator, and testifies to facts tending to prove the same, the party calling him may prove that such subscribing witness had before expressed opinions and made statements contradicting the testimony then given, and that he had in the same case testified differently in a former hearing. *Ib.*

3. If the depositary of papers assume the execution of the trust, he becomes responsible to any party who may suffer by the violation of it; his interest is balanced, and he is a competent witness for either party. *Lewis* v. *Hodgdon*, 267.

4. If a witness expects that he will be relieved from responsibility to the plaintiff by the suit, and therefore advised the bringing of it, when in fact his liability is not changed by the result of such suit, he is a competent witness. *Ib.*

5. When a witness has been called by one party and examined on some points, the other party may cross-examine him in relation to facts material to the issue, other than those elicited by the party calling him; and if the answers are not satisfactory, he may by any legal proof contradict or discredit them. *Ib.*

6. The rule that if a witness testifies falsely as to any one material fact, the whole of his testimony must be rejected, is not of such binding effect as to authorize the court to instruct the jury that they cannot believe one part of his statement and disbelieve another. This is but a presumption of law, and cases often occur in which jurors may yield entire credit to certain statements, and disbelieve others. *Ib.*

7. Giving a bond to an interested witness to indemnify him against his liability, does not render him competent. *Paine* v. *Hussey*, 274.

8. Where the records of a corporation are in existence, and may be obtained, parol evidence is inadmissible to prove the acceptance of the charter, or to prove what persons are members of the corporation. *Coffin* v. *Collins*, 440.

GUARDIAN.

The guardian of a person *non compos mentis*, who is entitled to a pension from the United States, is not bound to apply the pension money in his hands to the payment of pre-existing debts of his ward. *Fuller, J.* v. *Wing*, 222.

HUSBAND AND WIFE.

If shares of an incorporated bank stand in the name of the wife, the husband has power to transfer them by his own act. *Winslow* v. *Crocker*, 29.

INDICTMENT.

1. Where an indictment for cheating by false pretences alleges that the goods were obtained by several specified false pretences, it is not necessary to prove the whole of the pretences charged; but proof of part thereof, and that the goods were obtained thereby, is sufficient. *State* v. *Mills*, 211.

2. Where it was proved, on the trial of such indictment, that the owner of a horse represented to another that his horse, which he offered in exchange for property of the other, was called the Charley, when he knew that it was not the horse called by that name, and that by such false representation he obtained the property of the other person in ex-

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change, it was *held*, that the indictment was sustained, although the horse said to be the Charley was equal in value to the property received in exchange, and as good a horse as the Charley. *Ib.*

INSURANCE.

1. Where it is provided, that any dispute arising upon a policy of insurance shall be referred to arbitrators to be mutually chosen by the parties, an action may be sustained upon the policy without any offer to refer. *Robinson* v. *Georges Ins. Co.*, 131.

2. Where a vessel has been stranded on a sand-bar, within the United States and within a hundred miles of the place of holding a court of the United States for the district, and has been put afloat and repaired by salvors, the master has no power to refer the claim for salvage, without the assent of the owners. *Ib.*

3. And if upon such reference, the arbitrators award more than fifty per cent. of the value of the vessel to the salvors for salvage, and the master of the vessel sell her to pay the salvors, an action cannot be maintained against the insurers for a total loss, without an express abandonment. *Ib.*

LANDLORD AND TENANT.

1. Where a tenant holding under a written lease erects a furnace for warming the house, thereby making a material alteration of parts of the building, and where the house would be injured by the removal of the furnace; if the tenant does not remove it during his term, he cannot maintain trover against the proprietor of the house for refusing to permit him to enter and remove it afterwards. *Stockwell* v. *Marks*, 455.

2. Nor can the tenant maintain such suit, if the lease permit him to make any alterations or improvements during his occupancy, provided the same shall not lessen the value of the property, or occasion expense to the lessor. *Ib.*

LIMITATIONS.

1. A conditional promise to pay a specified demand, where the other party refuses to accede to the condition annexed, is not sufficient to take the demand out of the operation of the statute of limitations, either as a promise to pay or as an admission of present indebtedness. *McLellan* v. *Albee*, 184.

2. Where the principal in a note, on being requested to pay it, said, "he could not pay it then," and on being told that the surety would be called upon for the note, replied, "that he did not want to have the surety called upon for it, as the surety had signed the note to oblige him;" and where in another conversation with the agent of the payee, the principal "proposed to pay a part of it, if he could have time on the balance," and the agent replied that he "was not authorized to take a part of it; it was held by the court, that the demand was not taken out of the operation of the statute of limitations. *Ib.*

OFFICER.

1. If an execution is delivered to an officer, with instructions to call upon the debtor, and to return the execution to be discharged upon securing a sixth part thereof, the officer is entitled only to fees for his travel and on the amount secured. *Pierce* v. *Delesdernier*, 431.

2. On collecting an execution an officer is entitled to his travel, computing the distance by the road usually travelled, whether he in fact travels a more or a less distant way to suit his own convenience. *Ib.*

PARTNERSHIP.

1. If four persons, by an agreement in writing, enter into an association for the manufacture of paper, providing for the purchase of stock and the sale of paper indefinitely, they are partners in the business; although there is no express stipulation to share profit and loss, as that is an incident to the prosecution of their joint business. *Barrett* v. *Swann*, 180.

2. If a note be given by an individual partner in the name of the partnership, although it be limited to a particular branch of business, it is *prima facie* evidence that the note was given on the partnership account. *Ib.*

3. Although the record of a judgment, in virtue of its rendition, is not admissible evidence to prove a partnership, unless the parties are the same in both suits; yet the record of a judgment, rendered by default against certain persons alleged to be copartners, is competent evidence, in a suit where the parties are different, to prove the fact that those persons did hold themselves out to the world as partners. *Ellis* v. *Jameson*, 235.

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INTELLIGENCE AND MISCELLANY.

THE REPORTER OF NEW YORK. At or near the commencement of the present year, Mr. Wendell, the well-known reporter of New York, was removed from office, and Nicholas Hill, Jr., was appointed in his place. Mr. Wendell has made an appeal to the public, which we publish as a matter of interesting legal information, without any comment of our own:

To the Public. It was announced, a day or two since, in the public papers, that *Nicholas Hill, Jr.*, was appointed *State Reporter*, without adding that he was appointed in place of myself, *removed from office.* Ordinarily the public take but little interest in such occurrences, and especially are they indifferent to the private griefs of a losing party. The latter are not intended to be obtruded upon public notice at present; they will in due time be submitted to a court and jury. But it is supposed that the circumstances attending this transaction are worthy of public notice and consideration, and therefore this publication is made.

Shortly previous to the presidential election of 1840, the late Reporter was called upon in behalf of the *Albany Regency* to contribute towards the expenses of the approaching election. He in common with several of his fellow-citizens who had been in the habit of contributing freely in support of the *Republican Party* upon such occasions, had resolved not to do so at the then coming election. The Reporter having for a long time been dissatisfied with the political course of Mr. Van Buren in what he conceived a war upon the currency of the country, and not having concealed his opinion in that respect, the Reporter was called upon, probably for this reason, by an *envoy extraordinary* — instead of the usual collector of voluntary contributions. The Reporter declining to contribute, the gentleman urged various considerations to induce him to change his mind, and amongst others that he held a valuable office, the possession of which he ought not to endanger; that the *Whigs* could not protect him in its enjoyment, even should they be successful at the approaching election, as the disposition of the office belonged to the *Judges*, and they were *republicans.* The Reporter told him that in anticipation of such a visit, he had deliberately made up his mind, and could not be induced to change it. The gentleman then laughingly told him that the members of the Regency who had deputed him, had differed in opinion as to the probable result of his mission. Some said that he would yield ; whilst others thought differently.

At the very first term of the Supreme Court succeeding the election the reporter did not lose his office, but a very extraordinary circumstance occurred, which forcibly reminded him of the *threat* which had been made. The reporter holds his office by appointment not of the judges of the Supreme Court, but of a board of officers composed of the *Lieutenant Governor*, the *Chancellor* and the *Chief Justice ;* his duty is to report the decisions of the Supreme Court and of the Court for the Correction of Errors. His compensation arises from the publication of the reports; for though he receives an annual salary of five hundred dollars, he is required by law to furnish the public offices and officers copies of his reports free of expense, which at the ordinary price of the books exceed in value the amount of his salary. He therefore is dependent *entirely* upon the publication of the reports for his compensation. To enable him to prepare the reports,

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the judges deliver to him the papers in the several causes decided, together with their opinions, from which he prepares the reports for publication. Such is and has been the law and custom of the State since the first appointment of a reporter in 1804. The extraordinary circumstance above alluded to is, that at the close of the January term 1841, judges *Bronson* and *Cowen* withheld from the reporter their opinions in cases decided at that term. Judge *Cowen* assigned as a reason for so doing, that as the reports were in arrear, and as the reporter would not soon want his opinions for publication, he had concluded to take them home with him, as having them in possession might relieve him from examining the same questions in new cases which might arise; that his *brother* Bronson residing in Albany, might conveniently call upon the reporter if he wished to see his opinions, but that he could not do so. His brother Bronson, however, did not think so. for on the next day he transmitted to the reporter a list of cases decided by himself and Judge Cowen, designating by whom the opinions were written, so that the necessary information might be given to those who required copies of opinions, where they might be obtained. The CHIEF JUSTICE, as usual, gave the *opinions written by him* in cases decided at the *January term* to the reporter. At the *May and July* terms, the reporter, still being in arrear, did not call upon judges *Bronson* and *Cowen* for their opinions, but as usual received from the CHIEF JUSTICE his opinions. At the close of the *July* term a more extraordinary circumstance occurred in relation to the conduct of judges *Bronson* and *Cowen*, than what had taken place at the January term. An *anonymous notice* appeared in two of the Albany newspapers, announcing that copies of opinions in most of the cases decided at the *July term* might be obtained by application to *Nicholas Hill, Jr.* The reporter upon observing this notice addressed a note to Judge *Bronson* inquiring whether he and Judge Cowen had placed the opinions written by them at the July term, in the hands of Mr. Hill. To which he received an answer in the affirmative. It had now become manifest that the opinions were kept from the reporter, not for the convenience of the judges, but that some other cause operated. The reporter hereupon redoubled his diligence, to catch up with the court.

He had not been remiss, as the profession well know; (if any thing they probably thought him too prolific.) From his first appointment he had published nearly two volumes a year; and within a year previous to the January term, 1841, had published *three volumes*, of 700 pages each. Enough, in all conscience, it would seem, to satisfy the most voracious appetite for books; but judges *Bronson* and *Cowen* still complained of delay in the publications of the decisions. The reporter persevered in his attempts to catch up with the court, and on the *twenty-eighth* day of *September* last, had prepared two more volumes of 700 pages each, (one published, and the other in the press and subsequently published,) and was *then ready to proceed with the publication of the cases decided at the January term*, 1841. He, accordingly, within the next two days called on judges *Bronson* and *Cowen* for their opinions, and to his *utter astonishment* learnt from them that they had delivered not only their opinions of *July term*, as the anonymous notice above adverted to had indicated, but their opinions in cases decided at the *January* and *May* terms, and that they had been delivered to Mr. Hill *for publication.* The reporter complained of the injustice done him, and the judges attempted to justify themselves on the ground of *delay in the publication of the reports.*

In respect to this complaint of *delay* in the publication of the reports, a word of explanation is necessary, independent of the numerous volumes issued by the reporter. In the preface of the volume published by Mr. Hill, it is said that the judges, within the last two years, by *extraordinary exertions*, had been able to clear off the large amount of arrearages upon their calendar, and to prevent any new accumulation of business. This is undoubtedly true, and accounts for the *delay*, if any is imputable to the reporter. He was obliged to attend the terms of the court, *day and night*, and at the end of each term was inundated with a mass of cases, *all* of which he was under the necessity of *examining* and *studying*, to determine which ought, and which ought not to be reported, for that was

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wholly left to his *judgment.* Judge *Cowen*, in a deposition lately made by him, stated that whilst he was reporter, he published those cases that the judges *directed him* to report, but that *now* (speaking of the time whilst the late reporter held the office) *no direction is given to the reporter by the judges; but all the cases are handed over to him as soon as decided;* and Judge *Bronson*, in a deposition made by him at the same time, testified that he never supposed that the reporter published cases with the mere view of swelling a volume, or multiplying the number of volumes. Thus, when this labor is considered, in addition to the time spent in attendance upon the supreme court, and upon the court for the correction of errors, occupying nearly or quite six months in the year, the wonder, it seems to me, should be, not that there were not *more*, but that there were so *many* volumes published. But to return to the thread of the story. The reporter expressed his *astonishment* at the conduct of the judges, and that astonishment will be readily conceived, when it is considered that two of the highest judicial officers of the state, bound by every obligation to protect his rights as a citizen of the state, had grossly violated them; that they had neglected their duty in delivering over to the authorized officer of the state their opinions for publication; that they had thus nullified the laws of the state, and above all had *usurped* the power delegated by law to others, by *virtually appointing a State reporter;* whose appointment, as before stated, belongs exclusively to the lieutenant-governor, the chancellor, and the chief justice. This interview took place *more than three months since*, during which time the reporter was ready and willing to proceed in the publication of the causes in which they had written opinions, and during all which time it is presumed the reporter *appointed by them* has been engaged in preparing for publication the cases decided whilst the state reporter was in office, and reaping the harvest which belongs to him. When in September last the reporter demanded of the judges their cases and opinions, and they refused to deliver them, or give an order for them on Mr. Hill, the reporter desired them to give him a certificate of the demand and refusal, to prevent the necessity of a formal demand; this they both refused to do, and judge Cowen added, that he would furnish no facilities, that he *expected litigation*, and was prepared for it. Under these circumstances, the reporter, unwilling to engage in litigation with the judges, if it could be avoided, concluded to offer his resignation, provided judges *Bronson* and *Cowen* would yield up their opinions in cases decided whilst he was reporter, and give him the fruits of his attendance upon the courts, and accordingly repaired to Rochester at the last October term with the intention to make such proposition. He called upon the *Chief Justice*, and made known to him his resolution. The Chief Justice told him it was useless to make such proposition, as judges *Bronson* and *Cowen* had made up their minds definitively on the subject as to the course which they had adopted. Nothing was therefore left but for the reporter to remain at Rochester and discharge his duty by attending the term, which he did until the court ceased to hear arguments. After his return home the *Chief Justice* sent him the opinions written by him in cases *decided at the October term*, which have since been prepared for publication, and which are now in print, and will be ready for delivery on Monday next.

Thus at the close of the last term of the court, this strange state of things existed. The opinions written by the *Chief Justice*, during the *four last terms* of the court, had been placed by him in the hands of the *State Reporter* for publication, whilst those written by judges *Bronson* and *Cowen* had been placed in the hands of an *illegitimate reporter*, appointed by them *in violation of law.* The bar had long been embarrassed in obtaining copies of opinions, to ascertain the decisions of the court; and the foul blot is now cast upon law and order, in having the decisions of the court, *for the same terms*, prepared and published, some by the lawfully authorized officer of the State, and others by an *agent* of judges *Bronson* and *Cowen*. But to proceed with the narrative of events. When the Chief Justice sent his opinions of *October term* to the reporter, he recommended to him, under existing circumstances, to *resign his office* previous to the January term. The reporter answered, that, grateful as he was for the uniform

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kindness and friendship exhibited by the Chief Justice towards him, he could not adopt his advice; and that, under existing circumstances, he *could not*, with a due regard to his own honor, *resign the office;* but that if the Chief Justice, under all the circumstances of the case, should consider the removal *necessary*, to let the axe fall, and no unkind feeling would ever be entertained towards him. But as it respected *those who had made such an act necessary*, they would be arraigned at the bar of public opinion. He did deem it *necessary*, and on his motion (*the motion of my friend*,) I was removed from office on the evening of the 31st ultimo. The *Chancellor* concurred, and the *Lieutenant Governor* dissented. I owe it to the Chancellor to state, from a conversation had with him some time since, in reference to judges *Bronson* and *Cowen* withholding their opinions from me, that I am satisfied he concurred in my removal *solely* on the ground that he did not feel himself justified in thwarting the wishes of the judges whenever they should concur in desiring my removal. Thus I have been virtually removed from office by judges *Bronson* and *Cowen*. The *threat* of the Albany Regency has been fulfilled, and I have redeemed my promise.

JOHN L. WENDELL.

Albany, 6*th January*, 1842.

THE BANKRUPT LAW. The United States statute on bankruptcy is masterly and admirable for its comprehensiveness; it condenses and systematises in fifteen short sections the general provisions of the extended English statutes, and provides for voluntary bankruptcy besides. To this great merit its enactment is to be attributed — for a statute providing for details with the minuteness of the recent English acts, would never have obtained the assent of congress. The repeal of the law seems probable, and its fate will be fixed before our objections to it appear in print. The objections are, as all must be, to the practical details of the act, and if, as we hope, it shall be permitted to go into operation, its outline gives the model for a perfect system.

The early English statutes on Bankruptcy (13 Eliz. R. & al.) expressly provide, that the title of the assignees shall take effect from the time when the debtor *became bankrupt*, and in terms avoid all dealings of the debtor with his property, "made after any such person shall become bankrupt." It has been uniformly held, that the debtor *became bankrupt* at the time of *the act of bankruptcy* committed by him, and not at the time of the decree of the court establishing that act in proof. Thus *the doctrine of relation* as to the title of the assignees was the clear and express enactment and purpose of the English statutes, and when, in the later English statutes, provisions were introduced for the protection of parties dealing innocently with the bankrupt, these provisions were exceptions to the general operation of the English statutes.

The recent United States act, apparently for the purpose of protecting innocent parties, provides in express and emphatic terms, that the property of the debtor shall be divested from him, and vested in the assignee, "*from the time of the decree of the court* declaring the debtor bankrupt." There is, therefore, this plain and important difference between the English and the United States laws; by the former, *the doctrine of relation*, (as to the title of the assignees,) results from the direct and general operation of the statute, and obtains in all cases not specially excepted; but by the United States law this *doctrine of relation* is excluded from the direct and general operation of the statute, and can exist, only where introduced by special provisions, and is then limited to the cases provided for. The result is, that all dealings of the debtor, *subsequent to his act of bankruptcy*, are void by the English law, unless specially protected, and all dealings of the debtor, previous to the time of the decree, are valid, by the United States law, unless specially avoided.

It becomes, therefore, material to know what dealings of the debtor are avoided by the United States law, and to what degree the *doctrine of relation* is introduced into our national act.

The second section contains all the annulling power of the statute, and it provides, "That all future payments or transfers, &c. made and given by any

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debtor in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, or surety, or other person, *any preference or priority* over the general creditors of such bankrupt, shall be deemed utterly void." Except as to gifts and voluntary conveyances, this is the entire substance of the annulling clause of the second section; and it is manifest, that this clause refers only to *preferences* or priority of one or more *creditors or parties liable*, over the general creditors. The terms are express, and defined by more than two hundred years of legal construction; and *preference or priority* is exclusively a relation between *creditors or parties liable for the debtor*. The provisoes use broader language, and refer to the act of bankruptcy; but then the purpose of these provisoes, is *to limit the effect* of the annulling clause, by excepting from it innocent parties; and it is an established canon of legal construction, that a proviso cannot extend the operation of a statute. If, therefore, the annulling clause is confined to *preferences*, the provisoes are also; and the whole legal effect of the second section is to avoid *preferences*, unless made two months before the petition, and to a creditor, ignorant of any act of bankruptcy, committed by the debtor, and this construction makes the provisions of the second and third sections consistent with each other, and harmonious in the system.

The result of this brief technical reasoning is, that the United States act leaves the property of the debtor in his own ownership and control, until "*the time of the decree*" of the court declaring him bankrupt, and avoids no transactions of the debtor, previous to the decree, except *preferences*. So that it is important to determine *when*, the decree is to be obtained which is to convey and secure the property for the benefit of the creditors.

On the filing of the petition against the bankrupt, notice is to be published in the newspapers *at least twenty days;* a hearing is then to be had before the district court. This hearing will be on testimony, and of necessity subject to all the delays incident to ordinary litigation. As all the cases arising in Massachusetts will be heard before the district court in Boston, there will be many cases pending at the same time; these will form a large docket, on which each case must be heard in its order; after any case is reached and determined by the district judge, the bankrupt may appeal to a jury. There will be many of these appeals, and thus another docket will be formed, each case of which will have to be tried in its order, and the delay of another round of litigation on testimony will be incurred, subject, moreover, to have any question that ingenuity can raise, adjourned by the district judge into the circuit court, to be there finally determined in its turn, as the business and presence of that court, in one district of its extended circuit, shall afford opportunity for the decision. As the property of the bankrupt will remain in his possession or control *until the decree*, every inducement is given to the debtor to delay the decree by contesting it at every step, and protracting it to the utmost, thus months will be, and *years may be* consumed in litigation, before the property is taken from the debtor.

As the United States law appoints no messenger or receiver, the debtor, until *the time of the decree*, holds the legal ownership, and sole lawful control of his property. He may collect his debts, trade upon his property, sell it, live upon it, and dispose of it as he pleases, with one single restriction, (as the statute avoids *preferences*,) *he cannot pay debts with it*. Thus the main purpose of a bankrupt law, (securing the whole property to the creditors,) may be baffled by any bankrupt who had rather hold than give up his estate.

But if the property and legal title remains in the debtor until the time of the decree, the property is subject to attachment in the state courts, at the suit of any creditor, and if execution can be obtained and satisfied before the decree, the attaching creditor will secure his debt. If the decree is delayed by the debtor or *the attaching creditor*, (for he has a right and interest to oppose it,) for six months, ample time will be afforded for obtaining an execution and its satisfaction in most of the state courts.

Besides, we think the United States act does not discharge attachments on mesne process, so that any attachment made previously "*to the time of the decree*," would hold against the assignee. It is the general operation of all

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bankrupt laws, to preserve special liens, however gained; for the property passes to the assignee, as the debtor held it, and subject to all equities against him. There is no provision in the United States act dissolving attachments; and there is an express provision preserving *all liens valid by the state laws*, and the very definition of an attachment, is, *a lien, valid by the state law.*

It has been argued, that the discharge would annul the debt, and thus leave nothing for the lien by attachment to rest upon; if so, the discharge would annul a debt, secured by a lien made by contract, and so leave nothing for such a lien to rest upon; but this is never so in bankruptcy; the lien preserves the debt, to the extent of the lien; and there would seem to be no reason for a difference in this respect, between liens created by contract, and those created by state laws, especially when the United States act expressly preserves such liens; this can only be done by preserving the debt, and the discharge, and the clause preserving liens, must be construed together.

By the United States law the appointment of the assignee is vested in the court; this is a novelty in English and American bankruptcy, and the provision is more generally objected to than any other. It is evident the judge must be officially, without the knowledge that would fit him for this important part of his duty, and if the interference of the court can be required in any instance, or for any purpose, for the protection of the creditors, in such a matter, it seems to us it would have been better to have left the choice of the assignee with the creditors, subject to the approval of the judge. A bankrupt's business creditors are always those engaged in the same business with himself; these know the details of that business, and the individuals of their craft, and they can always select the person, whose character and business knowledge and capacity, and whose position in relation to the creditors, to the estate and to the bankrupt, especially fit him to be assignee. These things the judge cannot know, yet he is supposed to possess this knowledge, and, sitting in Boston, (for instance,) is obliged to select the assignees of all the various estates of bankrupts in the most distant parts of Massachusetts, and it is on the fitness of the assignee that the result of the estate, and the dividends to creditors must depend.

By the other provisions of the law the assignee is not left to use the judgment and business talent he may possess. He cannot sell as he can find a purchaser, or compromise claims as opportunity may offer, or bargain in the promptness that business habits require, and in which business talent is most available; if he wishes to sell any piece of property, even a bank share, or to compromise a debt due to the estate, even of twenty dollars, and the purchaser, or debtor to the estate is ready to make the bargain, the assignee cannot close it, he must go to the United States district court, and by a formal motion obtain leave; this leave can be granted only after ten days' notice, published in the newspapers. As these motions in court may be contested, and the assignee will avoid personal litigation in court, counsel must be employed, and thus every business operation of the assignee, in closing the estate, is clogged with expense and delay, and the notoriety of the gazette.

The money received by the assignee is required to be paid into court *every sixty days*. He will, therefore, be continually without funds to meet his current expenses, and as these occur and require to be paid, he can obtain the money only by applying to the court, and shewing cause, when he will receive such sum as he may at the time require, by a check signed by the judge, and countersigned by the clerk, as provided by the United States law.

The assignee may be required to give bonds with two sureties, for the due discharge of all his duties. And although this is left to the discretion of the judge, yet, as discrimination between cases and assignees would be odious, some general rules must be adopted, and if bonds and sureties were always required, then the requirement of bonds sufficient to protect the large amounts involved in the estates of bankrupt merchants and manufacturers, &c., would probably, with the restrictions we have referred to, and others which the law creates, be sufficient to prevent those from taking the office of assignee, whose prudence

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and position would best fit them for it, and whom the creditor would most desire should hold it.

Another objection to the law is the vast amount of business it imposes on the district courts. By the requirement of the statute, petitions, and all hearings on petitions—on contested debts—for and against the debtors discharged — for compromises of claims — for sales of property — applications for, and payments of, money by the assignees, and all jury trials, (except as *to the act* of bankruptcy,) on every case arising in the state of Massachusetts, must be had before the district court in Boston. It is to be remembered that each case in bankruptcy is not a single law suit, but of itself *a brood of lawsuits*. Every bankrupt estate is rife with contracts, broken, or partially formed — liens, mortgages, conflicting and intricate claims, and liabilities, and all other elements of litigation; and all these in all the cases in the state, must be disposed of by a court always open, and sufficiently employed, by a regularly increasing business, as a court of admiralty. The frequency of hearings in bankruptcy, and the time of the court required for all of them, may be estimated by a consideration of one branch of them, (hearings on compromises of claims due to the estate.) Every merchant, as he is becoming embarrassed, and approaching bankruptcy, collects, as they become due — or by discounting them — his *good debts*, so that at the time of his bankruptcy the largest portions of claims due, are suspended or doubtful. These are to be collected by compromise, and the compromise of each is to be heard and approved by the district judge, as the opportunity for compromising each shall occur. Then, the litigation arising in all the cases of bankruptcy in Massachusetts, on *the proof of debts*, will keep a perennial docket in the district court, larger than any term docket in the state. Thus, to the present duties of the district court in Massachusetts, consisting of a single judge, will be added a distinct burden, far greater, of itself, than that borne by all the judges of any court in the commonwealth. "The law's delay," and cost to parties, will be the consequence, and in closing bankrupt estates, the cost is borne by the creditors, for it is so much subtracted from the assets. As the district court for Massachusetts sits in Boston, litigants from every part of the state must attend there, while, by provisions resembling those of the English statutes, three quarters of the labors imposed on the district court might be performed, more cheaply and more expeditiously, by commissioners, at the doors of the parties in interest.

Obituary Notices. Died, in Philadelphia, on the morning of Saturday, January 15, Hon. Joseph Hopkinson, the distinguished judge of the district court of the United States, for the Eastern District of Pennsylvania, aged about 73. He was the son of Hon. Francis Hopkinson, one of the signers of the declaration of independence, and a distinguished patriot of the revolution. He inherited his father's virtues, his wit and his patriotism. His well known production of "Hail Columbia," has of itself rendered his name familiar throughout our land. For several years he represented the city of Philadelphia, in congress, and his career was, in all respects, brilliant. His integrity of purpose, his simplicity of manners, insured high regard; and those who could not assent to the doctrines which he advocated, saw how much weight those doctrines were obtaining by the excellence of their expounder. He succeeded Judge Peters, on the bench, to which he was appointed by John Quincy Adams, but the appointment was not confirmed, we believe, until after the election of General Jackson. In the recent convention of Pennsylvania, which remodeled the constitution, Judge Hopkinson was an active member. Though being conservative, he did not carry with him the votes of that vast majority which loved him for his honesty, his courtesy, and his decision; yet it cannot be doubted, that many alterations finally agreed on, received important modifications by the force of Judge Hopkinson's influential arguments, which, though they could not take with him the opinions of the majority, yet deprived those opinions of much that might be regarded as ultraism.

As a judge, the deceased had few equals, and no superiors. His judgment was sound; his perceptions were clear, and his knowledge of law was accurate

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and extensive, while the dignity and suavity of his manners rendered him universally popular. He was a gentleman, although a judge.

In the early career of our magazine, we were led to expect valuable aid from Judge Hopkinson. He expressed the kindest wishes for the success of our enterprise, and promised what assistance he could render. We have not often been able, however, to gratify our readers with his opinions. His judgment in the *case of Robert Morris, a bankrupt*, published in the first volume of the Law Reporter, was furnished by himself, and is a learned and elaborate production. His opinions in the case of *Durst* v. *Duncan*, (2 Law Reporter, 246 and 357,) are also interesting and able.

As a man, Judge Hopkinson was universally beloved. His ever-flowing wit, his cheerfulness, his kindness of heart, and, more than all, his sincerity, were justly prized by all who knew him. "He was eminently a candid man. He expressed his opinions cautiously, but plainly; and his opinions, once formed with care, were not lightly shaken. But, once convinced that he had erred, and he was prompt to correct himself. No man was more willing to encourage merit by early and judicious applause; and he made that applause doubly grateful and useful, by the kindness and freedom with which he expressed his dissent from certain points. And yet he was ready to have his opposing opinions combated, and to yield when he found himself incorrect."

On the day of Judge Hopkinson's decease, a meeting of the bar of Philadelphia was held, at which Hon. Thomas M. Pettit, president judge of the District Court of Philadelphia, presided. The death of Judge Hopkinson was announced, in a suitable manner, by Mr. Meridith, the District Attorney of the United States, who offered a series of resolutions, which were seconded and sustained by John M. Read, Esq. and were unanimously adopted. A committee of fifteen was appointed to express to the family of the deceased, the affection of the bar for his memory, and their deep regret for his loss, of which the chief justice of Pennsylvania was appointed chairman. The death of Judge Hopkinson was also announced in the court of General Sessions, by Stephen Edwards Rice, Esq., after which the Court, on motion of the attorney-general, immediately adjourned.

In Lynn, Mass. January 13th, Robert W. Trevett, Esq., aged 53. He was a graduate of Harvard College, and was formerly in extensive practice as a lawyer. For many years past, however, he had become much reduced, and died in poverty and distress.

Reporter of Maine. A few months ago, we announced the removal of John Shepley, Esq., of Saco, and the appointment of John Appleton, Esq. of Bangor, as the Reporter of Maine. The democrats having again obtained the ascendency, we have now to announce the removal of Mr. Appleton, and the reappointment of Mr. Shepley. Meanwhile, we doubt whether the former gentleman has obtained cases enough to make one volume, and most, if not all, of the cases where he has taken minutes of the arguments, and in which the opinions have not been given, will probably have to be argued over again, as two of the three present judges have been recently appointed.

The (Bankrupt) Law's Delay. We find the following advertisement in the Pennsylvanian, newspaper, of Jan. 15th, 1842. "*Notice.* — In the case of James Oldden, a bankrupt, (A. D. 1802.) The commissioners named in the commission of bankruptcy against James Oldden, formerly of the city of Philadelphia, merchant, and the assignee of his estate and effects, will meet on Tuesday, the 15th day of February next, at the room of the District Court of the United States, in the State House in the said city, to declare a final dividend, and to close the commission, that the same, and all the proceeding had therein, may be filed in the clerk's office of the District Court, according to law. By order of the commissioners. George Campbell, Secretary."

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MONTHLY LIST OF INSOLVENTS.

Boston.

Adams, Isaac, Clerk.
Chamberlain, Simeon G., Merchant.
Clinton, William D. Carpenter.
Fisk, Samuel, } Merchants,
Fisk, Josiah, } Copartners.
Folsom, Charles, Printer.
[*Late Folsom, Wells & Thurston*.]
Freeman, Arthur, } Blacksmiths.
Freeman, Moses H. } Copartners.
Jones, John, Agent for Bookselling.
Krueger, Henry, Laborer.
Learned, Henry, Chaisemaker.
Lawrence, James, } Traders.
Bodge, Daniel, } Copartners.
Mundrucu, Emiliano, F. B., Gent.
Newell, Constantine F. Gentleman.
Pearson, Edward N. Cigar Manufacturer.
Robinson, John, Trader.
Stone, S. S. Trader.
Swinson, William, Trader.
Thomas, Washington, Provis. dealer.
Willard, William, Hatter.
Williams, William A. Tailor.

Becket.

Loveland, John P. Yeoman.

Cambridge.

Thurston, Lyman, Printer.

Chelmsford.

Brown, Charles.

Georgetown.

Dow, Stephen S. Cordwainer.
Swett, James H. Cordwainer.

Lexington.

Buttrick, Isaac.

Lee.

Barnes, Chauncey, Yeoman.
Fairchild, John, Yeoman.
Ford, William C. Carpenter.
Judd, Bela, Yeoman.
Thompson, Horace, Carpenter.

Lowell.

Harris, Leonard.

Marblehead.

Orne, John, Jr. Trader.

Milford.

Littlefield, Joseph W. Cabinetmakr.

Newburyport.

Remick, Philip K. Hatter.

Randolph.

Littlefield, James. Merchant.
Mann, Adoniram J. } Boot & Shoe
Odell, Ira. } Manufact'rs.

Roxbury.

Cox, Charles, Husbandman.

Salem.

Buffum, Samuel, Jr. Cigar Manufacturer.
Gardner, Daniel B. Trader.
Marble, Herodian, Stonecutter.

Shrewsbury.

Richards, Leander, Shoe Manufacturer.

Stoughton.

Littlefield, Daniel, Merchant.

Templeton.

Merritt, Dexter P. Chairmaker.

Westborough.

Forbush, Charles C. Laborer.

Woburn.

Hill, Zechariah, Husbandman.

NEW PUBLICATIONS.

Messrs. Otis, Broaders, & Co., of Boston, have published a Treatise on the Right of Suffrage, by Samuel Jones. It makes a handsome duodecimo volume of 274 pages. A work upon this subject is much needed in this country, but we have not yet had an opportunity to examine the one before us with sufficient care to pronounce upon its merits.

The contents of the American Jurist for January, 1842, are as follows: Art. 1. Life of Lord Chancellor Bathurst. 2. Codification. 3. Right of Search. 4. The McLeod Affair. 5. The Barrister. 6. The Madison Papers. 7. American Criminal Trials. Digest of Cases. Critical Notices. New Publications. Index.

A new edition of Chitty on Contracts, is just published by G. & C. Merriam, of Springfield, Mass.

The twenty-fourth volume of Wendell's, and the twenty-third of Pickering's Reports, are also published.

A new edition of Starkie on Evidence, greatly enlarged, is in press in Philadelphia.

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THE LAW REPORTER.

MARCH, 1842.

REPUDIATION.

THE repudiation of state debts has excited so much attention in this country and in Europe; it has inflicted such injury upon American credit, and, in some parts of the United States, is apparently working its way into popular favor with such calamitous celerity, that an exposition of the doctrine can hardly fail to interest the readers of our journal. Nor is the subject inappropriate to our pages, involving as it does considerations of law as well as of state policy and public faith; and should it be considered as slightly out of our usual track, the deviation will, we trust, be excused on account of its general interest and importance. We propose, in what follows, to show the origin of the doctrine; to discuss, as far as we may, the arguments adduced by its advocates in its support, and its tremendous consequence, to the country, should it be allowed to obtain a popular and permanent foothold amongst us.

In 1838 the state of Mississippi chartered the Mississippi Union Bank. Its capital was $15,500,000, divided into shares of $100 each, to be "raised by means of a loan to be obtained by the directors of the institution."[1] To facilitate the bank in its negotiations for so large a sum, the faith of the state was pledged "for the security of the capital and interest."[2] The governor was authorized to issue seventy-five hundred bonds for two thousand dollars each, bearing five per cent. interest, and redeemable in twelve, eighteen and twenty years,[3]

[1] Charter, sec. 1. [2] Id. sec. 5. [3] Id. sec. 5.

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and to deliver them from time to time, in amounts proportioned to the sums subscribed, and secured to the satisfaction of the directors, as required by the charter.[1]

The charter prescribed the form of the bonds, which is inserted here because it has a material bearing upon the course subsequently adopted by the state.

"Know all men by these presents, that the state of Mississippi acknowledges to be indebted to the Mississippi Union Bank in the sum of two thousand dollars, which sum the state of Mississippi promises to pay in current money of the United States to the order of the President, Directors and Company, in the year, with interest at the rate of five per cent. per annum, payable half yearly at the place mentioned in the indorsement hereto, viz.: On the of every year until the payment of the said principal sum. In testimony whereof the Governor of the state of Mississippi has signed, and the treasurer of the state has countersigned these presents, and caused the seal of the state to be affixed thereto at Jackson, this in the year of our Lord.

Governor.
Treasurer."[2]

The bonds were made transferable by the indorsement of the president and cashier of the bank to the order of any person whomsoever, or to the bearer, and the indorsement was to fix the place where the principal and interest should be paid,[3] but the bank was to pay the principal and interest of the bonds as they severally fell due.[4]

An act supplementary to the charter, passed before the bank commenced operations, prescribed that two and one half per cent. on the subscriptions should be immediately paid.[5] The balance was to be secured by mortgages on real estate,[6] and the bank to commence business as soon as $500,000 were subscribed and paid in on the capital.[7] As soon, however, as the state bonds were sold and the proceeds of the sale realized by the institution, the directors were required to refund to the subscribers within ninety days the amount paid by them in cash on their subscriptions, with five per cent. interest.[8]

The supplement directed the governor to subscribe in the name of the state for fifty thousand shares, to be paid for out of the proceeds of the state bonds.[9] The government of the institution was authorized to appoint three commissioners to sell the bonds in "any market within the United States or in any foreign market," and under any rules and regulations, "not inconsistent with the provisions of the charter." Upon the power of sale there were but two restrictions, viz.: that the bonds should "*not be sold under their par value,*" and that the commissioners should not "accept any commission or agency from any other banking or railroad company for the disposal of any bonds for the raising of money, or act as agents for the procuring of loans upon the pledge of real estate for the benefit of any other corporation."[10]

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[1] Id. sec. 30. [2] Id. sec. 5. [3] Id. sec. 6. [4] Id. sec. 7.
[5] Supplement, sec. 19. [6] Charter, sec. 8. [7] Id. sec. 13. [8] Id. sec. 44.
[9] Supplement, sec. 1. [10] Supplement, sec. 9.

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By the charter the bank was empowered to "receive and possess all kinds of property, either movable or immovable, and to sell, alienate, demise and dispose of the same; to loan; to negotiate; to take mortgages and pledges, and to discount on such terms and securities as they should judge proper.[1]" Seven offices of discount and deposit were established in different locations with an aggregate capital of $10,500,000,[2] the directors of which were to appropriate two thirds of the capital of each office to loan on mortgages, and one third to loans on promissory notes and bills of exchange.[3]

On the day the books were opened at Jackson, the capital of the state, Governor McNutt subscribed for 50,000 shares, and between the fifth and ninth days of June, 1838, executed and delivered to the bank twenty-five hundred bonds, payable in twelve and twenty years from the fifth of February preceding.[4] Soon after the receipt of the bonds, the directors appointed three commissioners to effect their sale. The commissioners received a sealed power of attorney, which contained a clause prohibiting them from selling the bonds "for less than their par value in current money of the United States."

Upon the 18th August, 1838, the commissioners, in the name of the Union Bank, contracted with Nicholas Biddle for the sale to him individually of the whole amount of the state scrip then issued. The contract made the bonds payable at the agency of the Bank of the United States, in London, in sterling money of Great Britain, at the rate of four shillings and sixpence to the dollar, with interest, payable semi-annually, at the same place and rate; Mr. Biddle, on his part, agreeing to pay the Commissioners, five millions of dollars, lawful money of the United States, in five equal instalments of one million each, on the first day of November, 1838, and on the first days of January, March, May, and July, 1839. The Bank of the United States guaranteed the faithful performance, by Mr. Biddle, of this agreement. *It was punctually performed and the money received by the Union Bank.*

Of the bonds thus purchased fifteen hundred and forty-three, amounting to $3,086,000, were deposited by the Bank of the United States as security for loans to it in Europe. Some of these are now in the hands of Hope & Co. of Amsterdam. The rest may have been sold by the Bank of the United States. We cannot say exactly where they are, nor is it necessary to the right understanding of the case. It is sufficient to know, that the whole $5,000,000 are still outstanding against Mississippi.

In the following year, 1839, five millions more in bonds under the same charter were issued to the Union Bank; but upon the second day of March, 1840, the governor, fearing that they would be illegally disposed of, issued his proclamation, "warning all persons and corpora-

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[1] Charter, sec. 9. [2] Supplement, sec. 32. [3] Id. sec 36.
[4] Gov. McNutt's ann. mess. 8th January, 1839.

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tions not to advance money or securities or credit on the hypothecation of said bonds, or to receive the same in exchange for the circulation or other liabilities of the Mississippi Union Bank, or to purchase the same on a credit or for a less sum than their par value in specie, or any other terms not explicitly authorized by the charter of said bank."[1] In his annual message on the 5th January, 1841, the governor informs the legislature, that, by this proclamation, he had prevented an *invalid* sale of the bonds. Repudiation, therefore, affects only the first set issued and sold to Mr. Biddle.[2]

In less than two years after the Union Bank was chartered, it became hopelessly insolvent. Upon the amount it realized by the sale of the state bonds, the bank pursued its business with the spirit and desperation of a lunatic gambler, and ruined itself irretrievably, "by making advances upon cotton, issuing post-notes and loaning the principal portion of its capital to insolvent individuals and companies."[3] The history of this concern during its short existence is an exposition of gross folly and reckless fraud, which can be paralleled by that of no other institution in the country excepting that mighty mass of corruption lately controlled by the "great financier."

The situation of the bank was communicated to the Mississippi legislature in the annual message of the governor, January, 1841, and certain measures were suggested by him in relation to the bonds. In this message first appears the word at the head of this article, and which has since been generally adopted in the United States as a synonyme for extensive swindling; a word which, unless measures be taken to redeem the national honor so deeply implicated in the course of Mississippi, will be hereafter used abroad as characteristic of American faith; a word, in short, which, like the terrific cries of the French *sansculottes*, is filled with anarchy and revolution.

Without directly advising the measure, the governor insinuates that amongst others this will "be undoubtedly recommended," namely, "placing the bank in liquidation for the benefit of all concerned and REPUDIATING the sale of five millions of the bonds in the year 1838, on account of fraud and illegality." The response of the legislature to this *insinuation* was worthy the honor and dignity of the state.

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[1] Proclamation of Governor McNutt, 2d March, 1840.

[2] In his letter to Messrs. Hope & Co. he says that this proclamation prevented any sale whatever of the bonds.

[3] Annual message, January, 1841. The statement of the bank's affairs given in this message is as follows:

Suspended debt in suit,	$2,689,869 20
Do. do. not in suit,	1,777,337 78
Resources chiefly unavailable,	8,034,154 28
Immediate liabilities,	3,034,154 28
Capital stock,	5,008,000 00
Specie on hand,	4,349 06!

"Not more than one third of the debts due the bank will ever be collected, and the whole of its capital is irretrievably lost. It advanced to the planters, in the fall of 1838, sixty dollars per bale upon seven thousand bales of cotton."

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Joint resolutions were passed and presented for approval. As they are brief and pointed, we insert them here to show what was at that time the temper of the people as evinced by a newly elected legislature.

First. "That the State of Mississippi is bound to the holder of the bonds of the State of Mississippi and sold on account of the Planters' and Mississippi Union Bank, for the amount of the principal and interest due thereon.

Second. "That the State of Mississippi *will* pay her bonds and preserve her faith inviolate.

Third. "That the insinuation that the State of Mississippi would repudiate her bonds and violate her plighted faith, is a calumny upon the justice, honor, and dignity of the state."

These resolutions were undoubtedly intended as a censure upon the governor's insinuation and were received by him as such. He returned them with a veto message containing an elaborate vindication of his insinuated repudiation, which we shall hereafter more particularly examine. In this message he emphatically declares, that he will never sign a bill to raise money for the payment of the principal of the bonds. That if the legislature will, "before they adjourn, pass a law providing to raise, by taxation, a sum sufficient to pay punctually the interest on the seven millions state bonds and the several instalments as they fall due, he will return to the people the high office he has received by their suffrages." In that event he would have been succeeded by the President of the Senate who was pledged to an honest and honorable course in relation to the state debt. No such bill was passed, however, and therefore Governor McNutt did not *repudiate* his office.

On the 22d May, 1841, Messrs. Hope & Co., finding that the interest on the bonds holden by them on the first of that month was unpaid, addressed a letter to Governor McNutt, informing him of the delinquency, and expressing great confidence that the justice of that state would prevent future "demur or irregularities so prejudicial to American credit in general, and to that of the state of Mississippi, in particular." To this letter the governor replied on the 13th July, 1841, when, after stating his reasons, he explicitly declares, that "this state will never pay the five millions of dollars of state bonds issued in June, 1838, or any portion of the interest due or to become due thereon."

In the fall of the same year the question of repudiation was distinctly presented to the people, and the executive, a majority of the legislature and two members of congress chosen in favor of this modern discovery for the payment of troublesome debts.

It therefore seems settled, that this state will forever rest under the imputation of having deliberately committed the most barefaced robbery in the history of nations.

We have given all the facts of the case, and they show that this

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language is not too strong. A bank is chartered with an immense capital to be raised by loan. It had no credit and could raise nothing without assistance. The state lends its name to the whole amount. Its bonds go forth bearing its promise to pay the amount if the bank shall not pay. Upon the faith of that promise a large sum is actually received. The bank fails to pay even the interest. The contingency happens then, which justifies the holders of the bonds in calling upon the state. It is requested to pay and refuses. It has been cheated by the institution it created — and that, although not so alleged, is its real excuse for refusing.

But Governor McNutt did not recommend repudiation without advancing his reasons and arguing in support of them. The measure was too important in its consequences to be introduced without a flourish of trumpets in its favor. Legal sophistry must be employed for those inclined to cavil — political sophistry for the benefit of party — moral sophistry for those whose consciences are guided by the ethics of expediency — and above all, patriotic sophistry to cajole the "people" out of whose "hard earnings," this sum must be paid, if paid at all. "*Nemo tam audax unquam fuit quin aut abnueret a se commissum esse facinus, aut justi sui doloris causam aliquam fingeret, defensionemque facinoris a jure aliquo quæreret.*"

Accordingly in his annual message to the legislature, 1841, he assigns the following reasons why the sale was illegal and fraudulent and asserts that either of them is "sufficient to prevent its having any obligatory force on this state."

First. The Bank of the United States is prohibited by its charter from purchasing such stock either directly or indirectly.

Second. It was fraudulent on the part of that bank inasmuch as the contract was made with an individual when it was for the benefit of the bank and payment was made with its funds.

Third. The sale was illegal inasmuch as the bonds were sold on a credit.

Fourth. Interest to the amount of about one hundred and seventy thousand dollars, having accrued on these bonds before the purchase money was stipulated to be all paid, the bonds were, in fact, sold for less than their par value, "in direct violation of the charter of the bank."

In his letter to Hope & Co., he adds another, namely, "The currency in which the bonds were made payable was changed from current money of the United States, to pounds sterling of Great Britain, at the rate of four shillings and sixpence to the dollar."

Such is the foundation on which repudiation rests. Another reason might have been assigned fully as tenable and much more candid — namely — That the state found it troublesome to pay without direct taxation, and that measure, if resorted to, might have endangered personal popularity.

We proceed now to the examination of these "reasons," and shall

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in all instances do justice to his arguments, by using the governor's words. We must in the first place, however, examine an argument which even Governor McNutt does not have the effrontery to adduce, but which is relied upon in Mississippi by the advocates of repudiation and has been adopted by a prominent political newspaper in a neighboring state.[1] The argument is, that the law chartering the Union Bank is unconstitutional, or at least, that part of it authorizing the credit of the state to be pledged. The paper alluded to proposes the argument in this mode: The legislature and executive of a state are special agents of the people. The constitution is their letter of instructions. Therefore the charter of the bank being unauthorized by the constitution, the agents have exceeded their authority and the principals, that is, the people, are not bound by their acts, and have a right to refuse a redemption of the bonds. As an illustration, the commercial case is cited of a clerk being empowered by his employer to sign a receipt, but who executes a promissory note in his employer's name — gets it cashed and embezzles the money. Therefore, as in such case, the employer would not be bound to pay the note — so neither upon the same grounds, is Mississippi holden to pay her bonds.

This argument proceeds upon a *petitio principii.* The position is assumed, that the pledge of the state faith is unconstitutional, whereas the direct reverse of this is true. The act authorizing the loan of the state credit, passed through all the forms required by the constitution of Mississippi. The proposition for chartering the bank was first effectually made in the legislature of 1837. The bill was carried by a constitutional majority in each branch, was signed by the speaker of the house and the president of the senate, and was approved by the governor. The constitution prescribes, that "no law shall ever be passed to raise a loan of money upon the credit of the state for the payment or redemption of any loan or debt, unless such law be proposed in the senate or house of representatives, and be agreed to by a majority of the members of each house, and entered on the journals, with the yeas and nays taken thereon, and be referred to the next succeeding legislature, and published three months previous to the next regular election, in three newspapers in this state, and unless a majority of each branch of the legislature so elected shall agree to pass such law; and in such case the yeas and nays shall be taken and entered on the journals of each house."[2]

The section of the charter authorizing the loan was referred to the legislature of 1838. The whole scheme met with decided opposition. The governor himself opposed it. The charter nevertheless passed, and the loan was authorized by a legislature elected with special reference to the subject. The bill was again approved by Governor McNutt. "A large majority of the members returned at the election

[1] New York Evening Post, November, 1841.
[2] Constitution of Mississippi, art. 7. sec. 9.

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of 1837 were in favor of the bill. Coming as they did from every portion of the state, elected as they were long after the measure had been first introduced into the legislature, and submitted to the people for their ratification, I was bound to take their action on the bill at the January session, 1838, as conclusive, and accordingly gave it my executive sanction." [1]

The forms prescribed by the constitution were, therefore, strictly observed. Governor McNutt would not have signed the bill had there been any doubt upon this score. His approval is equivalent to an express declaration that the constitutional requisitions were strictly complied with, and estops the state from proving the reverse. It is true, that the constitutionality of the bill is questioned on other grounds, and strong efforts were therefore made in the legislature of 1838 to prevent its passage. But it is equally true, that a majority of that and the preceding legislature were of a contrary opinion. Very slight knowledge of constitutional law informs us, that an act passing through all the prescribed forms, and sanctioned by the legislative powers, is valid till set aside by the judiciary.

No legislation is presumed unconstitutional. The legal maxim "*omnia præsumuntur rite esse acta*," applies with especial force to acts of the legislature. The charter was pronounced constitutional by two legislatures which passed, and by the executive who approved it. They are in the first instance the judges of its constitutionality. Their decision binds till regularly reversed. No such reversal has taken place. The whole world has a right and is holden to take the charter as constitutional. Whether, therefore, the charter of the Union Bank is or is not such as the legislature of Mississippi had a right to pass, by the terms of their constitution, it is too late to inquire. The maxim is universal, that where one of two innocent parties must suffer by an abuse of confidence unworthily reposed, that party must suffer, who, by reposing the confidence, has caused the other to be deceived.

The governor denies this doctrine, and says it "may be law in governments where all power is vested in the monarch, and constitutional restraints are unknown. Far different is the rule in our republican country, where the people have retained the sovereignty in their own hands, and acknowledge the superiority alone of their constitution and laws." [2] He does not, in the passage from which this extract is taken, say that the charter was unconstitutional. He would scarcely venture thus to condemn himself, or to place his personal character in so unenviable a predicament. He intended it to apply to an unconstitutional sale of the bonds. But under any application, the doctrine is untenable. The value of state scrip and of the pledged faith of our independent sovereignties may be easily con-

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[1] Veto Message.

[2] Veto Message.

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ceived, if, before a purchaser felt safe in taking their bonds he was forced to dive into the unfathomable mysteries of local constitutional law. It is absurd to believe that scrip so situated could ever be negotiated. It cannot be supposed that foreign holders, or even our own citizens should be wiser on those points than the local legislatures, the trusted and honored agents of the people. The case of the Mississippi bonds is exactly the case where a court of equity should take "acts according to conscience, and not suffer undue advantage to be taken of the strict forms of positive rules."[1] To justify that state, whose legislature passed, whose executive approved, and whose people ratified the law, in its refusal to pay a debt incurred upon the faith of the law because it is presumed to be unconstitutional, is a monstrous departure from the first principles of morals, which, if adopted in this country, will more injure its little remaining credit than the explosion of Mr. Biddle's bank or the repudiation of Governor McNutt.[2]

We return now to a review of the arguments relied upon by the governor and the advocates of his doctrine.

1. "The purchase by the bank of the United States was illegal, and in fraud of its charter. I have understood that the larger portion of those bonds have not been sold by the bank, but are hypothecated with European bankers, and loans obtained upon them. It is a well-settled principle of law, that where no authority is given to an agent to sell on time, no legal sale can be made except for cash.[3] The Mississippi Union Bank was not authorized by her charter to sell the bonds on a credit. It is a well-settled principle, that where no express authority is given to an agent to sell on a credit, the sale must be for cash, and that a credit sale is not binding under such circumstances on the principal."[4] "It will no doubt be contended, that inasmuch as those bonds have passed into the hands of innocent purchasers, that the state is bound to redeem them. This argument vanishes when it is considered, that, under our statutes, all defences may be set up against an indorsee which would be available against a payee."[5]

Admitting it to be consistent with the honor of a sovereign state to take advantage of this provision of its local law, how does the defence stand against Messrs. Hope & Co.? In the first place, the Union Bank *was not the agent* of Mississippi, as alleged by the governor. The contract of agency was never contemplated by the parties. The law regulating the relation between principal and agent has no application to the conduct of the bank in selling the bonds.

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[1] *Chesterfield* v. *Jansen*, (2 Ves. 137.)

[2] For masterly arguments in answer to the constitutional objections see letter of George S. Yerger, Esq., to the editor of the Vicksburg (Miss.) Whig, published in the Southron, at Jackson, 7th October, 1841, and that of Charles Scott, Esq., 27th July, 1841. Hazard's (Philadelphia) U. S. Register, Vol. 5, 129.

[3] Annual Message, 1841. [4] Veto Message. [5] Annual Message.

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What is agency?

"The relation between principal and agent takes place whenever one person authorizes another to do acts or make engagements in his name." *Paley on Agency*, 1. "Agency is founded on a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name and on his account, and by which the other assumes to do the business and render an account of it." 2 *Kent's Comm.* 613. "In the common language of life, he, who being competent and *sui juris* to do any act for his own benefit or on his own account, employs another person to do it, is called the principal, constituent or employer, and he who is thus employed is called the agent, attorney, proxy or delegate of the principal constituent or employer. The relation thus created between the parties is termed an agency." *Story on Agency*, 3.

To constitute the relation of agent and principal between the parties, it is essential, then, that one should be authorized to do an act *for the other*; for that other's benefit and not for his own, except incidentally in the way of reward. Such was not the contract between the state of Mississippi and the Union Bank. The latter acted for itself and not for the state, except so far as the state was a stockholder. In that capacity the state lost its character as a sovereign commonwealth and descended to the level of an individual.[1] The whole sum received by the sale of the bonds was to be paid into the vaults of the bank and not into the coffers of the state. It received the money not as a reward for the service in procuring it, but as the price for the sale of its own commodities.

The form of the bonds shows that such was the case. It is immaterial by what name they are called. They are in effect promissory notes, negotiable by mere indorsement or simple transfer and made for value received, only the ordinary implication of this contract was reversed, and the indorser holden to pay in the first instance before a demand could lawfully be made on the maker. So far as any subsequent holder was concerned, it was of no consequence whether actual value had or had not been received by the state. Under the most solemn sanctions of law, on the face and by the language of the instruments, the actual receipt of a consideration was acknowledged. The bank had an absolute property in the bonds, and could sell them to whom and for what sum it pleased, subject to the *express* limitations in the charter. It was no more an agent of the state than the maker of a note of hand is an agent of his accommodation indorser.

Had the state executed these bonds for its own purposes; had the intention been to put the proceeds of them into its own treasury, and if it had employed the bank to effect the sale, the contract would have

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[1] *Bank of the United States* v. *Planters' Bank of Georgia*, (9 Wheat. 904.)

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been that of agency and the agent would be subject to the laws regulating such relation. This, however, is not the case, and the attempt to evade the obligation of the state on the ground that the bank exceeded its powers as the state agent, savors very much of the sophistry of an advocate defending a desperate cause.

Second. Should it be conceded even that the bank was a mere agent of the state, the governor's law equally fails him. "It is a well settled principle," he says, "that where no *express* authority is given an agent to sell on credit, the sale must be for cash, and a credit sale is not binding under such circumstances on the principal."

Now the law is directly the reverse. "A factor or merchant who buys or sells on commission or as an agent for others for a certain allowance, may sell on credit without any special authority for that purpose. It is the well settled usage that such an agent may sell in the usual way, and consequently he may sell on credit without incurring risk, provided he be not restrained by his instructions, and does not unreasonably extend the term of credit, and provided he uses due diligence to ascertain the solvency of the purchaser." 2 *Kent's Comm.* 622. "If an agent be authorized to sell goods, this will be construed to authorize the sale to be made as well upon credit as for cash, if the course is justified by the usage of trade and the credit is not beyond the usual credit; for it is presumed that the principal intends to clothe his agent with the power of resorting to all the customary means to accomplish the sale, unless he expressly restrict him." *Story on Agency*, 60; *Gervicr* v. *Emery*, (2 Wash. C. C. R. 413.)

We are aware that the same authorities mention it as an equally well established rule, that a sale of stock must not be on time. But the exception is founded on custom. Where the custom fails, the exception fails; and it is well known to be the custom in this country to sell everything on credit, from a state bond to a pound of tea. The general custom of credit sales is supported by the particular custom in sales of securities like these, for it is believed to be universal to sell state scrip on credit. The credit on the sale of the Mississippi stock was not unusually extended; the two conditions, as to custom and time, were complied with by the bank, and the charter contains no express restriction against selling for credit. But can property of the description of these bonds be properly deemed such stock as comes within the exception? They are negotiable securities; they were entrusted to the Union Bank, without restrictions as to the mode of sale, expressed either on the face of the instruments themselves, or in the charter of the bank. With respect to all instruments of that kind, the rule is, that if the agent "disposes of them by sale, or pledge, or otherwise contrary to the orders of his principal, to a bona fide holder without notice, the principal cannot reclaim them," because in all such cases "he holds out the agent as having an unlimited authority to dispose of and use such instruments as he may please." *Story on Agency*, 221.

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But after all, if this rule do not apply to Mississippi, from the peculiarity of her local law in relation to defences against indorsees, it is very clear, that this is not a case where the principal may disaffirm the sale, because the agent has exceeded his powers. If stock were sold, against the principal's orders, to an individual on credit, who became insolvent before the credit expired, by reason of which the principal receives no value on the sale, it could be disregarded and the stock be reclaimed. So if any damage were sustained by the principal on such sale, he would be entitled to a recompense. It is, however, entirely too much to say, that, where the order is disobeyed, but no damage is received — when by a sale against express instructions the entire benefit is enjoyed which was contemplated by a sale in accordance with the orders, the principal can disaffirm the transaction and yet retain the advantage. The law of no country goes that length. Consider a common case of factorage as a test of this principle. An agent is ordered to sell a bale of cotton for cash. The purchaser, knowing the instruction, takes the cotton, and delivers to the agent his note payable in sixty days. When the time has expired he pays the note. Could the principal, a year afterwards, reclaim the cotton, because it was sold on credit? Surely not. The agent ran the risk of the purchaser's solvency, which turned out to be no risk. In the case of these bonds no damage accrued to the state by the credit sale. The whole amount was received by the corporation appointed to receive it. It is quite too late to say, that the sale was not binding upon the state. At the very extent it can be vacated only as to the amount of interest required to be refunded by the bank.

We will not pursue this part of the subject farther, although the question whether the state did not ratify the illegal sale, if such it were, is worthy consideration. The bank in which she was a stockholder received the money and used it. More than two years passed before any disaffirmance of the transaction took place, and we apprehend that this acquiescence, on the part of the state, is equivalent to an original express authority.[1]

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[1] The case of the *State of Illinois* v. *Delafield*, in the Chancery Court of New York, reported in the third volume of this magazine, page 240, may seem, in some degree, to militate with the positions assumed in the text. There is, however, an obvious and important distinction between the situation of Illinois in respect to her bonds and that of Mississippi. An outline of the policy of the former state may interest the reader, and at the same time serve to explain this distinction. Upon the 27th February, 1837, the legislature of Illinois passed an act establishing an extensive system of internal improvements. No less than $10,200,000 were appropriated for the commencement and completion of various works, comprehending railroads, canals, common roads, and the improvement of navigable rivers. A board of "fund commissioners" was created by the act, whose principal duty consisted in "contracting for and negotiating all loans authorized to be effected by the legislature on the faith and credit of the state, for objects of internal improvements," — and "to sign and execute bonds or certificates of stock therefor, in the manner directed by law, and to receive, manage, deposite and apply all sums of money arising from said loans, in such manner as shall, from time to time, be provided by law. "A board of commissioners of public works," was created

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We pass now to another of the objections, namely, "inasmuch as the bonds were sold on a credit and the interest accrued from the date, it is certain that they were ***sold for less than their par value.***"

Here is the objection and the argument; and all which is said by the governor in support of them.

The restriction on the charter as to selling the bonds for less than their par value, must be construed according to the ordinary acceptation of the words. The term "par value," is a commercial phrase. In reference to bills, notes, bonds, and instruments of that description, they signify the expressed amount.

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by the same act, whose duties were "to locate, superintend, direct, and construct on the part and behalf of this state, all works of internal improvement which have been or shall be authorized to be undertaken, prosecuted, and constructed by the state, either in whole or in part, (excepting the Illinois and Michigan Canal.") "The charge and superintendence of all such public works" were vested in this board. To raise the money thus appropriated, "a fund for internal improvements" was constituted, to consist, amongst various other items, of "all moneys which shall or may be raised by the sale of stocks, or state bonds." The board of fund commissioners was authorized to contract, from time to time, for one or more loans, not exceeding, in the whole, $8,000,000, for the payment of the "legitimate demands upon the fund for internal improvements," and to issue for such loans, transferable certificates, to be denominated "Certificates of Illinois Internal Improvement Stock," in the name of the state, and the faith of the state was "irrevocably pledged," for the payment of interest and their final redemption. By a supplement to this act, passed March 4th, 1837, the "board of fund commissioners" was authorized to *sell* the stock for not less than par, which was to be deemed "a good execution of the power to borrow," and the governor of the state was authorized to execute the bonds whenever requested so to do by that board. The board was authorized by the same act, to appoint agents "with full power to negotiate the loans and make sale of the state bonds and certificates of stock."

The Michigan and Illinois Canal, had been commenced previously to these acts, and stock, to the amount of $4,073,048, had been issued by the state. Large donations of public lands were also given by the general government, to aid in its construction. The state of Illinois was thus a gigantic contractor on its own account. All the money received was to be paid into her own treasury, and to be appropriated to the construction of her own works. The fund commissioners were her agents, they stood with respect to her, precisely as the commissioners of the Union Bank stood with respect to that institution. In the opinion of the chancellor in the case cited above, he says "these state securities in the hands of its agents, were not an article of merchandise. The object was to borrow money, not to sell stock in the way in which stock, held by individuals, is sold." In the Mississippi case, the direct reverse of this is true. The *Union Bank* might, perhaps, *before it had received the money of Mr. Biddle*, have taken the same grounds that Illinois took. Besides, *Illinois did not receive the money.* Her course was altogether proper, and such as became the dignity of a sovereign commonwealth. "*It never contended for the bonds parted with by Delafield, in good faith, nor denied its legal and moral obligation to pay them when passed into the hands of innocent and bona fide purchasers.*" See letter of Richard F. Barret, Esq., fund commissioner of Illinois, published in 4th Hazard's Register, page 32.

The state debt of Illinois is now over $13,000,000, and "not a single work is completed or in a condition to produce revenue to the state." American Almanac, 1842, page 107.

From the earliest period of the sales of the public lands, to 30th September, 1838, this state has had granted to her, by the general government, 1,537,317 acres of the public lands, being at the government price $1 25 per acre, equivalent to $1,921,646. That portion granted to her for roads and canals, is 480,000 acres, equal at the same rate, to $600,000. Letter of Secretary of Treasury, February 7, 1839.

The general government has also granted to her, to aid in building her great canal, lands, "the estimate of which is equal to the whole cost of constructing the canal," namely, $7,000,000. This is specifically pledged for the redemption of the state bonds as indeed is, almost, the entire property of Illinois. 1 Hazard's Register, 1839.

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In Johnson's dictionary, *par* is defined to be "a state of equality, equivalence, equal value." The par of these bonds was two thousand dollars. Did the agents of the Union Bank, when they sold this stock, agree to take less than two thousand dollars per bond? If they did, they transcended their powers. But the contract with Mr. Biddle shows, that such was not the case. The stock was sold for its full value. Its reputation was not injured by the transaction. The mode in which payment was to be made, forms an independent branch of the contract. There is no necessary inconsistency between a credit sale and a sale for par.

The statement of the governor, then, that the bonds were sold for less than their par value, is incorrect in point of fact. They were sold for the amount expressed on their face. The whole five million dollars were actually received by the Union Bank. The scrip went into the market without depreciation, without indication of diminished confidence in the ability and will of the state to redeem it. The true statement of the operation is, that the terms of sale were such that an amount of interest was required to be paid by the bank, which, upon an account taken, diminished its *net* receipts. With this the state had no concern. The bank exercised its legitimate powers in acceding to such terms. Because the contract might have been improvident, it does not therefore follow that it was illegal.

Again, the governor objects that "the currency in which the bonds were made payable, was changed from current money of the United States to pounds sterling of Great Britain, at the rate of four shillings and sixpence to the dollar." By this change he says $901,343 were lost.

The answer to this objection is, *First:* That if the bank had a right to change the currency as stated, the loss consequent upon the change is immaterial, if four and sixpence sterling is not an unreasonable rate. *Second: That the governor misstates the fact.*

The bank was authorized to designate the place where the principal and interest should be paid. They designated London, and the following is the form of the indorsement. "The President and Directors of the Mississippi Union Bank hereby designate the Agency of the Bank of the United States in the city of London, as the place of payment of the within bond and interest, and hereby assign and transfer the same for value received to bearer, being equal to four hundred and fifty pounds sterling, and guarantee the payment of the same at the place designated."

This indorsement shows, that the currency of the bonds was *not* changed. It is, as to the point of currency, only an assertion by the bank, that two thousand dollars are equal to four hundred and fifty pounds sterling. It is not an agreement to pay *only* in currency of Great Britain, but to pay in that currency, *or* in dollars, at the option of the holder. This objection of the governor is the more unaccountable, because such an arrangement was essential to a negotiation of

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the scrip. It must have been anticipated by the legislature, when they authorized the scrip to be issued.

Let us examine the course to be pursued in the redemption of the bond when its time has expired. The Union Bank was authorized to designate the place of payment of principal and interest. It might, therefore, have selected the city of Calcutta or the island of Honolulu, and the state would have no legal right to complain. No complaint is made because London is selected. When the twenty years expired, therefore, two thousand dollars must be produced in London. The bank could take two thousand silver dollars and transport them to that city, and take up the bond. If the bank failed to do so, the state would be compelled to take its place. Or, instead of the specie, it might draw against its consignments of cotton — or it could purchase and remit a bill of exchange bought in this country. But who is to pay the freight, interest and insurance of the specie? Who is to pay the premium of exchange? The bank or the state beyond all question. The contract is to place in London two thousand dollars in specie, and one or other of these parties, the principal or surety, must pay all the expense of getting them there.

If the bank should draw upon its correspondent in dollars, the bill must nevertheless be paid in pounds sterling, for dollars are not current in Great Britain. If she buy a bill of exchange it must be drawn in the currency of the place where it is payable. Who shall say, then, how many pounds sterling are equal to two thousand dollars? When the time arrives for the payment to be made, that question must be answered unless the dollars are transported in coin. The indorsement, therefore, only anticipates the time, and establishes the present value of the dollar. The contract of the indorsement is, that if the bank choose to pay the freight and other expenses of transporting the specie to London to liquidate the bond, it can do so. If, however, the bank find it more to its advantage to send a bill, it can do so, in which case four hundred and fifty pounds sterling shall be deemed equivalent to two thousand American dollars.

If there be any loss in the payment, it is a part of the contract, both of the state and the bank, to sustain it. The holder of the bonds is not to be at the expense or the trouble of transporting his money to London, nor is he to sustain any loss, or to realize any profit on the difference of exchanges. All that, for better or worse, happens to the bank.

Under no circumstances, therefore, can the indorsement be truly said to change the currency in which the bonds are payable. Nor with any more justice can the bank be said to have lost any thing by the arrangement, because the relative value of the pound sterling and the dollar is subject to fluctuations beyond the control or foresight of the parties.

We come now to the charge, that the contract for the sale of these bonds was fraudulent. Governor McNutt's argument upon this

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point is as follows: "The contract was guaranteed by the Bank of the United States. The whole of the money was paid by that institution. The name of Mr. Biddle was merely used as a device to get round that clause in the charter of the Bank of the United States which prohibits her from dealing in state stocks. The currency in which the bonds were payable was changed from dollars to pounds sterling to give a false coloring to the transaction, and make it appear that the bonds were sold at par value. The principle is universal that fraud vitiates all contracts." Again: "It was fraudulent on the part of that bank, inasmuch as the contract was made in the name of an individual, when in fact it was for the benefit of the bank, and payment was made with its funds."

The allegation of a fraudulent sale is, therefore, unsupported. The vendors parted with the bonds in good faith. If there be any fraud in the case it is in the purchase. The Bank of the United States was the guilty party, and the state of Mississippi steps forward as the champion of her innocent and deceived institution, the Union Bank.

Fraud is defined to include "all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, and by which an undue or unconscientious advantage is taken of another." 1 Story on Eq. 197. Was the Union Bank cheated by this transaction? Was any undue or unconscientious advantage taken of it? Was any trust reposed by this institution violated, or confidence abused by the Bank of the United States when it paid the five millions in cash? Surely no sensible man will hazard an affirmative answer. The very idea of fraud implies deceit. Robbery is not fraud. The man who thrusts his dagger at your throat and forces you to part with your purse to save your life, commits a high-handed outrage against your natural and social rights, but in no sense can be said to commit a fraud. He has at all events the merit of boldness. The Bank of the United States, when it advanced its money to the Union Bank, perhaps committed an illegal act. It may have dealt in state stocks in violation of its charter, but if so, it was no fraud upon the Union Bank.

It is said, however, that the whole transaction was merely colorable, and that Mr. Biddle's name was used to give a false aspect to the affair. To this we reply, that it is a mere assumption, unsupported by evidence. His knowledge of law should have taught the governor that fraud is never presumed, but requires full and explicit proof. There is little doubt that the cash paid by Mr. Biddle for the bonds came from the Bank of the United States. It is well known, however, that about the same time he was speculating on his own account in cotton to an incredible amount, forming a true *leonina societas* with that institution, himself enacting the part of the lion. The transaction with the Mississippi bonds was probably only another shape given to his speculations. If any profit should be realized by the resale of them, he was to have the benefit of it; but as it turned out that losses

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would accrue because the stock fell, he chose to assign it to the bank at par, in payment of the money he borrowed to purchase it.[1]

But suppose it to have been merely a colorable transaction. Does that fact lessen the obligation of the sovereign state of Mississippi to redeem the bonds? Messrs. Hope & Co., or any other subsequent holders, may have reason to complain that they were deceived into buying bonds of an institution which had no right to sell them, and might, perhaps, rescind their contract. But is this defence tenable by Mississippi, who is the largest stockholder in the bank which originally sold them? Who has enjoyed her portion of the profits arising from the use made of the money? Who as a stockholder, appointed the agents who sold the bonds? Who by receiving the money, ratified the proceeding, and made herself a *particeps criminis? Who, by acts of her legislature, has procured out of this very money, loans to the amount of* $175,000,[2] besides discounts to the amount of $25,000 more? Surely she shall not be allowed *in foro conscientiæ*, at least, to set up her own fraud, if such she choose to call it, in avoidance of the consequences of it. Let her first pay the interest due, and tender the amount of the principal, and she may then place herself *recta in curia*, and be better entitled to refuse farther performance of her contract.

Such are all the legal arguments of Governor McNutt in support of his refusal. His political arguments are unworthy discussion. One, however, is of such extraordinary complexion as to claim a casual notice. "The bank, I have been informed, has hypothecated these bonds, and borrowed money upon them of the Baron Rothschilds; the blood of Judas and Shylock flows in his veins, and he unites the qualities of both his countrymen. He has mortgages upon the silver mines of Mexico and the quicksilver mines of Spain. He has advanced money to the Sublime Porte, and taken as security a mortgage upon the holy city of Jerusalem, and the sepulchre of our Saviour. It is for this people to say whether he shall have a mortgage upon our cotton fields and make serfs of our children. Let the baron exact his pound of flesh of Mr. Jaudon and the Bank of the United States, and let the latter 'institution of our country' exact the same of the Mississippi Union Bank. The honor, justice and dignity of the people of this state will not suffer them to interfere in the banker's war!"

In this choice specimen of executive eloquence, it is doubtful whether malignity or jacobinism be most conspicuous. The conclusion legitimately deducible from it is, that as Baron Rothschild is very rich, he can afford to lose five millions of dollars. And that, as the people of Mississippi are not so rich, their "justice, honor and dig-

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[1] The settlement of the balance due on his cotton speculation by a transfer of *Texan* bonds at par, is a key to this affair. See Report of Committee on Investigation, p. 20.

[2] Vide Stats. February 15, 1839; February 19, 1839; and April 19, 1839.

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nity" will suffer them to cheat him out of it because he is a Jew. The governor, therefore, makes war upon all rich bankers, and with the genuine spirit of Jack Cade, exclaims,

> —"you that love the Commons follow me;
> Now show yourselves men, 't is for liberty.
> We will not leave one lord, one gentleman,
> Spare none but such as go in clouted shoon,
> For they are thrifty, honest men, and such
> As would (but that they dare not,) take our parts."

We have now completed our review of the grounds assumed by Governor McNutt in justification of this extraordinary and daring breach of public faith. We do not believe he himself has any abiding conviction of their validity, but rather ascribe his course to that political insanity which has perverted the morals and clouded the judgment of many of the brightest intellects in the country. His reasons must fail to satisfy those who place public faith upon firmer foundations than the artificial distinctions and subtle refinements of law; and this brings us to consider other and more important grounds, upon which rests the obligation of Mississippi to redeem her bonds.

"Justice is the basis of all society, the sure bond of all commerce. Human society, far from being an intercourse of assistance and good offices, would be no longer anything but a vast scene of robbery, if no respect were paid to this virtue, which secures to every one his own." *Vattel's Law of Nations*, c. 5. s. 53. *Hæc enim una virtus omnium est domina et regina virtutum.*

Between individuals, justice may be well enough administered by the courts; but where a sovereign community is concerned, an adherence to the unavoidable subtleties and necessary refinements of law, are inconsistent alike with its dignity and its faith.

The foundation of all contracts with a sovereign community, is reliance upon its justice as well as upon its integrity. Individuals contract with each other not merely upon a belief in the existence of these virtues, but also with reference to and reliance upon the compulsory power of the law. In contracts with states, no such reliance can be had. They are above the reach of law. A healthy tone of moral sentiment; well regulated public opinion; the influence of the natural and innate sense of justice are the only securities on which creditors can depend, in their dealings with states. It is true, that Mississippi has wisely allowed itself to be made a defendant in its chancery court,[1] yet it is above the reach of any process of the court. It cannot be imprisoned for contempt, nor is its property liable to sequestration, till a compliance with the court's decrees. On the contrary the statute conferring this jurisdiction, provides that "no execution whatever shall issue on any decree in chancery against

[1] Constitution of Mississippi, art. 7, s. 10, and Stat. 1833, c. 41. s. 72.

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the state of Mississippi, whereby the state may be dispossessed of lands and tenements, goods and chattels." It may well enough be doubted, whether, if the foreign holders of the bonds obtained a decision in their favor, it would be of any ultimate value to them. Their case has been prejudged, both by the executive and the people to whom he has appealed. If the chancellor were righteous enough and firm enough to disregard this indication of popular opinion, suppose him uninfluenced by dependence upon popular caprice for re-election to office, and to decide in favor of these creditors, should they come before him; how long would it be before he was forced from his high station by an outbreak of popular clamor?[1] The same spirit which at the ballot box, has declared in favor of repudiation, would intercept an execution of his decree; for to the people through their represen tatives, the question would at last be sure to come.

In proportion precisely as an individual is beyond the reach of compulsory process, should he be inclined to disregard the technicalities of mere law, and base himself upon the broader principles of natural justice. This is still more necessary where an independent sovereignty is concerned, because it is more difficult to procure redress for wrongs committed by a state. The relation between debtor and creditor, in all cases involving the repose of confidence, is preëminently a fiduciary relation when the debtor is a sovereign commonwealth. It should be distinguished by that *uberrima fides*, which scorns the strict letter of the contract, and regards its spirit and intention. "The same principles of equity which bind the consciences and govern the actions of individuals in dealings of a private character ought ever to regulate the conduct of states. More imperative, indeed, upon them rests the obligation of such principles, since their own views of justice and uncontrolled will, constitute the only rules of their action."[2]

We place the obligation of Mississippi, to redeem her bonds upon the broad and immutable principles of justice. The question is not whether by nice distinctions of law she be able to escape her liabilities, but whether she be not in justice bound to redeem them, because the purpose of issuing her stock, was substantially answered.

That such is the fact, no one, not even the governor, will be hardy enough to deny. It is apparent, from his own statement, that the Union Bank came lawfully into possession of the bonds. That they

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[1] The Judiciary of Mississippi is elective, from a justice of the peace, who tries a fifty dollar cause, to the chancellor who sits in judgment on the state. The latter holds his office only six years. Miss. Con. art. 4.

[2] Governor Barry's message to the Michigan legislature, January, 1842. "This state has a debt of about five millions and a half of dollars, and, what is peculiarly unfortunate, the state has lost more than one third of the proceeds of the stock which has been issued, by the infidelity and insolvency of those with whom the loans were negotiated; and even the amount received has not been expended in such a manner as to yield revenue to any considerable amount." American Almanac, 1842, p. 106. What an honorable contrast does Governor Barry's course present with that of Governor McNutt.

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were issued for the purpose of enabling that institution to raise money by their sale. That it actually received a large amount of money and applied it, apparently, to the purposes of its charter. That the state itself received and used for its own purposes a considerable portion of this very money. That the bank grossly imposed upon the state is admitted, but no suggestion is made that the Bank of the United States, or any subsequent holder of the bonds was in any wise cognizant of the fraud. They had no control over the Union Bank, and were neither bound to know nor could know its conduct. Even had they been fully aware that the bank was misapplying the money it received, that knowledge would not affect the obligation of the state.

Yet the fraud of the Union Bank, by which the state has been deprived of many anticipated advantages, is the motive cause of that greater fraud upon its creditors which Mississippi undertakes to perpetrate. The consideration of state dignity and faith; the tremendous moral influence of such an example; the deep blow it inflicts upon American credit, whether of individual citizens, corporations, sovereign commonwealths or the federal government; the indelible and fatal stain upon our national honor, are all disregarded. Resort is had for justification, not to enlarged considerations of natural justice, but to the narrow technicalities of municipal law; not to the comprehensive reasoning of an enlightened statesman, but to the cunning refinements of a pettifogging attorney; and the grave question of state honor is discussed by the governor as if the commonwealth were an insolvent client, whom he was laboring to save from a jail.

It may, however, be said, that the sale of these bonds was either legal or illegal. If the latter why should the state be holden to redeem them, when an individual, under the same circumstances, would be exempted? Shall it be at the mercy of every fraudulent agent it happens to employ? By no means. Had these bonds been surreptitiously put into circulation; had the great seal been counterfeited, or the signatures forged, no one would say that the state was in any wise bound to redeem them.

If this money *actually* received by the bank, had, under precisely the same circumstances, gone into the treasury of the state, the nicest stickler for legal strictness would not hesitate to say that the state should refund it. What essential difference in the equity of the case is made, that the money went into the possession of the party appointed to receive it? Had the bank been honestly conducted; had it realized its anticipated profits; had Mississippi succeeded in its banking speculations, who can doubt that this army of pigmy objections would not have been raised?

What substantial difference is made by the fact that the institution was corrupt? Over its management no bond-holder had control, nor even the right of inquiry. The state had its own directors; was itself the largest proprietor; had prescribed its own rules, and had over it almost omnipotent power. Although a legal distinction is

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made between the state acting in its sovereign capacity and as a speculating proprietor of bank shares, yet before the common sense of mankind, it is, and forever ought to be, precluded from advancing the fraud of that institution as an excuse to escape from its unfortunate liabilities. The money was paid upon the faith of the state, to persons legally entitled to receive it. What became of it afterwards the state and stockholders have alone any concern.

But, says Governor McNutt, the bonds were sold below par, and were to be paid in sterling currency. Whence large sums have been lost to the bank which is therefore less able to indemnify the state. So far as this is intended as a legal defence, it is totally untenable. Is it any more so as an equitable defence? The argument amounts to this; that as the bank wasted four millions, Mississippi will not redeem her promise; because, by the nature of the contract on which the money was received, it was precluded from having one more million, to waste in the same way! A singular objection to advance directly after the exposition made to the legislature of the utter rottenness of that concern. Were this argument even plausible, it would affect only the obligation to repay more than the actual amount received.

Allowing, therefore, all Governor McNutt's positions to be sound law, we hazard nothing in asserting the universal sentiment of honorable men to be, that Mississippi is equitably bound to redeem her bonds. Were a merchant under similar circumstances to set up against the payment of his debts, this defence of Governor McNutt's, he would never again dare to show himself on 'change, should every court in the country decide in his favor. Already in a neighboring and eminently commercial commonwealth does a merchant of high standing attempt to escape the effect of a contract upon the ground, that the indorsement of a sealed instrument is not binding. Already has no measured reprobation been bestowed upon this course, although a compliance with his engagement may possibly ruin him. The success or failure of the defence will not alter public opinion as to its character.

Shall more scrupulous honor be expected of an individual than of a sovereign state? Will public opinion, by which we mean, not the clamor of an interested multitude, but the judgment of high-minded men, be more favorable to the latter than the former? We think not. The voice of condemnation will swell in louder and more unequivocal tones against a state, which, resting upon its sovereign immunity, declares itself above compulsion and deaf to the voice of justice.

Individuals lose their character and are punished for the crimes they commit. Fraud and robbery, however perpetrated, whether by the devices of cunning, or the arm of violence, receive the retribution of the law and the odium of society. Even those huge associations, which have been suffered for so many years, like beasts of prey, to devour the substance of society, and to taint the moral atmosphere with corruption, find the influence of their members and the power of

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their wealth insufficient to protect them. In a community where all moral sense is not yet obliterated, which is still within the pale of Christian nations, and under the influence of Christian principles, the state of Mississippi will not escape the scorn it merits for this stupendous fraud.

The states of this Union have generally withdrawn themselves from the jurisdiction of any court, whether federal or of their own creation. No remedy lies against them in favor of injured creditors. The sole resort is a supplication to their justice or an appeal to their fears. The former is declared by the official authorities of Mississippi to be useless and the latter must involve the nation in a war. By its independent sovereignty it defies the national judiciary. Its agents close the halls of legislation, declare the case already decided, and announce its determination never to perform its promise. Confidence in its own courts is prostrated by its executive. The people sanction and adopt his acts by ranging themselves, in a popular election upon the side of those who raise the banner, and shout the cry of "repudiation."

Thus does christendom, for the first time in history, witness the astounding occurrence of a christian community taking advantage of its station in the civilized world, to commit an act which would make the cheek of an Arab burn with shame. The commercial world is astonished by a declaration that *debts honestly incurred upon the pledged faith of a commercial state* shall never be discharged. American patriotism and pride are mortified and humbled by a spectacle of one of their own number, with an increasing population and extended wealth; which produces the great staple of the country, "equal in value to one fourth of the whole crop of the Union, which yields an amount equal to one seventh of the whole exports of the United States of domestic growth, and whose immense increase in the growth of corn, oats, wheat and rye, and its large amount of cattle, horses and swine raised by its planters, have already made it independent of other states for the necessaries of life,"[1] violate its honor and trample upon its faith, to escape the payment of five millions of dollars, the use of which its citizens have enjoyed! Every honorable merchant and honest man, every genuine philanthropist and sincere patriot, every upright statesman whose conscience is not seared by the demon of party, every American citizen who desires the prosperity and regards the character of the Union, all, all must unite in unmitigated reprobation of this atrocious fraud.

The people of Massachusetts are deeply concerned in this question. No one doubts that our debt will be punctually paid. The honor of Massachusetts has ever been and ever will be above suspicion to those who know her. But the disgrace of one portion of the Union is, in one sense, the disgrace of the whole. Foreigners will not be apt to

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[1] Governor McNutt's Annual Message, 1841.

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separate in condemnation one part of this great country from another. The states are embarked in a common bottom, united by a common tie, with one character, one interest, and one policy. The dishonesty of one member inflicts a stain upon the American name, to be borne alike by the revolutionary repudiation of Mississippi, and the cautious conservatism of Massachusetts.

The moral effect of the example of Mississippi deserves to be considered.

No one can be blind to the truth, that within ten years, and especially within the last five, public morality has been gradually undermined. It is not our province to discuss the causes of the fact; the fact alone is all we are concerned to know. Petty crimes have increased. Mobs, riots and lynch law are of daily occurrence. Fraud in every gradation, from the trifling tricks of a timorous thief to the barefaced bribery of a beggared bank; robbery, arson and murder in all varieties of horrid shapes, are the disgusting details of decaying morals.

That our national independence is founded upon the intelligence and virtue of the people, is a truth become stale by repetition, but which cannot be too often repeated. We point in vain to our public schools, to the universally accessible means of education; in vain do we boast that in a multitude one individual can scarcely be found unable to read and write; our splendidly endowed institutions will be worse than useless, if the virtue of the people keep not pace with their intellectual progress. Intelligence and morality must exist together; neither alone can preserve our national existence. Better that the people should be as ignorant as the serfs of Russia or the cannibals of New Zealand, if they disregard that standard of virtue, without which public education is but a torch destined to wrap the institutions of the country in the blaze of a general conflagration.

Non nobis solis nati sumus, ortusque nostri partem patria vindicat, partem amici. The influence of individual example is inculcated by our preachers as a maxim of Christianity; it should be promulgated by our statesmen as an axiom of politics. If individual character be important to social relations, where the people have comparatively slight political influence, it is eminently so in our country where they control the destiny of the nation. The more prominent his station, the more scrupulous should an American citizen be, that his declarations and his acts furnish no encouragement to a sin, which, unless checked, bids fair to be a national characteristic.

In the present depression of popular morals, who can, therefore, doubt the pernicious tendency of repudiation upon individual virtue? It is in vain that nice distinctions and metaphysical differences are arrayed to support it. They will be neither regarded nor comprehended. The great fact will alone be recollected, that a sovereign state has refused the payment of a debt which justice requires it to pay. Many a petty villain, imprisoned for his crimes, will denounce the partiality of the

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law which visits its retribution on him, but suffers dignified wickedness to escape unscathed. There may be still more occasion for us to lament, that we

> —"have seen corruption boil and bubble,
> Till it o'errun the stew; laws, for all faults;
> But faults so countenanc'd, that the strong statutes
> Stand like the forfeits in a barber's shop,
> As much in mock as mark."

We are now indebted to European creditors more than two hundred millions of dollars. The money was advanced upon our solicitation, and with reliance upon our national honor. These creditors, many of whom sought in American securities, investments, not for extravagant gain, but for certainty of income and safety of principal, are not the avaricious Shylocks Governor McNutt would induce his constituents to believe. They became creditors, because they were solicited to be, and accepted what terms were proposed. They saw a young and vigorous nation, striving with magnificent energy, to develope its resources. They saw the lavish profusion with which Providence had poured forth its bounties on this favored region, and that a people, so blessed, should become bankrupt, was never imagined.

The enormous sum borrowed has been wasted. Speculations have failed; plans are defeated; anticipations of wealth have faded like a morning dream. The debt, however, remains. The imprudence which contracted it, cannot diminish the obligation to repay it, and we will be the last to believe that the whole of it will not, sooner or later be discharged. If, however, the doctrine of Mississippi prevail; if it be not indignantly frowned down by the moral sense of the community, the country must rank on the same level with that abandoned herd of plunderers whose deeds have astounded the world.

Already has repudiation raised its horrid cry in Pennsylvania. Thanks to the independent firmness of her noble executive, to the patriotic virtue of her enlightened legislature, it finds no foothold there. Thanks to the virtue of her people, who, uncorrupted by that mass of profligacy she has so long unwittingly cherished, support her magistrates in maintaining the honor of the American name. But can we rely upon the continuance of this tone of mind? Demagogues are not wanting there to raise the piratical standard of Governor McNutt. Repudiation is agitated; the miseries of taxation are proclaimed; the Shylocks of the East are holden up to alarm the people for their independence. Governor McNutt has triumphed over justice, and his doctrines, at least in his own state, are adopted by the people.

Has his example had no effect upon Michigan? None on Illinois?[1]

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[1] It is due to this state to say that she has not repudiated although "some good men both in and out of the legislature honestly think" "that bonds illegally sold by the former agents of the state, but now in the hands of innocent purchasers, should not be paid." Mr. Barret's letter, *ubi supra*. This letter is too long to be inserted here.

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Will it have none upon Pennsylvania and the other indebted states? When the alternative of direct taxation or repudiation is distinctly proposed, the virtue of the people will be put to its test. If the legal and political sophistry by which Governor McNutt has undertaken to justify himself be admitted by the country, it needs no great foresight to predict that, when an unworthy servant is raised to the executive chair, who shall also employ the influence of his station to excite popular clamor against the payment of the debt, he will find a precedent in the course of Mississippi, and consolation for his infamy in the support of the people.

Such, then, is the moral influence of the Mississippi doctrine. It has broken the ice — "*Ce n'est que le premier pas qui coute.*" It offers a temptation which the moral firmness of the country may not be, but which we trust in heaven it yet is, great enough to resist. It has shown to what extent fraud may be carried with impunity. How much farther effect it shall have, rests with the people to determine; but if not received by them with unequivocal and universal reprobation, they removed the first barrier to a mighty flood of wickedness, which once in motion will hurry to a vortex of ruin the character and independence of the nation.

We have left barely space to allude to some of the practical consequences of this doctrine. The holders of Mississippi bonds will not rest contented with Governor McNutt's exposition of the law. They will endeavor, in some mode, to obtain redress. What course can be taken? The state of Mississippi allows them to sue her in her chancellor's court. Will they avail themselves of the permission? What an idle waste of money for these creditors to seek justice in her courts! Her chancellor is elected by the people for six years. His term of office is about expiring. This fact indicates the sort of justice reasonably to be expected. The circumstances are an admirable commentary upon the policy of an elective judiciary.

But suppose the chancellor to be firm enough and righteous enough to decide against the state; and we have no reason, from any knowledge of his personal character, to suppose that he would not impartially administer the law. With their decrees in their hands the bondholders must petition the legislature for satisfaction. The result is obvious; who would dare vote for the payment of a repudiated debt?

How unbecoming, therefore, was it in Governor McNutt, to prejudge this case, and after first destroying all confidence in the integrity

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It explains the course of the state, and frees it as a state, from the imputation of countenancing the accursed doctrine of repudiation.

See also the letter of Samuel B. Ruggles, Esq. to Messrs. Lewis Townsend & Co., November 28, 1840, in which it is stated that "the question arising in the cause as to the legality of the original sale of the bonds to *Mr. Delafield*, by the fund commissioners, is a matter resting exclusively between him and the state, in no way affecting third parties holding bonds, who are not bound either to prove or know or inquire how or by whom the bonds were originally put in circulation." 4 Hazard's Register, 430.

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of the judiciary, though it may exist in a high and honorable degree, to render its exercise nugatory by arraying against the foreign creditors of the state the low and venal passions of the mob.

What other course remains? Shall they appear as plaintiffs in the federal courts? These have no jurisdiction over sovereign states. Shall they petition congress? *Cui bono*, when so many domestic claimants are, year after year, denied a bearing by the interference of party tactics and the miserable brawls of its members? An application to congress, even were there no constitutional objections in the way of redress, would be more futile than an application to the justice of the Mississippi legislature, for the last would settle the question by a prompt refusal; the former would wear patience thread-bare by delay.

Only one of two courses remains. They must petition their own government to make it the subject of diplomatic negotiation with ours, or they must seize upon Mississippi property, wherever found, and pay themselves.

If they adopt the former course, so many grave questions will at once arise, that a definite location to the eastern boundary may sooner be expected than a termination to the discussion.

Is the federal government authorized to interfere? Suppose it is. Shall congress pay the amount out of the national treasury? What would this be but an assumption of the state debts, and a premium to repudiation throughout the country? If done in one case why not in all? Such a course would be as demoralizing and insane as the extravagance which incurred the debt.

But if the federal government should conclude to pay the amount, shall it not require a repayment? How can such requisition be enforced? Shall taxes be imposed on Mississippi? It is unconstitutional. Taxes must be uniform and equal. Shall she forfeit her portion of the proceeds of the public lands? Would Mississippi submit to be thus indirectly forced to pay a debt she had deliberately repudiated? Her share is not enough to cover the interest, and besides who shall guarantee the continuation of the distribution or any other national policy?

In whatever mode the subject is approached, the weakness of the federal government is apparent. Negotiation would be inordinately protracted and finally fail in its object.

But suppose, what would doubtless be the case, that the federal government should refuse to interfere, because in its commercial operations a sovereign state is a mere individual.[1] What would then result? Either

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[1] The answer of the acting Secretary of State to the pathetic complaint of a holder of some of this valuable stock, may indicate to our European friends what sort of assistance is to be expected from the general government, in case of an official negotiation. A Mr. J. Hawker, "Clarencieux king at Arms," wrote to the President, personally, (not to the Secretary of State,) on 1st October, 1841, stating that he always considered the American people almost as his own countrymen, being descended from

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Holland will consider herself justified in demanding of the federal government the liquidation of the debt, with war as the alternative, or Messrs. Hope & Co., choosing to right themselves, will seize Mississippi property wherever found, and thus compel us to take up arms in defence of that state.

Should these creditors insist upon some recompense for their injury, and our government interferes, either a civil war, or a national debt of two hundred millions is the consequence. Should it refuse to interfere, then there is a war with Holland.

It is true, that, apart from the disgrace of it, such a war is not to be feared. Holland may pause, before she inclines to provoke our strength. To disburse from her own treasury, the amount stolen from her citizens by superior power, may be a less evil to her than the misery of a war, in which she would inevitably fail. If repudiation, therefore, be confined to Mississippi, no very great practical consequences may result to the nation, except so far as the federal government, in being compelled to tolerate so enormous a fraud, will excite the contempt of the civilized world. But should this detestable doctrine extend, as it may do, to other states, the probability of a war with all christendom will be reduced to a certainty.

Whether or not repudiation offers to foreign nations a justifiable cause of war, we will not now discuss. We hold, that it does, and perhaps on some future occasion may attempt to prove it. Under such provocation for hostilities, however, other causes would soon arise, and no peace could be expected without a settlement of the debt.

Most of our state bonds are in the hands of English capitalists. We have already so many causes of complaint against that arrogant power, that probably nothing but the strong commercial ties which unite us with England, nothing but mutual interest has long since prevented us from coming to a rupture. Let it once be understood that the basis of commercial intercourse, good faith, is destroyed, what interest will keep us at peace? of what value will our commerce be to England if wholesale robbery is officially countenanced?

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the same stock, and that he "could most safely trust to the honor and integrity of the several states." *Therefore*, he "purchased eight bonds of the Mississippi state, for one thousand dollars each," and "induced a friend to purchase four more!" "We considered our money as safe as in the Bank of England, and that the state of Mississippi had every opportunity of laying out its funds to the greatest advantage, in the vast extent of its back settlements." Perhaps if Mr. Hawker had known that this money was to be employed in enormous banking speculations and not in internal improvements, he would have been more cautious.

The Secretary in replying to the request, that the President "will exert himself in healing this breach of national faith," namely, a failure to pay the interest due in June, 1841, says that it "is a matter over which he has no control," and that "it is not at all within his constitutional power to afford any relief, or to interpose in any manner." See correspondence, published in National Intelligencer, January 26th, 1842. How many persons situated in the same way will associate the American name with every species of dishonesty and fraud?

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We will not pursue this theme. We have sufficient confidence in our countrymen to believe that their foreign debt will be paid. Boundless wealth, exhaustless resources are at their disposal. Activity and enterprise, without parallel in the history of the world, stand ready to develope them. Time and determination to do justice are all which are required, and the blessing of heaven must attend their righteous labor.

Let us hope also that, although "a wonderful and horrible thing is committed in her land; though her prophets prophesy falsely, and the priests bear rule by their means, and her people love to have it so," a better feeling will soon pervade our sister state; that the virtue of her citizens may soar superior to the sordid policy of her governor, and that the black cloud with which repudiation has enveloped the American name may be dissipated by the returning light of that "queen of virtues," which can alone secure our prosperity and independence.

NOTES.

Page 411. In the Banker's Circular of December 10th, 1841, a part of which is published in the New York Herald of 25th January last, it is said that of the Mississippi bonds $1,570,000 were pledged by the Bank of the United States, to secure in part the payment of their last loan.

Page 413. It has been denied that the Mississippi elections of 1841, were any indications of the popular sentiment, as to repudiation. The following extract from the message of Governor McNutt, to the legislature of 1842, may throw light on the subject.

"The letter referred to," (that to Messrs. Hope & Co.,) "will place you in full possession of the grounds upon which I have deemed it my duty to advise the bond-holders, that this state will never pay the five millions of dollars in state bonds delivered to the Mississippi Union Bank, or any part of the interest due or to become due thereon. *An appeal has been made to the sovereign people of the state on this question, and their verdict from which no appeal can be taken, has triumphantly sustained the principles for which I have long contended.*"

In farther confirmation of the position assumed in the text, see the inaugural address of his Excellency Tilghman M. Tucker, the successor of Governor McNutt, in which the former says, "The question as to the liability of the state, on account of the Mississippi Union Bank, may obtrude itself on your consideration. For myself, I consider that important question settled by the highest tribunal known to free governments. I mean the people themselves; *they having decided in effect that the transaction connected with said bank, both in its conception and final consummation, were not governmental, but were, on the contrary, individual transactions performed not only without the authority of the constitution of the state, but contrary to the express provisions thereof.*"

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RECENT AMERICAN DECISIONS.

Supreme Court of Ohio, December Term, 1841, *in Bank.*

LESSEE OF WHITNEY & OTHERS *v.* WESTENHAVER AND WEBB.

The saving clause in the statute of limitations, does not allow successive disabilities, in different persons, to take a case in ejectment out of the operation of the statute.

The words "*beyond seas,*" in the statute of limitations of a state, mean without the jurisdiction of the state.

EJECTMENT. The facts in the case were as follow: Elisha Whitney became seised, in fee, of the premises, on 2d July, 1792. He died 22d February, 1807, having devised the same to his widow, Eunice Whitney. She died, intestate, 28th April, 1819, leaving the lessors of the plaintiff her heirs. The defendants and those under whom they claim, have been in possession since 1805, claiming title. The said Elisha, Eunice, and the lessors never have been, or either of them within the state of Ohio. And the question presented was, whether the plaintiffs were barred by the statute of limitation.

GRIMKE J. delivered the opinion of the court. As the plaintiffs and those, under whom they claim, have always been non-residents of this state, the question which arises, is whether the former are within the exceptions in the statute of limitations, in favor of absentees. This is the first time that this question has been made in the courts of Ohio, which may seem remarkable, as controversies must have repeatedly arisen, involving a consideration of the same point. But it frequently happens that principles, the most firmly established, entirely elude observation, until some startling controversy springs up, which rouses the mind to a survey of the whole field of dispute. In *Perry* v. *Jackson,* (4 D. & E. 516,) Lord Kenyon remarks, as surprising, that it was the first time the question in that case had arisen, in an English court; and yet it was one which could not have been of unfrequent occurrence. Some accidental circumstance suddenly drew the attention of the mind to it in that particular instance.

The saving clause in favor of non-residents is the same in the act of 1804 and in the act of 1810. They both contain an exemption for persons "*beyond sea,*" at the time the cause of action accrued; and this term "*beyond sea*" has received a fixed signification in Ohio. It means persons *out of the state;* although they may have been in the United States. If it were confined literally to persons, who were on the other side of the Atlantic, the consequences would be that individuals residing in Mexico, or Buenos Ayres, would be placed on the same footing, as those residing in the state of Ohio. I cannot

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help thinking, however, if the question were a new one, that it would better promote the ends of justice and public tranquillity to say, as the courts of Pennsylvania have, that the statute referred simply to persons who were beyond the bounds of the United States. A non-resident does not, like an infant, a person *non compos*, &c., labor under any disability to sue, either mental or legal. Information circulates so readily through every part of our country, that no one who possesses an ordinary degree of vigilance, can be unapprized of his rights. And the absentee has the double advantage of being able to sue, either in the federal, or state courts. The construction which has hitherto been given to the statute, confers upon them a treble advantage. It permits them to lie by until property, which was of no worth, has acquired a very great value in consequence of the labor of residents, from whom everything is then suddenly torn.

One remark, which I would now make and which is more immediately to my present purpose is, that the construction which has actually been given to the law is by no means founded on its literal meaning, but has been supposed to be in conformity with the intention of the legislature. In other words, it is admitted to be a sound maxim, that in ascertaining the meaning of a law, it is often necessary to inquire, what was the intention in passing it. It is a principle which should be made use of very cautiously; but it is one of undoubted force and application.

The statute which was of force when the present cause of action arose, declares "that if any person, or persons, are beyond sea at the time the right accrued; every such person or persons shall have a right to sue within twenty years after he, or they, came into the state." If the heirs of Elisha Whitney, the present plaintiffs, are within this exception, as well as Elisha Whitney himself was, they are entitled to recover. And that depends upon the determination of a question, which has been greatly agitated, both in England and this country — whether an heir can unite his disability with the disability of his ancestor. In other words, whether successive disabilities in different persons are within the true meaning of the statute of limitations.

The case of *Stowel* v. *Zouch*, (Plowd. 353,) was the first in which the question was discussed, whether the exception in favor of infants, was confined to the person to whom the right first accrued, or whether it was extended to the heir who was an infant at the time the title descended to him. The case, we are told, was argued with great ability, twice in the Common Pleas, and twice in the Exchequer Chambers, before all the judges of England, and it was determined that the exception extended only to such infants, to whom the right accrued; and that no such right had, at that time, descended, for the ancestor was then alive — that the plaintiff being an infant when his father died, was of no consequence, because the exception expressly afforded the excuse of infancy to those only, to whom the right *first* accrued. It was observed, that if every heir should be allowed the

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full period of limitation, after he arrived at twenty-one, the controversy might be delayed many hundred years, for, the heir of the heir might labor under the same, or some other, disability and so on, successively, for several generations. And when the title came ultimately to be tried, the evidence on which the defendant's title was founded would have been lost in obscurity. For the sake, therefore, of the public repose, as well as in accordance with what seemed to be the evident intention of the legislature, the heir was denied the privilege of sheltering himself under his disability. This case did not present an instance of successive disabilities, because, the plaintiff's father never himself labored under any disability. It is of the same importance, however, as if it had; because it determines the material question, who is the person that may take advantage of the exception, he to whom the right *first* accrued, or the person to whom it afterward descended.

But the case of *Doe* v. *Lesson*, (6 East, 80,) is similar to the present. There, the owner of the estate was dispossessed when he was an infant. He died in infancy, leaving an infant sister, his heir, and it was held, she was not allowed a period of twenty years, after the death of her brother, within which to bring her ejectment. As remarked by Lord Ellenborough, the time allowed by the statute for making an entry might be indefinitely postponed, if a different construction were given, "that there was no calculating how far it might be carried, by parents and children continuing under disabilities, in succession."

The case of *Eager* v. *Commonwealth*, (4 Mass. 182,) is a case of still greater importance, as it arose in our own country. The plaintiff was an infant, and before the termination of her infancy, the disability of coverture accrued. But the Court held that the disability, which should have the effect of protecting the plaintiff, must exist, at the time the right first accrued; and as this was not the case, the statute was a complete bar. This case, it will be observed, goes further than even the last. Mr. Blanchard, in his treatise on the Statute of Limitations, (1 Law Library,) remarks, "that successive disabilities, in the same person will continue to him the protection of the statute." But *Eager* v. *Commonwealth*, does not countenance that doctrine. And I think it may be asserted, that whether successive disabilities exist in one and the same person, or in different persons, the law is the same; and that it is only where several disabilities exist in one and the same person, and *at the same time*, that the statute affords a protection.

The doctrine taught in the above case has been confirmed by that of *Bunce* v. *Wolcott*, (2 Conn. 27,) where a female heir, being under age, at the time the title descended to her, and having married before she arrived at the age of twenty-one, it was decided that she could take advantage of the saving of the statute in favor of infancy only.

If this were not the true doctrine; if disability were permitted to lap over disability, there might be no termination to many controver-

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sies. As Lord Eldon remarks, "a right might travel through minorities for two centuries."

But the most full and elaborate of all the cases is that of *Demarest* v. *Wynkoop*, (3 Johns. Ch. Rep. 129,) where the same doctrine is expounded and enforced with masterly ability. Indeed, this must be considered as the settled and established law in England and this country. There are but two cases which contradict it. *Eaton* v. *Sanford*, (2 Day, 523,) which was afterwards doubted in *Bush* v. *Bradley*, (4 Day, 298,) and finally overruled in *Bunce* v. *Wolcott*, to which I have already referred. The other is the case of *Cotterell* v. *Dutton*, (4 Taunton, 826.) It is entirely opposed, however, to the preceding English determinations, as well as to the opinions of the profoundest lawyers in that country.

But the proviso in the statute of Ohio, is not the same as in the English statute, or in those of the other states, to whose decisions I have referred. The statute of limitations of Massachusetts, New York and Connecticut, are borrowed from that of James. It is this difference which creates the real difficulty in the case. If the provision in our statute were the same as in those last, we might stop and rest satisfied with the great weight of reason and authority which have been thrown into one of the scales. But, as this is not the case, we are constrained to go further, and to examine, whether the difference is so great as to involve a totally different construction.

In all the last named statutes, the period of limitation is prolonged, in favor of persons living under any of the disabilities mentioned; although those disabilities existed, at the time the right first accrued. Under one of those, five, and under the others, ten years may be added to the twenty; so that in some cases twenty-five, and in others, thirty years, but never exceeding that period, may have run out, before the bar will finally operate. In other words, the infant, the non-resident, &c., are allowed five, or ten years, after their disability has ceased, notwithstanding the full period of twenty years has already expired. There is no similar provision in any of the statutes of Ohio, until the year 1831, when, for the first time, the *proviso* in the statute of James, except so far as regards the case of non-residents was endeavored to be imitated. But I think it clear, that this difference does not make any sensible, or just, distinction between the case at bar, and the English and American cases. The true interpretation of our laws of 1804, and 1810, is that twenty years, and no more, is allowed to the person, or persons, to whom the right first accrued, after their disability is removed. The words of those acts are "that if any person, or persons, who are or shall be entitled to bring any of the actions enumerated, shall be beyond seas, infants, *non compos*, &c., when any such action accrued, then they shall have a right to commence such actions within the time limited, after the disability has ceased;" and the question is not, whether the law has still further prolonged the time in favor of the heirs of such persons, for that it evidently has not done;

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but whether the saving clause only extends to the persons, to whom the right *first* accrued, without including their heirs, or representatives. And here is another difference between the law of Ohio and the English and New York statutes.

In the two last, the word *first* precedes the words accrued, or descended, while, in our statute, it is entirely omitted. But the meaning of the clause is, in reality, precisely the same, whether that word be inserted, or not. The use of the words *person or persons*, it is clear, does not authorize us to say that it intends to speak of the several persons *in succession*, to whom the right may have fallen, for the English and New York statutes, also contain that phraseology. The words person, or persons, are used merely because the right may accrue, either to one person singly, or to many persons jointly. And if the word person only were used, then, there could be no doubt that *the person*, to whom the right accrued, was the person to whom it *first* accrued, whether the word first was inserted or not; and that the word, in the plural, is afterwards added, cannot vary the signification; because, as I have already observed, that is merely for the purpose of indicating that there may exist a joint right, in several persons, as well as a single right, in one person. But the statute of Massachusetts, which gave rise to the decision in *Eager* v. *Commonwealth* is, in this respect, precisely like our own, the word *first* is entirely omitted. And yet, this circumstance does not appear to have afforded a ground for any just distinction, between their law and the statute of James. It is true, no allusion is made to this difference; but it is to be presumed that it would have suggested itself to the learned judge, who delivered the opinion, if it was entitled to much weight. I have already noticed another difference between the statute of Ohio and the English and other American statutes. The last contain a *proviso* in favor of the heirs of the person to whom the right accrued, adding five, or ten years, as the case may be, to the period of twenty years. There are two classes of persons, then, to whom a right may accrue; first, the ancestor, and second, his heir. The last only is entitled to the additional period, and his case is provided for in the last part of the clause. The ancestor is provided for in the part which precedes, and therefore it is that the word first is, from abundant caution, inserted to indicate, with absolute precision, *the order*, in which the several persons are entitled to the respective periods of twenty, twenty-five, or thirty years, as the case may happen; I say from abundant caution only; because the statute of Massachusetts contains the whole of this *proviso* in favor of the heir, and yet, has omitted the word *first*.

There is a still further difference between our statute and the others, to which I have referred. The language, in these last, is this: "so as such person and persons, or his, or their heirs, shall, within ten years after full age, discoverture, coming into the country, &c. *or death* commence their action." The words, "*or death*," are omitted in our laws; and this is supposed to have a most important bearing upon the

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subject. But those words are inserted, in a part of the *proviso*, which is not contained in our law, and therefore, could not properly have a place in this last. They are inserted to indicate the rights of those, who are entitled to the additional period of ten years, and for no other purpose whatever; and as this additional period is not afforded, in the Ohio law, they are necessarily not to be found in it. In *Doe* v. *Jesson*, these words were referred to, as governing the determination, in that case; and very properly, for there the question was, whether the infant heir of an ancestor, who died in infancy, was entitled only to ten years after his death, or whether the whole period of his own disability was not to be allowed, so as to give him the whole time of its continuance; and the ten years, in addition; and it was held that he was entitled to ten years after the death of his ancestor; and not to ten years after his own disability ceased. It is evident, then, that these words could not be inserted in the same place which they occupy in the statutes of James, because no such place exists, in our statute. But that the insertion of these words, in the statute of James and of the other states, was unnecessary, is evident, from the case of *Stowel* v. *Zouch*, which was decided upon the statute of Henry VII. in which they are entirely omitted; and yet, as we have seen, this is the leading case in England, and contains the foundation of the whole law with regard to successive disabilities. The doctrine established in that case was, that the exception extended only to such infants, to whom the right accrued; that no such right had, at that time, descended to the plaintiff; because his father was then alive; that he was bound to make his claim, before the expiration of the five years, and that the circumstance of his being an infant, *when his father died*, was of no avail; because the exception in the statute afforded the excuse to those only, to whom the right *first* accrued.

These words are also omitted in the *proviso* of the English statute, which regards *personal* actions; and although I am not aware of any decisions, as to the effect of successive disabilities, where the cause of action is *personal*, yet it is evident, from the last case, which places no reliance upon the omission of the word "*death*," what such decision would be. Indeed, it is an established principle, that the several statutes of limitations, being *in pari materiæ*, ought to receive the same construction; although the phraseology, in all, may not be exactly the same. From every examination, which I have been able to give to this very intricate subject; and I have endeavored to make that examination as thorough as possible, in consequence of the great importance of the question involved, I am of opinion that the statute of Ohio, equally with the English and the other American statutes, lends no countenance whatever, to the doctrine of successive disabilities. *If this interpretation is not given, the bar of the statute can never take effect.* Elisha Whitney lived abroad, and died abroad, while the disability existed. The difficulty, then, is infinitely greater than was apprehended, in the several cases, I have referred to. There,

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it was said, that the title might float through a whole century, if disability were permitted to be added to disability.

But in this case, death having intervened, during the existence of the disability, this can never cease, but will literally run on to infinity. This is a consequence too monstrous and absurd to be admitted, and never could have been within the intention of those who made the law. The omission of the words "*or death*," renders the *proviso* in our law more, instead of less, restrictive, as I have shown; and this circumstance, together with the fact, that the advantage of the disability is given to the person to whom the right accrues, and not to his heirs, shows that the death of the ancestor must be deemed to be *an extinguishment* of the right; at any rate, after the full period of twenty years has run out, counting from the commencement of the adverse possession. If the statute were not sufficiently clear without, we should be absolutely compelled to give it that interpretation; otherwise, a law, without a parallel, would be found in our statute book. Statutes of limitation have, with great reason, been termed statutes of repose.

But if any different construction were given to our law instead of being a statute of repose, it would be one of perpetual disquietude.

It is evident, from the preceding view, that the whole difficulty and embarrassment, which surround the case, arise from the total omission of an important part of the *proviso*, contained in the statute of James. The consequence is that the death of a person, while laboring under disability, is entirely unprovided for. The only alternative, then, to which we can cling, is to say that such person stands upon the same footing as residents of the state; and that the lapse of twenty years from the time the cause of action accrued, will be a bar to the assertion of the right. To say that it shall be twenty years from the death, will be going even beyond the statute of James, in which express provision is made for extending the period; not, however, to twenty, but only to ten years, and without which provision this advantage could not, *by construction*, have been given to the heir. Even the act of 1831, is entirely silent as to the case of a person dying under disability; and it is, for that reason, that I have said it has endeavored to imitate, not that it has actually imitated, the statute of James and of the other states. It has prolonged the period of limitation, but not in favor of the heir. These repeated acts of legislation distinctly manifest, throughout, the intention of the legislature. Death is a *casus omissus*; and as there is no "inherent equity," growing out of the statute of limitations, in favor of persons under disability, and not actually provided for, we must say that death, combined with the lapse of twenty years, operates a total extinction of the right.

Judgment for the defendants.

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District Court of the United States, Maine, December Term, 1841, *at Portland.*

The Brig Gertrude.

The tackle, apparel and furniture of a foreign vessel, wrecked upon our shore, and landed and sold separate from the hull, are not goods, wares and merchandise imported into the United States within the meaning of the revenue laws.

Goods taken and landed from a foreign vessel wrecked upon the coast are not subject to forfeiture under the 50th section of the Act of March 2, 1799, ch. 122, by being landed without a permit from the collector.

This was a libel for a forfeiture founded on the 50th section of the Collection Act of 1799, ch. 128. The libel alleged that on the first of January, 1840, certain goods, wares and merchandise, of the value of $400, brought from a foreign port, were unladen from the brig Gertrude without a permit therefor having been first obtained from the collector of the port against the form of the statute, whereby said brig became forfeited to the United States. It appeared from the evidence that she was a British brig, and that on the ninth of December, 1840, she was driven on shore in a storm and wrecked on the north side of West Quoddy Head. On the application of the master, surveyors were appointed by Solomon Thayer, a notary public, to examine the vessel, who after visiting and examining her reported her to be a wreck, and in consideration of her exposed situation and the danger that she would go to pieces in the event of another storm, advised that she should be sold the next day where she lay, and she was sold accordingly. The day following the sale she was got off the rocks and towed into the harbor of Eastport. She had at the time no cargo on board, but her cables, anchors and rigging appear to have been taken on shore while she lay on the rocks at Quoddy Head and before she was carried to Eastport, and this was the unlading, which was relied upon as involving a forfeiture of the vessel.

Holmes, District Attorney, for the United States.

C. S. and *E. H. Daveis*, for the claimant.

Ware J. The single question in issue, between the parties in this case, is whether there has been a forfeiture by unlading goods, wares and merchandise from the brig Gertrude, of the value of $400, without a permit having been first obtained therefor from the collector of the district, within which they were landed. The argument has indeed taken a somewhat wider range, but the judgment of the court must follow the *allegata et probata*, and be confined to the matters that have been put in issue by the parties in their pleadings, and which are made out by the proofs.

By the act of Congress, March 2, 1799, ch. 128, § 50, under which the forfeiture is claimed, it is provided, that no goods, wares or

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merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen from such ship or vessel within the United States without a permit from the collector of the port, or the naval officer, if there be one ; and if they are unladen contrary to the act, the master and all other persons knowingly concerned in aiding in the unlading or delivering are subjected to a penalty of $400 ; and when the goods so unladen shall amount to $400 in value, the ship herself with her tackle, apparel and furniture, shall be subject to forfeiture.

There is no direct evidence that any thing was unladen from the vessel, and it is conceded that she had no cargo on board. But it appears when she went ashore, that she had on board two anchors and two chain cables, and certain other furniture and rigging employed in the navigation of the vessel, which were not on board when she was brought into Eastport. As no account is given of them by the claimants, it must be presumed that they were landed while she was lying on the shore near West Quoddy Head. If it were otherwise, it would be easy for the claimants to show it. It is also clear from the evidence, that the value of the rigging, of which the vessel had been stripped, including the cables and anchors, was more than $400.

Upon these facts two questions have been raised and argued at the bar. First, whether the tackle apparel and furniture of a vessel thus cast on shore a wreck, which have been actually used or have been specially destined for the use of the vessel in navigating her, are goods, wares and merchandise imported into the United States within the true intent and meaning of the revenue laws. At the first blush, this question would seem to admit a very easy answer. The rigging and apparel of a ship are a part of the ship, and therefore not merchandise in any other sense of the word than that in which the ship herself is.

But it is said that when the ship is wrecked and the rigging separated from the hull, it becomes merchandise in the ordinary sense of the word. It is sold as such, and becomes mixed in the general mass of consumable commodities in the country. When thus separated with the intention of being thrown into the market and sold, as these articles take the place of others of the same character, which are regularly imported, the argument is that there is the same reason for charging them with duties as there would be if they were imported as cargo, and of course subjecting them to all the restraints and safeguards imposed by the revenue laws upon regular importations. All this may be admitted to be true, and the question will still return, whether this has been done by the legislature. However just and reasonable it may be that goods thus introduced into the country, and sold for common use and consumption, should be subject to duties, it is quite clear that the court has no authority to impose the tax. Our duty is limited to the inquiry whether it has been imposed by the legislature.

If we look through the whole of the numerous acts of congress laying duties on merchandise imported, as well as those regulating the collection of the same, we shall find they uniformly contemplate the

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cargo; they refer to articles having the quality of merchandise in the ordinary and most popular sense of the word. They refer also to goods intended to be introduced into the country for sale and consumption, or for the general purposes of commerce. Although they speak generally of goods imported or brought into the United States, it has been uniformly held that to constitute an importation within the true meaning and intent of these laws, the arrival must be voluntary, with the intent to import them. If therefore a vessel not bound to the United States is by stress of weather forced into our ports, this will not constitute an importation, upon which the right to duties will attach. This, as the authorities cited at the argument abundantly prove, has been the uniform construction given to the revenue laws. *The Mary,*[1] *United States* v. *Vowell,*[2] *United States* v. *Arnold,*[3] *Prince* v. *United States,*[4] *Prat* v. *United States,*[5] *Peish* v. *Ware.*[6] A like construction has been given to the navigation laws of England; (Reeves's Law of Shipping, 203), and probably the same rule prevails in every civilized community. It can only be a people who have made but little progress in civilization that would not permit foreign vessels in distress, to seek safety in their ports, except under the charge of paying import duties on their cargoes, or under penalty of confiscation, if they were prohibited goods, which would be the consequence of applying to such cases the rigor of the fiscal laws. Against such a country the unfortunate mariner might justly exclaim —

> ——" Quæ hunc tam barbara morem
> Permittit patria? hospitio prohibemur arenæ."

To hold then the rigging of a vessel cast by misfortune a wreck on our shores, to be goods, wares and merchandise imported into the United States, would be extending the operation of the revenue laws beyond what their natural and obvious meaning requires. The fiscal laws of the country which furnish the means by which the whole machinery of the government is sustained, although they impose burthens on individuals, are not to receive the strict and narrow construction, that is given to penal laws. Neither are they, like remedial laws, to be enlarged by construction so as to include cases, which seem to stand on the same reason with others which are within the express words and the plain intention of the law, if it is not apparent that they were intended to be included by the legislature. They are to be applied according to their plain, natural and obvious meaning, regarding as well the general tenor as the particular words of the law; as comprehending all cases, which from the general scope of the law, appear to have been intended and contemplated by the legislature; and neither to be extended by analogy, nor restrained by a strict con-

[1] 1 Gall. R. 206. [2] 5 Cranch 362. [3] 1 Gall. R. 342.
[4] 2 Gall. R. 204. [5] 1 Peters C. C. R. 256. [6] 4 Cranch 347.

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struction, from the notion that they belong to the class of penal laws, because they impose burthens on individuals as a condition of their being allowed the free disposition of their property.[1]

The revenue laws in all cases contemplate a ship as a single object, and when it is subjected to any fiscal charge it is imposed under the name of a tonnage duty. The rigging, furniture and appurtenances are a part of the ship. See the case of the *United States* v. *a Chain Cable*, (2 Sumner R. 362), the very question was presented whether a chain cable, which had been purchased in a foreign country for the use of the vessel, was embraced by the revenue laws, under the terms "goods, wares and merchandise," which could not be landed without a permit. The court held that it was not. If this vessel had gone to pieces on the rocks so that there had been nothing but fragments remaining, it would hardly be pretended that the broken yards, the torn sails and damaged cordage with the fragments of the hull would come within the descriptive words of goods, wares and merchandise imported, and liable to duty, or that it would be necessary for the master under penalty of confiscation of the wreck to obtain a permit from the collector before he could collect the *disjecta membra* on the shore. And yet in what discriminative features would that case differ from the present? It might be said of every part of these fragments, that they were goods, wares and merchandise brought into the United States from a foreign country with the same reason as it is said of the rigging in this case. My opinion is that the materials and rigging of a foreign vessel cast upon our shore as a wreck, when landed and sold do not come within the purview of the revenue laws as merchandise imported.

But if this opinion is erroneous, then the second question which has been argued will arise, whether in this case a forfeiture of the vessel has been incurred by landing the goods without a permit. It is not to be readily supposed that a provision so highly penal, as this section of the law is, was intended to be applied to a class of cases, in which a compliance with its terms would in some instances be impossible, and in all involve the most imminent danger of the entire loss of the property. When a vessel is thrown upon the coast a wreck, the cargo must be saved by such means as are practicable, or not saved at all: if the master before taking measures for placing it beyond the reach of the waves, must wait until he can obtain a permit of the collector for that purpose, whose residence may be a day's journey from his vessel, it is very evident that in many cases the entire cargo would be swallowed up by the waves before the permit could be obtained. To require a compliance with this section of the law in such cases would be nearly equivalent to the revival of the old and barbarous custom, by which all wrecked goods were confiscated. Such a construction of

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[1] Sumner R. 16.

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the law is wholly inadmissible, if it will admit of any other. Now if we look at this section in connection with the whole tenor of the law, it is evident that the legislature contemplated only cases of vessels which had arrived in safety at the regular port of their destination, and certainly did not contemplate cases where a compliance with the law would be impracticable. Upon the common principles therefore of construing statutes, the words of this section must be so interpreted as to carry into effect the general intent of the lawgiver, neither to defeat it, nor to extend it to cases clearly beyond the purview of the law.

But this can hardly be considered as an open question. It was, as it seems to be, conclusively settled in the case of *Peish* v. *Ware*, (4 Cranch, 347), more than thirty years ago. For though in that case there was no allegation in the libel founded on this section of the law, there was one founded on the fifty-first section, and in deciding it, the court thought necessary to give a construction to the fiftieth. In that case the goods were landed from a wreck without a permit, and it was held that upon just legal construction, the landing of the goods did not subject them to forfeiture under the fiftieth section. The act of landing in such a case, the court said, is not within the law, which is calculated for cases in which the general requisitions of the law can be complied with, and not for salvage goods in cases where they cannot be.

Upon the whole, the conclusion to which I am brought is, first, that the tackle, apparel and furniture of a foreign vessel wrecked upon our shore, and landed and sold separate from the hull, are not goods, wares and merchandise imported into the United States, within the meaning of the revenue laws. And in the second place, if they are to be so considered, that they are not subject to forfeiture under the fiftieth section of the act of March 2, 1799, ch. 122, by being landed without a permit from the collector. At the same time, it may not be improper to remark, that there is something of mystery hanging over this case. The evidence before the court is sufficient to raise the questions, which have been considered, and yet it is pretty clear that the whole evidence which it was in the power of the parties to produce, has not been before the court. It is a little singular that the informer in this case is the purchaser of the vessel at the sale that was made in conformity with the recommendation of the surveyors; that he does not insist upon his title, and that the claimant now resisting the forfeiture is the original British owner. What might be the result if every fact in the power of the parties to prove was spread upon the record, is not for me to say. I can act only upon the allegations that are made and the facts that are proved, and on them my opinion is that the law requires me to pronounce for the restoration of the vessel; but I shall grant a certificate of probable cause of seizure.

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Supreme Judicial Court, Maine, October Term, 1841, *at Bangor.*

Douglass and others v. Winslow.

No action can be sustained by a firm against an officer, for attaching property belonging to the firm, on a writ against one of the members.

This was an action of trespass brought against the defendant, a deputy sheriff, for attaching certain articles of property belonging to the plaintiffs, who were doing business as partners under the style of T. G. Brown & Co. The defendant having a writ against Brown, one of the plaintiffs, and a member of said firm, attached and removed from their store certain articles of jewelry and other goods belonging to them. A partnership creditor afterwards attached the same goods, and the defendant relinquished the former attachment for the plaintiff's benefit. The plaintiffs brought this action to recover damages for the attachment and removal on the first writ. A nonsuit was entered with leave for the plaintiffs to except.

McDonald for the plaintiffs.

Moody for the defendant.

Weston C. J. The authorities, cited for the plaintiffs, very clearly establish the doctrine, that partnership creditors have a priority over the separate creditors in relation to the partnership funds. It was recognised in Massachusetts at a very early period; and is the settled law of that state and this. *Pierce* v. *Jackson*, (6 Mass. 242,) *Com. Bank* v. *Wilkins*, (9 Greenl. 28.) The interest of each partner is in his portion of the residuum after all the debts and liabilities of the firm are liquidated and discharged. Equity will not aid the separate creditors until the partnership claims are first adjusted, and will interpose to aid the creditors of the firm when a separate creditor attempts to withdraw funds in regard to which they have a priority. These principles are illustrated and sustained in many of the cases cited for the plaintiffs.

But at the common law, according to the English practice, a separate creditor of one of the firm may seize and sell on execution the interest of his debtor in the partnership stock. No case has been referred to at law where this has been prevented by any movement or interference in behalf of the partnership. They have in England no attachment of property on mesne process except that of foreign attachment, which depends upon its own peculiar principles. But in this state and in Massachusetts a separate creditor may attach the goods of a firm so far as his debtor has an interest in them subject to the paramount claims of the creditors of the firm. This right has been repeatedly exercised, and has never been defeated, so far as the

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cases have come to our knowledge, unless in behalf of partnership creditors. In the case of *Pierce* v. *Jackson*, Parsons C. J. says, "a creditor of one of the firm has a right to attach the partnership effects against all creditors whose demand is not upon the company." That the debtor himself could join with his partner in a suit to prevent this has never before, that we are aware of, been attempted. The existence of the right, and its exercise, subject to the superior rights of the partnership creditors, is assumed in the case of *Commercial Bank* v. *Wilkins*. It may be inconvenient to other partners to have their operations thus broken in upon, and partnerships virtually dissolved for the benefit of separate creditors; but it is a hazard to which they are necessarily subjected when they unite in business with others encumbered with separate debts. In *Allen* v. *Wells, et al.*, (22 Pick. 450,) the superior claims of partnership creditors are discussed and admitted, but the right of a separate creditor to attach when he is not thereby brought in conflict with them, is conceded.

Were the law otherwise, a wide door would be opened to delay and defraud creditors. A man with funds to a very large amount, half of which is due to others, has nothing to do but to invest them in a partnership, and he may thus set his creditors at defiance, or oblige them to wait until the partnership concerns are liquidated and closed by the slow process of a court of equity. While the policy of the law has been to withdraw the body of the debtor from coercion and restraint, it has been equally its policy, with certain exceptions which humanity requires, to afford adequate remedies, by which all his property may be made available to satisfy his creditors. It lends its aid to defeat all devices to delay or defraud them, and it will not suffer legal principles, established for beneficial purposes, to be perverted to his prejudice.

The defendant was justified in making the attachment at the suit of a separate creditor, and in relinquishing it for the benefit of partnership creditors.

Nonsuit confirmed.

Inhabitants of Garland *v.* Inhabitants of Dover.

Supplies furnished to the minor children of one alleged to be a pauper, while separated from him, and not under his care and control, *held* to control the settlement of the father when the separation was caused by his poverty.

This was assumpsit to recover payment for supplies furnished to Robert French, a minor son of Simon French, as a pauper. The only question in the case was the settlement of the father, at the time the supplies were furnished, in May, 1837. His settlement was admitted to have been in Dover, in January, 1830. In May following he moved into Garland, where he has ever since resided,

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without having personally received any assistance, as a pauper, from any town. Two of his daughters, however, did receive supplies as paupers, from Dover, within five years, under the following circumstances. When the father of the pauper removed into Garland, in 1830, his family was broken up, and the daughters still remained in Dover, and have ever since resided there. The wife was convicted of adultery about that time, and sentenced to the state prison, and never afterwards returned home. The father testified that he had not controlled the daughters, nor furnished them any assistance; that he did not keep house, after leaving Dover, until 1839, when one of his daughters came to live with him; that if he had been able he should have taken care of them; that he did not take any of their wages or earnings, or call for them, or in any way exercise any control over them, but they made their own contracts, and received their own earnings.

Hereupon, the defendants' counsel requested the judge to instruct the jury, that if French, at the time he sold out his improvements in Dover, and established his residence in Garland, abandoned his wife, broke up his family, and left his daughters behind him, to provide for themselves, neither claiming parental authority, nor exercising parental duties over them, that supplies furnished them would not defeat his residence in Garland, provided he had resided there five years.

This instruction was refused, and the court, (Shepley, J.) instructed the jury that the father was entitled to the earnings, and had a right to control their course of life, and was bound to support and educate them; that if they were separated from the father in consequence of the breaking up of the family, or for other cause; that he turned them off to get their own living, intending to do no more for them, whether able or unable; that he did not until 1837 provide any thing for them, and that the parental and filial relations were broken up, the supplies furnished them would not prevent the father's gaining a legal settlement in Garland. But if satisfied that the cause of their separation was the poverty of the father, and that the parental and filial relations remained in other respects unchanged, supplies to them must be regarded as supplies to the father, and they would prevent his gaining a residence in Garland.

The verdict was for the plaintiffs, and the defendants excepted.

A. W. Paine, for the defendants, cited *Green* v. *Buckfield*, (3 Greenl. 136); *Dixmont* v. *Biddeford*, (ibid 205); *Hallowell* v. *Saco*, (5 Greenl. 143); *Raymond* v. *Harrison*, (2 Fairfield, 190.) The rule recognised in all these cases, is, that no supplies furnished have any effect to control the settlement of the father, "unless furnished to himself personally, or to one of his family, and that those only can be considered as his family who continue under his care

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and protection." No abandonment is necessary, nor do the facts in the first three cases cited show an abandonment, nor any thing more than a separation, without any regard to the causes of the separation.

J. Appleton, for the plaintiffs, contended, that where the separation was caused by the poverty of the father, the pauper child could not be considered as beyond the "care and protection" of the parent, that an abandonment was necessary in order to produce that effect.

WESTON C. J. During the period when Simon French, the father of the pauper, is supposed to have gained a settlement in Garland he had broken up housekeeping, and no member of his family actually resided with him. His minor children, however, might be under his care and protection. Upon the facts found, his daughters were not emancipated, as clearly appears from the authorities cited for the plaintiffs. Some of the facts assumed by the counsel for the defendants, in his requested instructions, have been negatived by the jury. They have found that the separation of the daughters from the father was occasioned by his poverty, and that in other respects the parental and filial relation continued. They were, therefore, under his care and protection, as much as his and their condition permitted. He was bound to maintain them. He would have performed this duty if he could. His poverty alone prevented. The supplies for his daughters, which he would have furnished if he could, were provided by the town. This was indirectly receiving supplies as a pauper. He is a pauper who is unable to provide necessary food and clothing for his minor children, and leaves them to be aided by the town.

Judgment on the verdict.

Supreme Court of Pennsylvania, September Term, 1841.

VOORHIS *v.* FREEMAN.

Though the criterion of fixtures in a mansion or dwelling be actual and permanent fastening to the freehold, it is not the criterion of fixtures in a mill or manufactory.

Machinery, which is a constituent of a mill or manufactory, insomuch that the building would not be a mill or manufactory without it, is part of the freehold, even when it is not fastened to the floor or walls, whether the question be between vendor and vendee, heir and executor, debtor and execution creditor, or between co-tenants of the inheritance; but not between tenant and landlord, or remainder-man.

Ruled, therefore, that a sheriff's sale and conveyance pursuant to a judgment on the mortgage of a lot and iron rolling mill, "with the buildings, apparatus, steam engine, boilers, and bellows attached to the same," passed the entire set of rolls in the mill, with their duplicates, as part of the realty, as well those fixed for immediate use as those temporarily detached; and that such rolls could not be seized and sold on an execution against the mortgagor.

Ruled, also, that they would have passed to the mortgagee had they been chattels, by force of the word apparatus.

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DIGEST OF AMERICAN CASES.

Selections from 9 Watts's, 2 Ashmead's, and 6 Wharton's (Pennsylvania Reports).

ADMINISTRATOR.

Where an intestate left a bird (an ostrich), which subsequently died in the hands of the administrator, who suffered four months to elapse between the time of taking the inventory and the death of the bird, without exposing it to public sale; which four months were the most inauspicious for its sale or exhibition; and it appeared, that an immediate sale of it would have sacrificed the property; and the postponement was made apparently for the benefit of the estate, the court refused to charge the administrator with the appraised value of the bird. *Secondo Bosio's estate*, 2 Ashmead, 438.

AGENT.

The general rule is that for an agent's omission to keep the principal regularly informed of the agent's transactions, and the state of the interests intrusted to him, the measure of damages is to be proportioned to the actual loss sustained by the principal. *Arrot* v. *Brown*, 6 Wharton, 9.

2. An exception to this rule is, where the information transmitted is such as may induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw; in which case the agent makes the debt his own. *Ib.*

ANNUITY.

Land charged with the payment of an annuity, having descended to the heirs at law, of whom the annuitant was one, is not thereby wholly discharged from the payment of the annuity, but only *pro tanto*, which the annuitant took as heir at law. *Quære*, if the annuitant had acquired the same interest by purchase, and not by the act of the law? *Addams* v. *Heffernan*, 9 Watts, 529.

ARBITRATION.

After an award is made, and filed in court by the arbitrators, it is not competent for the court to alter it upon the affidavits of the arbitrators, that they made a mistake in calculating the amount. *Tilghman* v. *Fisher*, 9 Watts, 441.

ARREST.

The arrest of a debtor upon a *capias ad satisfaciendum* and a discharge from the arrest by the consent of the creditor extinguishes the judgment; and it does not even remain as a good consideration for a subsequent promise to pay; but if the debtor be discharged in consideration of a promise to pay, such promise is binding on him, and may be enforced by action. *Snevely* v. *Reed*, 9 Watts, 396.

ASSIGNEE.

A foreign assignee in bankruptcy may sue in the courts of Pennsylvania in the name of the bankrupt, for the assets of the estate, and recover them, unless as against the rights of an American creditor. *Merrick's estate*, 2 Ashmead, 485.

ASSIGNMENT.

An assignment for the benefit of creditors stipulated for a "full and complete release of their respective claims" against the assignors within a certain time. A mercantile firm, creditors of

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the assignors, executed a general release under seal, and added to the signature the following words, "on condition that the assignment pays over 25-100 on our claim:" *Held*, that the condition was void, and the release single and absolute; and that it extinguished the debt. *Tyson* v. *Dorr*, 6 Wharton, 256.

BAIL.

Where a crime is charged, which is short of a capital felony, the judges are bound to admit the prisoner to bail; but, where a capital felony is charged, and the proof of it is evident, or the presumption great, no power exists anywhere to admit to bail. *Commonwealth* v. *Keeper of prison*, 2 Ashmead, 227.

2. A safe rule, where a malicious homicide is charged, is to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and in instances were the evidence for the commonwealth is of less efficacy, to admit to bail. Hence, where a judge is satisfied that the offence at most is only murder in the second degree, the prisoner is entitled to be liberated on bail. *Ib.*

BAILMENT.

If one hire a carriage and horses to go a journey, and the owner send his own driver, and the horses are injured by immoderate driving, the person who hired them is not liable to the owner for damages. *Hughes* v. *Boyer*, 9 Watts, 556.

2. In such case, the hirer incurs no responsibility for any injury happening to the carriage or horses, unless such injury have occurred from some act or interference of his. A driver sent by the owner is his servant, and unless the hirer causes the driver to go beyond the contract of hiring, he will not be liable for the acts of the driver occasioning injury to the carriage or horses. *Quære*, whether he be liable for injuries done to third persons, by the act of the driver? *Ib.*

BEQUEST.

In Pennsylvania, every bequest to the wife is conditional by force of the statute, which declares that every legacy to her shall be in lieu of dower if the contrary be not expressed; and thus standing as if a surrender of her dower had been expressly prescribed by the testator, she is not a volunteer, but a purchaser. *Reed* v. *Reed*, 9 Watts, 263.

BILLS AND NOTES.

Although the taking of the note of a third person as collateral security for a preëxisting debt, without more, will not place the taker in the situation of a holder for value, so as to protect him against the equities subsisting between the original parties to the note; yet it is otherwise if there is a new and distinct consideration — as, if time be given in consideration of obtaining the note as security for the debt, etc. *Depeau* v. *Waddington*, 6 Wharton, 220.

2. The plaintiffs, who were creditors of A. to the amount of $1500, held as security for the debt a bond given by a third person to A. for about $2400. A. applied to them for the bond, alleging that he had an opportunity of getting the money upon it, and would with the proceeds pay the amount of his debt to them. The bond was delivered to A. upon this understanding. A few days afterwards A. paid the plaintiffs $800 in cash, and gave them a note drawn by the defendant in his favor for $983, as security for the balance. *Held*, that under these circumstances the note of the defendant was taken upon a sufficient consideration, and therefore that the plaintiffs were entitled to recover against the defendant, although there was no consideration between him and A. *Ib.*

COLLISION.

It is an undoubted rule that for a loss arising from mutual negligence, neither party can recover in a court of common law. *Simpson* v. *Hand*, 6 Wharton, 311.

2. And this rule governs the case of shippers of goods on board of vessels which have come into collision, to the injury of the goods, as well as the owners of the vessels themselves. *Ib.*

3. An action cannot be maintained, therefore, by the owner of goods on board of a vessel, against the owners of another vessel, to recover damages for an injury done to the goods by the col-

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lision of the two vessels; if there have been mutual negligence in the conduct of those who have had the vessels in charge. *Ib.*

4. In an action to recover damages for an injury to goods on board of a vessel while she was lying at anchor in the river Delaware, by a vessel coming up the river in the night time, it was held that if the anchored vessel was moored in the channel without a visible light burning at the time, or if her watch was not on deck, and did not do what was customary for the purpose of avoiding a collision, there was such negligence as to bar the action, though there might have been negligence on the other side; and that the burthen of proof lay upon the plaintiff. *Ib.*

COMMON CARRIER.

The common law responsibility of a carrier may be abridged by the special terms of the acceptance of the goods; but these are exceptions which leave the common law rule in force as to all beside, and it being the business of the carrier to bring his case distinctly within them, they are to be strictly interpreted. *Atwood* v. *Reliance Trans. Co.*, 9 Watts, 87.

2. Excepted "dangers of the navigation" of a public canal, are such as are incident to it when the trip is made in conformity to the public regulations, of which the carrier is bound to take notice; consequently, damage from bilging in a lock which was entered in contravention of the rules, must be compensated by him. *Ib.*

CONSPIRACY.

To make a conspiracy an indictable offence, there must be either a direct intention that injury shall result from it, or the object must be to benefit the conspirators to the prejudice of the public, or the oppression of individuals. *Commonwealth* v. *Ridgway*, 2 Ashmead, 247.

2. The vital principle, in a charge of conspiracy, is the fraudulent and corrupt combination between the alleged confederates in crime; and the combination must be proved either by direct evidence, or through the exhibition of such circumstances as necessarily tend to its establishment. *Ib.*

CONTRACT.

Parties contracting for the purchase and sale of land may make the time of payment of the purchase-money essential to the contract, so that if the money be not paid at the times stipulated, the contract shall be null and void; and the vendee cannot compel its specific execution, although previously in part performed. *Dauchy* v. *Pond*, 9 Watts, 49.

CORPORATION.

As a general rule, a corporation may forfeit its charter by misuser or nonuser, judicially ascertained, namely, by *scire facias*, where an existing corporation abuses its powers; and by *quo warranto*, where a corporation *de facto* assumes authorities which do not pertain to it. *Commonwealth* v. *Bank of U. States*, 2 Ashmead, 349.

COURT.

A day to which a court was adjourned is part of the same term at which the adjournment was made. *Leib* v. *Commonwealth*, 9 Watts, 200.

COVENANT.

By articles of agreement under seal between the plaintiff and defendant, the defendant agreed to take a certain portion of a railroad contract, which the plaintiff had entered into with a railroad company, at a certain rate, and to pay the plaintiff a certain sum for it; and the plaintiff agreed to give the defendant a power of attorney to do all business pertaining to the contract if accepted by the company: held, that these were independent covenants, and that it was not necessary for the plaintiff to prove that he had given or offered to give the defendant the power of attorney mentioned in the agreement. *Quinlan* v. *Davis*, 6 Wharton, 169.

DAMAGES.

In an action to recover the price of machinery made by the plaintiff for the defendant, where the defence and evidence are that the machinery is defective, if the defendant have procured the machinery to be made good, the time necessarily lost in the process, unless so small as to fall within the maxim *de minimis*, &c., would be a legitimate subject of compensation; though

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time lost by working on with it in a defective condition would not be. *Cumming* v. *Garside*, 6 Wharton, 299.

2. In an action for a nuisance created by obstructing a stream made navigable by law, if it appear that the injury to the plaintiff arose from causes which might have been foreseen, such as ordinary periodical freshets or the collection of ice, he whose superstructure is the immediate cause of the mischief shall be liable to damages; but if the injury be occasioned by an act of providence, which could not have been anticipated, the defendant will not be liable. *Bell* v. *M'Clintock*, 9 Watts, 119.

DEATH-BED DECLARATIONS.

To make death-bed declarations admissible in evidence, they must proceed from a person under apprehension of impending dissolution; and a sense of impending death existing in the mind of the declarant is a prerequisite to the admission of death-bed declarations in evidence. *Commonwealth* v. *Williams*, 2 Ashmead, 69.

2. It is not essential that the sense of impending death should be expressed by the dying man himself; but it may be collected either from the circumstances of the case, as the nature of the wound and state of the body, or from expressions used by the deceased. *Ib.*

3. Of the existence of the consciousness of approaching death, the judge who tries the cause must be satisfied, before he admits such declarations in evidence. *Ib.*

4. Where declarations are offered in evidence against a defendant, made by one most mortally wounded, as to who was the perpetrator of the injury and the facts which attended it, *prima facie* evidence is submitted to the judge, that they were made under a consciousness of impending death, and then the evidence is received, and left to the jury to determine whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred. *Commonwealth* v. *Murray*, 2 Ashmead, 41.

5. The consciousness of death may be inferred by the judge from the nature of the wound, or state of illness, or other circumstances of the case, although the deceased may not have expressed any apprehension of danger. *Ib.*

EDUCATION.

Although courts of equity recognise the common law obligation of a father to support his children, and generally refuse to assist him from their private estates; yet where he is without any means, or without adequate means to maintain and educate them, according to their future expectations in life, equity will interpose, and make him an allowance out of the estate of his children for that purpose. *Newport* v. *Cook*, 2 Ashmead, 332.

2. In a case of clear and manifest urgency, a court of chancery will not hesitate in breaking into the principal of a vested legacy, for the purposes of educating an infant legatee. *Ib.*

ENDORSER.

A blank endorsement of a note, in its terms not negotiable, after it becomes due and payable, creates such a liability of the endorser, that the endorsee may maintain an action against him in his own name. *Leidy* v. *Tammany*, 9 Watts, 353.

ENTRY.

An entry upon land will avoid the operation of the statute of limitations; but it must be accompanied by an explicit declaration, or an act of notorious dominion, by which the claimant challenges the right of the occupant. *Altemus* v. *Campbell*, 9 Watts, 28.

EVIDENCE.

Parol evidence of what took place at and immediately before the execution of a written instrument, is admissible to prove fraud or plain mistake in drawing the writing, or to establish a trust, or to rebut an equity. *Scott* v. *Burton*, 2 Ashmead, 312.

2. Parol evidence is not admissible to vary the contents of a written instrument, even in the case of a clear departure from instructions, where it would affect the interests of third persons, uninformed of the facts, and who have *bona fide* and for a valuable consideration, acquired rights under it. *Ib.*

3. The doctrine in Pennsylvania is, that mere unaided comparison of hands is not in general admissible. But after

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evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with a writing, concerning which there is no doubt. *Baker* v. *Haines*, 6 Wharton, 284.

4. To authorize the admission of the writing offered as a test or standard, nothing short of evidence by a person who saw the party write the paper, or of an admission by such party of its being genuine, or evidence of equal authority, is sufficient. *Ib.*

5. In an action by a blacksmith to recover for work done, the plaintiff produced a book containing entries, some of which he swore were made by himself not later than the second day in the evening after the work was done, and were partly taken from a slate and partly from his own head. A witness was also produced, who testified that he made some of the entries by copying them from the plaintiff's slate on the evening of the day on which they were made, or in the course of the next day. Held, that the book was admissible in evidence. *Hartley* v. *Brookes*, 6 Wharton, 189.

6. A book of entries, manifestly erased and altered in a material point, cannot be considered as entitled to go to the jury as a book of original entries, and ought to be rejected by the court, unless the party offering it gives an explanation which does away with the presumption arising from its face. *Churchman* v. *Smith*, 6 Wharton, 146.

7. Evidence is admissible of admissions made by one of two co-plaintiffs or defendants, respecting material facts within the knowledge of the party making the admissions; but declarations by one of two co-plaintiffs or defendants of what he has heard the other plaintiff or defendant say in regard to the subject-matter of the action, are not admissible. *Quinlan* v. *Davis*, 6 Wharton, 169.

8. Parol evidence of the understanding of the parties in relation to the construction of a written agreement, may be given to explain that which is otherwise ambiguous. *Selden* v. *Williams*, 9 Watts, 9.

9. The nature of a case and its circumstances may raise such a natural presumption of a fact, that it may be submitted to a jury without positive proof. *Snevely* v. *Jones*, 9 Watts, 433.

EXTINGUISHMENT.

The taking of a new note of equal degree, either from the debtor himself, or from a stranger, at the instance of the debtor, is not an extinguishment of the first note, nor will it release any indorser of the same, unless the holder agreed to accept the new note in satisfaction, or to give time for the payment of the first note. *Weakly* v. *Bell and Sterling*, 9 Watts, 273.

FRAUD.

A parol contract for the purchase of land, is not taken out of the statute of frauds by the mere payment of the purchase-money. *Parker* v. *Wells*, 6 Wharton, 153.

HABEAS CORPUS.

Whenever a person is deprived of the privilege of going when and where he pleases, he is restrained of his liberty, and has a right to inquire if that restraint be illegal and wrongful; and that, whether it be exercised by a jailor, constable, or private individual. *Commonwealth* v. *Ridgway*, 2 Ashmead, 247.

HUSBAND AND WIFE.

It is settled that chancery will not execute an agreement between husband and wife to live separate and apart from each other. *M'Kennan* v. *Phillips*, 6 Wharton, 571.

2. But where an agreement was made between a husband and wife for a separation, and the wife covenanted to relinquish all claim to his estate, and the husband agreed to pay her a certain sum of money; which money was paid to her; and they lived separate from each other, and afterwards she died, having put the money out at interest: it was held, that she had acquired a separate property in this money, which was subject to her disposition as a *feme sole*. *Ib.*

3. A wife may acquire a separate property, in equity, by an agreement with her husband, without the intervention of trustees. *Ib.*

4. Neither a court of equity nor a court of law, in Pennsylvania, will lend its aid to a husband who has deserted his wife, to enable him to recover her choses in action, without making a suitable provision for her maintenance; unless he had, previously to

the separation, reduced them into possession; and the principle is the same in regard to her real estate. *Rees* v. *Waters*, 9 Watts, 91.

5. "I give and bequeath to my daughter Catherine, married to Samuel Meisenhelter, the eighth part of my estate, to them." Held, to be a bequest to the husband and wife, to which the husband, surviving the wife, is entitled. *Hamm* v. *Meisenhelter*, 9 Watts, 349.

INCUMBRANCE.

A public road, upon lots of ground which the owner had covenanted to sell and convey, is not such an incumbrance as will entitle the vendee to defalck from the amount of the purchase-money, in an action of covenant upon the agreement of sale. *Patterson* v. *Arthurs*, 9 Watts, 152.

INSURANCE.

Where the goods of an assured were levied upon by the sheriff by virtue of an execution against him, and the sheriff took actual possession of the goods, and left them in the store of the assured, the doors of which he fastened and the windows of which he nailed up; and the sheriff went out of town, and took the key of the store with him, and during his absence a fire took place, which destroyed the store with its contents: it was held, that the assured was nevertheless entitled to recover. *Franklin Fire Ins. Comp.* v. *Findlay*, 6 Wharton, 483.

INTEREST.

Where a sum of money is set apart and charged upon land, the interest of which is to be paid annually, if it be not punctually paid, the annuitant is entitled to recover interest upon the annuity from the time it was payable. *Addams* v. *Heffernan*, 9 Watts, 530.

INTESTATE.

Questions of advancement depend upon the intention of the parent; and of this, the declaration of the parent at the time, or the admissions of the child, at the time or afterwards, would seem to be evidence. *Danl. King's estate*, 6 Wharton, 370.

2. If there be no evidence at all on the subject, then whether it was a present or an advancement, may be judged by its amount and character. *Ib.*

3. Where a father, whose estate appeared, on the settlement of the accounts of the administrators, after his death, to have amounted to upwards of $120,000, and who had four children, bought furniture for a daughter, on her marriage, to the amount of $1132, and there was evidence of his declarations that he had given them to her as a present and a gift; it was held, that she was not to be charged with this as an advancement, but that it was to be considered as a present to her. *Ib.*

NEGLIGENCE.

In an action by the owner of a canal boat against the steersman, whom he had employed to take her down the river, to recover damages for the loss of the boat, which was carried over a dam, in consequence of the negligence of the defendant, it was held, that it was not a sufficient answer to the charge of negligence that the boat was not properly provided with poles and hands; if the vessel was improperly navigated too near the dam. *Hice* v. *Kugler*, 6 Wharton, 336.

REPAIRS.

A covenant by a lessor, that he will *pay* all repairs exceeding a certain sum, cannot be so construed as to oblige him to *make* the repairs. *Lomis* v. *Ruetter*, 9 Watts, 516.

STATEMENT.

Nothing is indispensable to a statement which is not made so by the statute which has substituted it for a declaration; the cause of action must be set forth intelligibly, so as to exhibit an available cause of action, but performance of conditions precedent and everything beyond the defendant's engagement to pay may be omitted. *Snevely* v. *Jones*, 9 Watts, 433.

STATUTES.

The expiration of a statute, by its own limitation, *ipso facto* revives a statute which had been repealed and supplied by it. *Collins* v. *Smith*, 6 Wharton, 294.

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INTELLIGENCE AND MISCELLANY.

The Bankrupt Law. The *act* passed at the extra session of the present Congress, "*To establish a uniform system of bankruptcy, throughout the United States,*" having been permitted to go into operation, since the issuing of the last number of this journal, the questions arising under it, both as to its construction and the manner of carrying it into effect, which have been alluded to, have acquired a deeper interest. Of these questions, one of the most important relates to *attachments of real and personal property upon mesne process*, made in conformity with the laws of this state, and other states, where such attachments are allowed. Does this act discharge and vacate such attachments, in all cases of bankruptcy coming under its operation, so that the assignee will take the effects of the debtor, free and discharged from them; or are they protected and excepted out of its operation?

The operative words of the statute, which apply most immediately to this subject, are contained in the second and third sections, and are as follows. "All the property and rights of property, of every bankrupt,—who shall by a decree, &c., be declared to be a bankrupt, &c., shall, by mere operation of law, &c., be divested out of such bankrupt, &c., and shall be vested, by force of such decree, in such assignee;" &c. (Sect. 3d.) "Nothing in this act contained, shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any LIENS, mortgages, or other securities on properties, real or personal, *which may be valid* by the law of the states respectively, *and which are not inconsistent with the provisions of the second and fifth sections of this act.*" (Sect. 2.)

As the right of the debtor to possess and control his property is not impaired by filing his petition to be declared a bankrupt, and the decree declaring him such, does not, like an act of bankruptcy in England, have relation back to the filing of the petition, we may lay out of our consideration all cases, wherein the creditor takes judgment and actually levies his execution upon the debtor's property, before he is declared to be a bankrupt by a proper decree. In all such cases the right of the creditor is complete, before those of the assignee have come into existence. The real question is restricted to those cases, in which the *attachment* takes place *before*, and judgment is recovered *after*, the decree of bankruptcy. The operative words of transfer in the third section would seem to be sufficiently large and comprehensive to carry every thing belonging to the bankrupt; unless the *proviso*, at the close of the second section, can save it. In this proviso, the only expression, which has been supposed capable of reaching the case, is the word "*lien*."

The real question to be considered, therefore, is, does an attachment upon mesne process, under the laws of this state, constitute a "*lien*," in the sense in which that word is used in the statute?

It must be admitted, on all hands, that all priority and preferences between creditors, are utterly at war with the first principles of a bankrupt system;—the very essence of such a system consists in an equal distribution of the effects of the bankrupt. But if *attachments* upon mesne process are excepted out of the operation of this act, in nine cases out of ten, all the tangible property of a bankrupt would be absorbed by attachments, which can be put on before a decree of bankruptcy can be passed, and the property thereby be vested in the assignee. Before an interpretation of the statute, giving so wide a scope for pre-

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ference, should be adopted, a very clear case should be made out. If a fair construction of the words of the act compel us to give it this effect, it will be conceded, that the makers of the law have done precisely the *reverse* of what they intended to do. This could result only from ignorance of the applicability of their language to the class of cases, which we are considering. But have they, thus ignorantly, fallen into the supposed error?

A *lien* is defined to be, "a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied." (Groce J., in *Hammonds* v. *Barsly*, 2 East, 227; also 1 Story Eq. Jur. 483). It is essential to a *lien*, at law, *first*, that the claimant should be in possession, — *secondly*, that he should have some claim unsatisfied, — *thirdly*, that he should have a right to hold, until his claim shall be satisfied. These are the general essential ingredients in every right of lien, at common law; and in all states and countries where the common law is used and practised upon, the word would convey to the mind of every professional man the idea of such a qualified property or right. Whenever, therefore, the word is used, without limitation or qualification, we are to consider it as used in this sense; it being a universal principle of construction, both in statutes and legal instruments, that words are to be understood in their most usual sense, unless a different one is to be gathered from the context or connection.

Does an attachment upon mesne process come up to this definition of *lien*?

The plaintiff, in a suit where the attachment is made, is the only person who sets up a claim, *unsatisfied;* he, therefore, if anybody, must have the right to hold the property attached. But it is well settled, by a long series of decisions in our courts, that the creditor has no interest, or estate whatever, in the property attached upon his writ. He cannot claim the possession of it from the officer, and if the officer puts the property into his custody as his keeper, he is construed to be the mere servant of the officer, and he can maintain no action against a wrong doer, who takes the property from him; the action for such an injury must be brought in the name of the officer. See *Ludden* v. *Leavitt*, 9 Mass. R. 104; *Warren* v. *Leland*, ibid. 265; *Perley* v. *Foster*, ibid. 112; *Commonwealth* v. *Morse*, 14 Mass. R. 217. It is plain, then, that the attaching creditor has not a *lien*, in the common acceptation of that word; indeed, he has no interest or estate in the property, to which any name can be given.

But it may be answered, that the officer has a *lien*, if the creditor have none, and that the officer is the agent of the creditor, and his lien shall inure to the benefit of the creditor. It is true, that the officer is appointed by law to make service of writs, and in doing so is authorized to seize and hold the property of defendants, — and it is made his duty to safely keep the personal property so taken, as well for the *general owner*, the debtor, as for the purpose of levying the execution, which may be recovered, upon it, in satisfaction of the creditor's judgment. Having thus the legal custody of the property, it was a necessary consequence, that he should have a right of action, to enable him thus to keep it, against any one who should take or injure the property, or in any manner disturb his possession. He can maintain such an action against the creditor, who has attached it, and against the general owner, as well as against any stranger. In speaking of the officer's right of action, for these purposes, it is, also, true, that our courts, for want of a convenient term applicable to the case, have often said, that *he has a lien*. *Dennie et al.* v. *Willard*, 11 Pick. R. 524; *Fettyplace et al.* v. *Dutch*, 13 Pick. R. 392; *Bursely* v. *Hamilton*, 15 Pick. R. 42; *Sanderson* v. *Edwards*, 16 Pick. R. 145. But a moment's consideration will show, that this phraseology is used, merely by way of accommodation, to express a *quasi lien*, not a lien in the common acceptation of the word. The officer has possession, but he has no unsatisfied claim, which is one essential ingredient in a lien. He has a right to *hold*, but not until his, or any other claim, is satisfied. His right to hold depends upon his precept, and the law appointing him to serve it; and he has the same undoubted right to hold it, even if there be no just claim on the part of the plaintiff.

If the plaintiff should sue, maliciously, without any just pretence of claim, still the officer may hold, and should hold, until final judgment; unless the at-

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tachment be relinquished by consent of the plaintiff. Neither does the right to hold, where there is a true claim, depend in any manner upon the satisfaction of that claim. A creditor attaches, and omits to prosecute his suit, or omits to take judgment, or to take execution, or to deliver it to the officer within thirty days after judgment. In either of these cases, the officer has no longer a right to withhold the property from the debtor, although the creditor's claim is as much unsatisfied as when he first took it. Indeed, so far is the officer from having a lien, that he cannot even hold the property for his own fees and expenses in taking care of it. In this respect he has not even the right of a naked bailee, without hire, a finder, for instance. Indeed, the law seems to have taken special care to keep the officer uncorrupted and free from temptation, as its own servant, having no motive but to do his duty in guarding the property to be disposed of, as its judgment shall award.

It appears, then, that the attaching creditor lacks all the requisites of a *lien* except an *unsatisfied claim*, and the officer has no other, but possession, and both, united, do not bring together enough to make out a right of lien, at common law, because the right to *hold does not depend upon the claim.*

It must not be supposed, that in adopting the foregoing definition, we have forgotten, that there are other rights, which are usually called *liens*, and which do not conform to it. *Maritime liens*, for instance, the rights of the sailor to the vessel, the salvors to the property saved, &c., and liens in equity. But in all these cases, the word *lien* is used for convenience, as coming nearest to the thing: — and besides, in all such cases, as the property is bulky, and not capable of manual possession, all persons having actual possession are construed to hold for the benefit of the claimants. At any rate, in construing a *statute*, enacted upon a *common law* subject, it would not be conformable to the usual principles of construction, to seek for the meaning of its terms, in some other department of science, unless some intimation be given in the act itself, of the source whence we are to seek the interpretation.

Thus far we have looked to the general and most obvious meaning of the words, to learn the intention of the law. But there are *restrictive words*, and words of limitation, in the latter part of the *proviso* under consideration, which seem designed for the special purpose of precluding any such local or provincial interpretation of the words, " *lien, mortgages*," &c., as should work the mischief of priority or preference. "Nothing in this act shall annul, . . . any rights, . . . liens, mortgages, . . . valid by the laws of the states, . . . which are not *inconsistent with the provisions of the second and fifth sections of this act*." The fifth section runs thus. "All creditors, &c., . . . shall be entitled to share in the bankrupt's property and effects, pro rata, *without any priority or preference whatsoever*, except only for debts due . . . to the United States," &c. It would scarcely be possible to imagine, what would be "*inconsistent with the provisions*" of this section, if such a construction of the word *lien*, as would embrace attachments upon mesne process, be not so. The naked and undisguised result of such an effect given to the law, would be, to give a *preference*, to an unlimited extent, to creditors, having no manner of claim to it, from any thing *inherent* in their contract, or connected with it, by any agreement, express or implied, between the creditor and debtor.

It may be objected, that the construction here contended for, would make the word *lien*, useless and nugatory, in the place where it stands in the statute. If this were so, it has but little force, as an argument, — for useless and unnecessary words are found in all statutes. But it does not seem, that the word, construed as we propose, would be inoperative. It is true, it was not needed to protect the rights of mortgagees, pledgees, pawnees, or other *liens*, known to the common law, — for they have always been construed to be unimpaired, under the most rigid interpretation of the English bankrupt laws, — and even *equitable liens* have in like manner been saved under those laws. But all *liens*, properly so called, would be saved under this clause of the statute, which have been created by *state legislation*. For instance, our *lien* in favor of mechanics, doing work and furnishing materials for houses erected upon the land of their employers, — though a *lien* by our statutes, it would be saved, because it is, in truth, a *lien*.

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Such, then, would seem to be the fair construction of this part of the act, that an attachment upon mesne process shall not work a preference in favor of the creditor, who thus seeks to prefer himself, in spite of the general provisions of the law. During the debate upon the bankrupt bill, in congress, it was objected, by members from states having no attachment laws, that this clause would give priority to attaching creditors, in those states, where such laws existed; — and such objections were answered by persons, of the legal profession, from the latter class of states, by the distinct averment, that in their own states, those laws had been construed to give no interest or lien to the creditor, upon the property attached. It is not to be denied, however, that there is a case, which seems to have undergone some examination before a respectable court in a neighboring state, which must have been decided upon grounds somewhat at variance with the views which we have taken of this matter. The case of *Ingraham* v. *Phillips*, 1 Day's Conn. R. 117, arose under the bankrupt law of 1800. That act contained a section (63) to this effect, — "Nothing in this act . . . . shall invalidate . . . . any lien, existing at the date of this act, upon the lands and chattels of any person," &c. The superior court had decided, that under that provision in the law, an attachment of real and personal property, made before the passage of the act, was not discharged by the bankruptcy of the debtor. In that case, the discharge of the debtor under the act, was pleaded, and a replication to the plea, setting forth this saving clause of the statute, was demurred to, and the replication was adjudged good, and judgment was rendered for the plaintiff, and he had execution against the property attached. To this, error was brought, and the case was decided by the then court of errors in that state. Not a word is given, spoken by any judge in the case, and upon looking at the argument of *Daggett* and *Hosmer*, both of them subsequently, each in his turn, promoted to the office of Chief Justice of their highest court, we should hardly have expected, that the judgment of the court below would have been affirmed. The reporter states, however, that it was so ordered, without any reasons given for the decision by the court or the reporter, and there is scarcely a word of argument by the counsel of the original plaintiff, to explain the grounds taken upon that side. Upon a careful consideration of that case, — taking it in connection with the constitution of that court at that time, (composed of the Governor, Lieutenant Governor, assistants, &c.) — and as it stands thus naked, without reasons or explanation, it does not seem to deserve great weight as an authority.

Resignation of Mr. Justice Putnam. Most of our readers are probably aware, that the Hon. Samuel Putnam, senior justice of the supreme judicial court of Massachusetts, has resigned his seat on that bench, after a service of nearly thirty years. Mr. Justice Putnam possesses many rare qualities, which peculiarly fitted him for the office he so long held, with honor to himself, and credit to the bench. His legal opinions, which are scattered through many volumes of the Massachusetts Reports, are monuments of his learning as a lawyer, and will well compare with those of any other member of that able court, during the whole period while he was on the bench. Upon commercial law, in particular, his knowledge is varied and extensive, and commands universal respect. Mr. Justice Story, in his late treatise on Partnership, which is dedicated to Mr. Justice Putnam, thus addresses him. "I desire that this dedication may be deemed, on my part, a voluntary tribute of respect to your personal character, adorned, as it is, by the virtues, which support, and the refinements, which grace the unsullied dignity of private life. I recollect with pride and pleasure, that I was your pupil in the close of my preparatory studies for the bar; and, even at this distance of time, I entertain the most lively gratitude for the various instruction, ready aid, and uniform kindness, by which you smoothed the rugged paths of juridical learning, in mastering which an American student might then well feel no little discouragement, since his own country scarcely afforded any means, either by elementary treatises or reports, to assist him in ascertaining what portion of the common law was here in force, and how far it had been modified by local usages, or by municipal institu-

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tions, or by positive laws." These sentiments meet the hearty response of all who have witnessed the judicial labors of Mr. Justice Putnam, and the Suffolk bar, at a late meeting, only repeated the sentiments of the whole bar of Massachusetts, when they desired to "express their sense of the great value of the judicial labors of Mr. Justice Putnam, and the affectionate respect which they feel for him; to make known that they appreciate his learning, his firmness, his purity and his entire devotion to truth; that they can never forget that these high qualities have been graced by the manners of a kind-hearted gentleman; and that he carries with him into retirement the strong wishes of his brethren of this bar for his prosperity and happiness." The members of the Middlesex bar also had a meeting on the occasion of his resignation, at which appropriate resolutions were passed, of which the following is peculiarly true — if such an expression may be allowed. "*Resolved*, That while we gratefully remember the uniform urbanity of his deportment to the bar in general, we cannot forbear to mention that striking and amiable trait of his character which was manifested in his undeviating kindness to the *junior members* of the profession, whom he appeared to look upon as his *legal children;* and those of us who are growing old, can never forget his patronizing manner when we were young, and those of us who are yet young, feel that in separating from him, we have lost a *kind friend and indulgent patron.*"

Obituary Notices. Died, in Washington, D. C., on Saturday morning, January 29, the Hon. Nathan Fellows Dixon, a member of the senate of the United States, from Rhode Island.

He was born in Plainfield, Connecticut, in December 1774. He was graduated at Brown University in 1799, and studied law in his native state. In 1802, he came to Rhode Island to practise in the courts of that state, but he continued to pursue his professional labors in Connecticut. He was married soon after this, and settled permanently in Rhode Island. In 1813, he was elected a member of the general assembly of the state, and was elected by the same constituency at *thirty-four successive elections.* In October 1838, he was elected a member of the senate of the United States for a term of six years, to commence the March following. The death of Mr. Dixon was announced in a suitable manner, to the senate, by his colleague, Mr. Simmons, and, on motion of Mr. Woodbridge, suitable resolutions were passed by that body.

In Augusta, Maine, January 21, the Hon. Daniel Cony, in the 90th year of his age.

He was born in that part of Stoughton, which is now Sharon, in Massachusetts, in August, 1752. He was the second son of Dea. Samuel Cony, who was the fifth son of Nathaniel Cony, of Boston. As early as 1775, and in the two following years, he was called to fill trusts, civil and military, in the town where he resided. He was an active and ardent patriot in the revolution, and served as an officer in the militia, which was called out to reinforce the army under Washington, at Cambridge and Roxbury, and under Gates, at the capture of Burgoyne in 1777. In 1776, he married Susannah, youngest daughter of the Rev. Philip Curtis, of Sharon, with whom he lived fifty-seven years. In the year 1778, he removed with his family to Augusta, then a part of Hallowell. In 1786, he was chosen a delegate to the first convention, which was held on the subject of the separation of Maine, and which met at Falmouth, now Portland. The same year he was elected a representative for the town of Hallowell to the general court of Massachusetts. For twelve successive years he was chosen to fill a seat in the house, the senate, or the executive council. During that time he was appointed a special justice of the common pleas, and a justice of the peace, and of the quorum through the state; and for ten years was an active and useful member of the committee for the sale of Eastern lands. Upon the creation of the County of Kennebec, in 1799, he was appointed a judge of the court of common pleas, which he held for twelve years; and in 1804, he was made judge of probate for the same county, which he held when Maine became a separate state. In 1819 he served as a delegate from Augusta in the

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convention chosen to frame and report a constitution of civil government for Maine. And when that government was organized, he was reappointed judge of probate, and a justice of the peace and of the quorum, through the state. He was made trustee of Hallowell Academy and an overseer of Bowdoin College, by the acts creating these institutions, and served as such for many years. He was distinguished for liberality in aid of public objects, and especially of literary institutions. The sums he bestowed upon the Cony Female Academy, of which he was the founder, did not fall short of four thousand dollars. He was a member of the Massachusetts Medical Society, and was for a number of years elected one of its counsellors, and was President of the Kennebec Medical Society. The honorary degrees of A. M. and of M. D. were conferred upon him by respectable collegiate institutions. At the age of seventy, he resigned all his public trusts and offices, and retired to private life, visiting from time to time his numerous friends in Massachusetts and elsewhere, with many of whom he continued to correspond until near the close of his life.

Supreme Court of Massachusetts. The Hon. Samuel Hubbard, of Boston, has been appointed one of the justices of the supreme judicial court of Massachusetts, in place of the Hon. Samuel Putnam, resigned. Several projects have been *talked of*, at the present session of the general court, to facilitate the administration of justice, some of them contemplating important changes in the present judicial system; but it is not probable that any very striking change will be accomplished at present.

TO READERS AND CORRESPONDENTS.

We trust that none of our readers will be prevented from examining the first article in the present number, on account of its length. Those who feel no interest in the subject of that article, will observe, that the number contains sixteen pages more than usual, and, consequently, there is nearly as much variety in it, as there would be if the article on Repudiation occupied less space.

Our last number contained some remarks from a correspondent, on the Bankrupt Law, which did not meet with universal approbation. The editor of the Portland Advertiser, in particular, who is known to be a sound lawyer, commented upon them at length, and considered them "in several instances as altogether too sweeping and positive." In our present number, there is an article on the same subject, from an eminent member of the Boston bar, whose varied learning and great practical experience entitle his opinion to much weight.

We have it in contemplation to publish hereafter a *Monthly List of Bankrupts*, arranged in alphabetical order,—*probably* throughout New England, *possibly* throughout the United States. The point at which we intend to start, is the *declaration of bankruptcy*, and not the *filing of the petition*.

Our next number, being the last of the fourth volume, will contain an Index and Table of Cases. The fifth volume will commence in May.

We have received the second part of the ninth volume of the New Hampshire Reports, containing the cases from the July term, 1838, to the December term of the same year.

The report of the case of *The Brig Gertrude*, on page 444 of the present number, originally appeared in the Portland Advertiser.

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THE LAW REPORTER.

APRIL, 1842.

MASSACHUSETTS GENERAL COURT.

We have just been called upon to witness once more the rise, decline, and fall of a Massachusetts legislature. The general court of 1842 was prorogued on the 3d ultimo, having solved a problem which the legislatures of past years have attempted with most indifferent success, and really attained that desirable and difficult object — a short session. We will not permit ourselves to say that they deserve credit, only for the novelty of their exertions, that while others have failed in attempting to make one short session, this legislature, with a praiseworthy ingenuity, has succeeded in securing *two*; — whatever of credit or discredit its members deserve for ordering the extra session in September next, they certainly have succeeded in passing on the ordinary business of the year in less time than their predecessors.

> "True patriots they, for be it understood,
> They spared the state their counsels, for its good."

A session rarely passes now, without leaving behind it a conviction or an impression that it has cost the state much more than it is worth. Of the correctness of this impression or conviction, we shall see something before we have done. But there is one point which ought to be remembered, which deserves particular attention this year, and is generally kept too much out of view in the formation of such opinions concerning the general court of Massachusetts. It ought to be recollected, that it is not solely nor in great part even, a *legislative* body. We mean that its time and attention is, in great

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measure, from the nature of the case, occupied with subjects entirely alien from, and independent of, the jurisprudence or political government of the state. To speak definitely of the last session, out of ninety-eight acts and seventy-two resolves, which received the executive sanction, eleven of the acts only can have the slightest direct influence on the real course of law among us. Of the rest, almost all are of interest to private persons only, a part of the acts are devoted to securing more perfectly the accuracy of the returns made by incorporations to the state government; several of the resolves to an expression of the opinion of the legislature on matters of public interest; and the rest of the action of the session concerns merely trifling changes in different departments of the state government. It is by no means singular, therefore, that whoever supposes that the changes in the statute book will be the most important results of the labors of a session, should feel that it has failed entirely to meet what might have been expected from it. He ought to recollect that the general court really concentrates all the political power of the state, and that the proper conduct of the government of the state for the year, involving every question, from the change of the name of a child, to the maintenance of the honor and credit of the commonwealth, rests upon its decision.

Even on this view, however, the legislature of this year is fully open to the charge of inefficiency. That two months should have been occupied in the maturing of such a paltry list of subjects as appear in the list of acts and resolves, still seems surprising. And if we are not mistaken, the evil does not decidedly lessen, as the state grows older, and gives, in her history, more experience to her legislators. We do not doubt, that business was better done in the good old days of the colony, when rules and orders, perhaps, were not, but when the members of the general court were kept in the same house from the beginning to the end of the session, not leaving it even to eat or sleep, but like well drilled soldiers, always standing at their posts, than in our more refined and experienced times. This inefficiency has been too often noticed to excite particular surprise; we are disposed to believe that a new cause is annexing itself in our own times to those which have heretofore been active in producing it. We mean the want of concert, of sympathetic action between the two houses. More than one instance occurred in the past session where, a bill having been reported, debated, and lost in the house, a similar bill was reported and passed in the senate afterwards, to receive, of course, certain and immediate death as soon as it was sent down. And in matters of less prominence this want of knowledge of each other's action was still more striking; to almost all intents and purposes the two branches might have been sitting hundreds of miles from each other, neither having any knowledge of the other's action, except such as it gained from the indorsements on the documents which passed to and fro. There is nothing we ad-

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mire more, or would contend for more earnestly, than the entire independence of each of the two branches, and the maintenance of the check which each preserves on the other; there is, however, a manifest distinction between these desirable objects and that entire mutual ignorance which can only result in confusion, trouble, imprudent action and "reconsideration," the worst disturbance of the even progress of a deliberative body. The cause of the difficulty is the precise similarity in the nature and feelings of the two bodies. So far as the theory of their organization goes, the senate is now the popular, and the house the conservative branch of the legislature, the senate being now based merely on population, and the structure of the house rests, in a great measure, on the corporate rights of the towns. We are not sure but we could show instances where this theoretically supposed distinction has appeared in fact; in general, the difference in the size of the two bodies modifies any slight effect which would arise from it, so that it would be impossible to show any real distinction between the views taken by the respective branches of any subject presented to them.

Whatever particular errors or omissions the legislature is answerable for, certainly do not arise from want of talent among the members who composed it. There were, if we are not mistaken, more than the average number of men of distinguished ability. The standard of speaking, never low in a Massachusetts legislature, was well sustained; there was no desire on the part of any one to avoid laborious duties, — no one, who has not had an opportunity to observe the course of proceeding closely, can readily understand the great amount of public business transacted, particularly in committees, by leading members, whose time is as valuable to them as any one's; there was no rancorous party-spirit; although quite enough appeared, we believe that an unusual degree of good nature was displayed on all sides; in almost every instance — we wish we could say in all, members showed a desire to act on the abstract merits of cases before them without a view of consequences of secondary real importance. The only fault to be found with the *materiel* which composed the legislature, or more particularly the house, was the want of legislative experience seen in most of the members. The number of new members, we believe, was surprising even to those who are accustomed to the constant changes of the organization of the house. Between the legislature of 1842 and any of two or three years ago, there was as striking a *personal* difference, as if an entire political revolution had swept over the state. This difficulty is one which is observed always in our government; it had more weight than ever this year.

After what we have said, it follows almost of course, that a review of the results of the session would dwell more on what was omitted than what was performed. The bills which passed contain, as we have said, very little of general interest, besides the act

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relating to imprisonment for debt, that suspending the insolvent law, that regarding divorce, and the guardianship of minors, and the resolve establishing libraries for the district schools of the state, we know of none that require notice here. Urgent attempts were made to make some change in the present system of the judiciary of the state; they failed entirely, however, — mostly from a disagreement of the views of those who desired to effect such change, and partly from the holy horror with which the legislature of the state always regards the bar, and any thing which, by any possibility, it may desire. An attempt to obtain another more deeply seated change, by introducing an amendment to the constitution which should prevent judges from holding office when more than seventy years of age, was more summarily rejected. An attempt to improve on the law relating to elections, so that the check lists might be more accurate, also failed. A bill repealing the probate assessment act was lost in its last stage, having passed both branches after the ordinary debate, and been engrossed by their order. Besides these, there were, of course, the discussions on the rights of atheists, on the liabilities of stockholders in corporations, on the justice of corporations in general, on such matters of national politics as could possibly be introduced, and on the intermarriage law. Besides the ordinary petitions on this last subject, those who advocated its repeal urged a law which should prevent any distinction in railroad cars on account of color; and we noticed, also, that one or two of the petition blanks on the admission of Florida into the Union, which were very rife a few years since, had been filled up and sent in. All these movements and debates were entirely inoperative, except in the consumption of time.

These were matters of comparatively trivial importance, — they were subjects which would have hardly been thought of, which certainly would have excited no general attention, if there had not been this body collected for the mere purpose of tampering with and changing existing customs and institutions. The great omission of the session, which draws and deserves all the censure which can be thrown on the whole, was the refusal to tax the state for the payment of the funded debt due this year. Here is the measure on which members who are answerable for it may rely in all future time, as their defence against any charge of undue boldness in patriotism or economy. When, in commenting on the legislation on this subject last year, we said that the legislature of 1842 would be actually driven to the resource of borrowing money to pay borrowed money,[1] we did not suppose, that we were actually foretelling the adoption by that legislature of a settled course of suicidal policy; we merely alluded to the necessity which would exist of borrowing money in anticipation of

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[1] See the article on Legislation in Massachusetts, Law Reporter for April, 1841, (Vol. III., p. 441.)

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the slow process of collecting a tax; we did not dare to say, we should not have been justified in saying, that a legislature which had the debt staring it in its face, without the power of subterfuge or evasion, would be satisfied with postponing the evil day in the full consciousness, that, when it did come, it would be worse than ever, and that the very process of postponement would be an additional wound to the prosperity of the community.

If we are to judge of the future by the past, there are now very few things which one might not feel justified in saying of the Massachusetts legislature. Thus much however, even now, it deserves at our hands. We cannot say, as we did last year, that it was satisfied with hasty legislation on this point. The question was fairly stated, and discussed with marked ability. We know of no legislative body of the present time, which can boast of greater skill and power in its members than was shown here on all sides, in the discussion on the finance bills. There was little "speaking for Buncombe," there seldom is in the general court; the question was really *debated*, and, in great measure, on its own merits. No one could watch the course of the discussion without being convinced that the heavy vote which the supporters of the tax at length were able to give, on a division, resulted from their strong and pointed arguments, which were pressed on the house in every variety of form. About one hundred and fifty members voted in favor of the bill throughout, and we believe we hazard nothing in saying that it would not have received one third of that number of votes had the question been taken without previous discussion, and every man had voted on his own original impressions, as the different proposals came before him.

The course of the affair was simply this: the finance committee presented their estimate of revenue and expenditure for the year at an early part of the session, from which they inferred that there would be about $55,000 of surplus of revenue, without any calculations on receipts from the general government. From this surplus, and the balance in the treasury at the beginning of this year, they proposed to pay $94,000, about one-third of the debt, and to pay the remainder in instalments of $50,000 in the four next years, borrowing from the banks, meanwhile, to pay such bond-holders as would not be satisfied to renew the state bonds in their possession. They also proposed to borrow from the banks $435,000, to pay the state's assessments to the Western Railroad, such loans to be repaid when the "state of the money-market" would permit an advantageous sale of the state scrip. The minority of the committee, consisting of the opposition members who served upon it, submitted a minority report, in which they attacked the estimates of the majority, and argued that the surplus supposed would never exist. These papers being before the house, Mr. Stevenson, of Boston, moved to recommit with instructions to report a tax-bill, and in that state of things the several parties joined issue.

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We have no desire to follow the discussion; as we have said the plan of the finance committee was attacked with great force; those who felt that they had it in charge, defended it as they could, showing as much ability as could have been expected from men who had so distressingly weak a case. The very circumstance that before the end of the session, by the action of the legislature itself, nearly $20,000 was deducted from their "probable surplus," was enough to show the confidence their estimates deserved. This was, however, but a trifling matter; the question was one of principle; its decision was to settle the policy of the state; as such it was argued and as such it prevailed on the first test vote; one hundred and fifty-four members voting for the tax, and one hundred and forty-nine against it. Let us hope, that it was only the specious circumstances which gave an air of propriety to the opposite course, which led to the defeat of the bill when it was presented to the house more in detail; and that, in a case which shall have less plausible ground for pound-foolishness than this had, the legislature may show itself at least penny-wise. On its passage to a third reading the bill, as drawn up, was lost, one hundred and forty-one to one hundred and forty-nine. It is worthy of remark, that the representatives of Boston, whose citizens would have paid at least one half of the tax, voted, three to one, in its favor, and supported it with all their power and eloquence.

We had intended to say a word of the September session which the general court will hold for the apportionment of the representative districts of the state; but we have not left ourselves room. We have not ourselves seen the necessity of such a movement, when the regular session of next year would have time to perform the duty in any probable contingency, or when, at this session, the general court might have arranged for either of the three possible apportionments. We do not believe that there will be, in the disposition of the districts, the slightest partisan feeling. We doubt if any man of either party wishes an unfair partition; we know that no man dares to suggest one. The more is the pity that such a subject should be discussed at a special session, when no other questions will come before the two branches. The principal use which we can anticipate from this session will be an indirect one. Every new meeting of a political body like this, is a new evidence that the world is governed too much, and gives new reason to hope, that in time it may be content to govern itself with more moderation.

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RECENT AMERICAN DECISIONS.

District Court of the United States, Maine, February,* 1842, *at Portland.*

The Brig Casco.

In every contract of affreightment, whether by charter party or bill of lading, the ship is, by the marine law, hypothecated to the shipper for any damage his goods may sustain from the insufficiency of the vessel, or the fault of the master or crew.

If a vessel is let on a contract of affreightment by charter party, the owners will not be held responsible for a loss occasioned by the violence of the elements, although the dangers of the seas are not excepted by the charter party.

But if they are chargeable with any neglect or fault, without which the loss would not have happened, they will be liable.

This was a libel on a charter party. The master of the brig Casco chartered her to the libellant for a voyage to Porto Rico, to carry a cargo of lumber, and from thence to her port of discharge in the United states, touching at Turks Island for a cargo of salt, if required by the charterer. The voyage was performed to Porto Rico and the cargo delivered. From that place she went to Turks Island and took a cargo of salt. On her return from Turks Island, she was found to leak so badly, that a large part of the salt was lost; of 5676 bushels laden, only 3132 bushels were delivered at Portland, the deficiency amounting to 2544 bushels. This libel was brought by the charterer against the vessel, to recover damages for the loss. The questions of law which arose and were discussed in the case, together with the substance of the testimony, appear in the opinion of the court.

The case was argued by *Rand* for the libellant, and by *T. A. Deblois* for the respondents.

Ware J. The first question which was raised and discussed at the bar, was whether under this charter party the vessel, *in specie,* is liable for any loss which the charterer may have sustained from damage to the cargo. It is contended on behalf of the respondents, that there was a demise of the vessel herself to the charterer, by which the possession was transferred to him; that he, under the charter party, became owner for the voyage, and thus his own carrier, and consequently, if any damages have been sustained, from the fault of the master or crew, his remedy is solely against the master and not against the vessel. This is a question which must be determined by the terms of the instrument itself.

The charter party is, in its form, somewhat special and peculiar. It sets forth that it is made and concluded between Allen G. York, the master, (who is also a part owner,) and John B. Brown, the libellant; and the master, in consideration of the covenants and agreements

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of the libellant, does covenant and agree on the freighting and chartering of said vessel to the said party of the second part (the libellant), for a voyage from the port of Portland, "to one port in the Island of Porto Rico, and from thence to her port of discharge in the United States, touching at Turks Island for a cargo of salt, if required by the party of the second part." The charter party then proceeds to state the covenants on the part of the master; first, that the vessel shall be kept during the voyage tight, stanch and well-fitted, tackled, and provided with every requisite, and with men and provisions necessary for such a voyage; secondly, that the whole vessel, with the exception of the cabin, and the necessary room for the accommodation of the crew, and the sails, cables, and provisions, shall be at the disposal of the charterer; and thirdly, he engages to receive on board all such lawful goods and merchandise as the charterer or his agents may think proper to ship. The libellant on his part agrees to furnish cargoes for the vessel at Portland and Porto Rico, or Turks Island, and to pay for the charter of the vessel 1175 dollars, one half to be considered as earned at her port of discharge, and so much to be paid as may be required for the vessel's disbursements, and the balance on the delivery of the cargo in the United States, and also to pay all the expenses of loading at Portland.

It seems very clear from these covenants, that the possession of the vessel was intended to be in the master. He is to victual and man her, he agrees to receive on board such goods as the charterer shall choose to ship. The charterer agrees to furnish the cargoes, to pay the expenses of loading at Portland, and to advance, at her outward port of delivery, so much of the freight as may be required for the vessel's disbursements. Why should these covenants be inserted if the possession of the vessel was to be transferred to the hirer; and to be navigated by him? It is quite evident that this charter party was a contract of affreightment for the transportation of goods, and not a demise of the vessel; that the owners retained the possession under their master, and must be considered, therefore, as carriers.

There is, in the common form of charter parties, a clause by which the ship and freight are specifically bound for the performance of the covenants in the charter party. There is none such in this, but this is a condition which, by the marine law, is tacitly annexed to every contract entered into by the master for the transportation of goods, whether by bill of lading or charter party. The ship is, by operation of law, hypothecated to the shippers for any loss she may sustain from the insufficiency of the vessel or the fault of the master or crew.

There is another peculiarity in this instrument. It is usual in charter parties of affreightment, as well as in bills of lading, to insert a clause specially exempting the master and owners from losses occasioned by the dangers of the seas. This instrument contains no such exception, but this, as was justly contended in the argument for the respondents, is an exception, which the law itself silently supplies, without its being

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formally expressed. It is a general rule of law founded upon the plainest and most obvious principles of natural justice, that no man shall be held responsible for fortuitous events and accidents of major force, such as human sagacity cannot foresee, nor human prudence provide against, unless he expressly agrees to take these risks upon himself. *Casus fortuitos nemo præstat. Pothier, Des obligationes*, No. 142. *Toullier, Droit Civile*, vol. 6. No. 227, 228.—*Dig*. 50, 17, 23. *Story on Bailments*, § 25. There is an exception to this rule that is entirely consistent with the principle of the rule itself. It is when the party to be charged has been guilty of some fault, without which, the loss would not have happened. The liabilities of the owners in this case are precisely the same, and no more extensive than they would have been if the usual exception of the dangers of the seas had been inserted in the charter party.

Having disposed of these preliminary matters, we come to the questions which have been principally discussed at the bar. They are partly, questions of law, and partly, fact. In the first place there does not appear to be any sufficient reason for questioning the seaworthiness of the vessel, when she sailed from Portland. She was carefully examined by Mr. Fickett, a caulker, before she was loaded, and he states that, with very slight repairs, which were made by him, she was in perfect order for the voyage. And in point of fact, on her outward passage, and till after she left Turks Island, she did not leak more than vessels which are considered tight, ordinarily do. On the 7th day after sailing on her return voyage she was found to have sprung a leak. The weather was not at the time, and had not been tempestuous or unusually bad. There had been part of the time a heavy head beat sea, and the ship at times labored badly. Occasionally, there were fresh winds but not amounting to a gale. On the 7th of November, at 8 o'clock, A. M. it was found that the vessel leaked badly.

The entry in the Log is, that the day commenced with fresh breezes, and cloudy weather with a heavy cross-head-beat-sea; at 6 o'clock P. M. took in foretop gallant sail, the brig laboring heavily, tried the pump every half hour; middle part of the day high winds and heavy head-beat sea, tried the pump every quarter of an hour. At 8 o'clock, A. M. commenced leaking badly; double reefed the mainsail and single reefed the foretopsail; two hands at the pumps. For the whole 24 hours she kept on her course N. W. with the wind at N. N. E. The testimony of the witnesses substantially agrees with the account given in the log. There was a fresh wind with a heavy swell of the sea. The vessel also had a cargo which tried her strength, but all these causes do not seem to have been sufficient materially to injure a strong and stanch vessel.

There can, however, be no doubt, that she was strained at that time and her seams were opened so as to admit a considerable quantity of water. During the remainder of the voyage the weather was variable,

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but the vessel encountered none of unusual severity, until her arrival off Cape Cod. There she met a heavy gale and was obliged to carry a press of sail to keep off a lee shore. After it was discovered that the brig leaked, fruitless attempts were made to discover where the leak was, and she continued to leak more or less until her arrival at Portland on the 23d of November. The master then made a protest and called a survey of the vessel.

After the cargo was discharged the vessel was examined and repaired by the same caulker, who examined her before the voyage. He states that he found openings in her seams, which appeared evidently to be recent, and showed that she had been strained during the voyage. There was a leak about a foot in length in the garboard streak. The butts and wood-ends were a little slack and wanted some caulking; there was a small leak under the forecastle, the seams were a little open at the break of the deck, and the waterways were considerably open. The vessel on the whole bore evident marks of having been strained, but the injury could not have been great, as the caulker used but thirty pounds of oakum in putting her in good order for another voyage, and the whole expense of repairs did not exceed fourteen dollars. It appears also that the ship was easily kept free of water during the whole voyage by one pump, except for a short time, when the leak was first discovered.

If the injury to the vessel was so inconsiderable, the question presents itself, how happened it, that so large a part of the cargo was lost. All the witnesses, who examined the vessel before the cargo was discharged agree in ascribing the loss to two causes. *First*, the limber holes (which are small holes made in the under part of the floor timbers next the kelson, making a passage for the water to flow from the forward part of the vessel back into the well) it appears were choked up so as to prevent the flow of the water. A considerable quantity of water which should have found a passage back into the well, was thus constantly kept forward between the ceiling, or skin of the vessel, and the outside planks. The second was the want of sufficient dunnage at the bilge, between the first and second thick streaks, in the forward part of the vessel. All the witnesses agree that there was sufficient dunnage on the floor, and also on the sides of the vessel in the after part. But at the bilge, between the two thick streaks, from the mainmast forward there was on the starboard side about eighty square feet and on the larboard side about forty square feet uncovered with dunnage. On examining the ceiling here the seams were found to be open. On the starboard side, one seam was open for five or six feet to the width of five-eighths of an inch, and on the larboard side there was a seam open as wide for fifteen feet, and generally the ceiling was not sufficiently tight to prevent the water from being forced through, by the motion of the vessel. The vessel having a flat floor, when she was sailing with the wind on her beam, and thrown down on the opposite side, the water, which was prevented from passing through the

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limbers into the well, was washed down to her bilge, and by the motion of the ship blown up through the open seams of her ceiling directly upon the salt. Nearly all the witnesses agree that it was in this way the salt was lost. And in point of fact the whole extraordinary wastage was on the sides in the forward part of the vessel; the loss in the after part was not more than what is usual. The evidence also is, that the salt melted most in the larboard wing, though that was better supplied with dunnage than the other side. But then it appears from the log, that the vessel, during the greater part of the passage, was sailing on her larboard tack, and this would naturally occasion the most waste there, if it was produced by the blowing of the water through the seams of the ceiling. On a view of the whole evidence it may, I think, safely be taken as an established fact, that the loss of the salt arose from the two causes that have been mentioned.

The whole case, then, seems to be reduced to this, whether the neglect of the owners to provide means for clearing the limber holes, and the neglect of the master to place sufficient dunnage on the wings of the forward part of the vessel to protect the salt from the water, are faults of such character as to render the parties legally responsible for a loss occasioned by these very deficiencies. If no fault can be imputed to the master or owners on this ground, the loss must be ascribed solely to the dangers of the seas and be borne by the shipper; for though these dangers were not by the terms of the charter party in terms excepted from the responsibilities of the master, the exception is made by the law. A person is never presumed to take upon himself the risk of inevitable casualties, which the common law, somewhat irreverently calls the acts of God, unless he expressly agrees so to do. The law never requires impossibilities. *Impossibilium nulla obligatio est. Dy.* 50, 17, 25. But when a party is chargeable with a neglect or fault, without which the case would not have happened, he will then be responsible for a loss by inevitable accident, or an accident of major force. It is not that the casualty is imputed to him, but his own neglect or fault, which is the occasion of the accident proving fatal. Some vessels have movable boards or plank placed over the timbers, called limber boards, so that they may be taken up to clear the limbers when they become choked; some have a rope or small chain rove through these limber holes to clear them when necessary. This vessel had neither. The board over the limbers was fastened down and no examination was made to ascertain whether the limbers were free or not. Now, if the importance of providing a passage for the water is such that grooves are cut in the timbers for that express purpose, it certainly would seem to be a want of proper care on the part of the owners to provide no means for keeping them clear; especially as they are very liable to become stopped. If this passage had been kept clear so as to admit the flow of the water forward to the after part of the vessel, it is certain that the pump would have easily kept her clear. The accumulation of the water forward would easily have been pre-

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vented, and of course the salt would not have been dissolved. And in the second place, with respect to the dunnage; upon this point, a number of witnesses of extensive experience in navigation, either as ship owners or shipmasters, were examined. Some were of opinion that the dunnage in this case was sufficient for a tight vessel, others thought that the dunnage, whether the vessel was tight or not, for a cargo of salt, ought to be carried higher up upon the wings. But all agreed that it was insufficient if the vessel was not tight. It must be admitted upon the evidence that the vessel was tight when she received her cargo, and that the leaks were produced by straining with a heavy cargo and a heavy swell of the sea. But admitting the vessel to be tight, it is still true that some water will find its way into a tight vessel; and it is certain that the ceiling, or what in the language of the sea is called the skin of the vessel, was far from being tight. The seams were open to such a width that in the rolling of the vessel the water, if it did not find its way into the well through the timbers, would be freely blown through them upon the salt.

Did then the master or the owner take all the precautions for the safety of the cargo, which was required by the nature of their engagement. The duty of the owners under a contract of affreightment by a charter party, is, to provide a vessel tight and stanch, and every way fit and prepared for the particular service for which she is hired. The seaworthiness of the vessel, and her fitness for the particular voyage, is a term of the contract implied by law. The common law holds the owner to a warranty in this particular, and though the vessel may have been examined before sailing by skilful shipwrights, and pronounced by them every way fit for the voyage, yet if the goods of a shipper are injured from some latent defect of the vessel, the better opinion is that the owner will be responsible. 3 *Kent's Comm.* 205, *and* 213. *Curtis's Rights of Seamen*, 202. *Lyon* v. *Mells*, (5 East, 428.) And this warranty against latent defects, is held by Pothier to result from the nature of the contract. In every contract of letting and hiring, the letter undertakes that the thing let, is fit for the purpose for which it is hired. *Pothier — Contrat, Charte Parties, No.* 30. *Contract de Louage No.* 110 — 112. And then with respect to the stowage of the goods, the master is held to the most exact care and diligence, and it is particularly his duty to provide proper dunnage to prevent the goods from being injured by the leakage. *Abbot on Shipping, Part* 3, *chap.* 3, *s.* 3, 224. The degree of care will of course depend on the nature of the cargo, some goods being more liable to injury by exposure to wet, than others. My opinion upon the whole is, that the neglect on the part of the owners to provide means by which the limbers might be kept open so as to leave a free passage for the water from the forward part of the vessel to the well, and the omission on the part of the master to provide proper dunnage for the wings of the forward part of the vessel, are such neglects as render them legally responsible for a loss that may be ascribed directly to those deficiencies.

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Supreme Court of Pennsylvania, December Term, 1841.

THE SCHOOL DIRECTORS OF THE BOROUGH OF WEST CHESTER *v.* FRANCIS JAMES, GUARDIAN OF THE MINOR CHILDREN OF WILLIAM GIBBONS, DECEASED.

The domicil of a guardian is not necessarily the domicil of his ward: Therefore ruled, that the property of minor children resident in a township, which had rejected the common school system of Pennsylvania, was not taxable for common school purposes by a borough in which their guardian resided, though such borough had adopted it.

THIS was a case stated in the common pleas of Chester county, and the facts were these. The defendant, an inhabitant of West Chester, was appointed guardian of the minor children of William Gibbons, whose residence at his death was in East Bradford, in the same county. The children continued to reside with their mother in East Bradford, where they were born soon after her marriage with a second husband. The common school system of Pennsylvania was adopted by the inhabitants of West Chester but rejected by the inhabitants of East Bradford. The personal property of the minors, however, was assessed, in the hands of their guardian by the common school directors of West Chester; and the guardian resisted the tax on the ground that the domicil of his wards was in East Bradford, and their personal property not taxable in West Chester. The court gave judgment in his favor; and the cause being removed, by writ of error, was argued here by

Lewis for the plaintiffs.

Frazer Smith for the defendant.

GIBSON C. J. delivered the opinion of the court. As this case has no precedent, we must decide it on grounds of reason and analogy; and, in order to do so, it is necessary to premise certain principles about which there is no dispute. The domicil of an infant is the domicil of his father during the father's lifetime, or of his mother during her widowhood, but not after her subsequent marriage, the domicil of her widowhood continuing, in that event, to be the domicil of her child. A husband can not properly be said to stand in the relation of a parent to his wife's children by a previous marriage, when they have means of support which are independent of the mother in whose place he stands for the performance of her personal duties, because a mother is not bound to support her impotent children so long as they are of ability to support themselves. Neither can they derive the domicil of a subsequent husband from her, because her new domicil is itself a derivative one and a consequence of the merger of her civil existence. Her domicil is his, because she has become a part of him; which cannot be said of her children. Having no personal existence for civil purposes, she can impart no right or capacity which depends on a state of civil existence; and after a second marriage, the domicil of her

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children continues to be what it was before it. Thus we see, that, when the defendant was appointed guardian of these minor children, their domicil was in East Bradford, where they resided with their mother if that were important, even after her second marriage; and as the *situs* of their movable property attended the domicil of their persons, it was taxable only there. So far there is no dispute. But as a father, or a mother *sui juris*, may change the domicil of the child by changing the domicil of the family, provided the change be induced by a disinterested motive—not, for instance, to change the rule of succession in the event of the child's death—the question is whether a guardian or tutor stands in the place of a parent or has the same power; and it is still a vexed one with the civilians, who are equally divided about it. Those who maintain the affirmative of it, are corroborated by the Code Civile, which, though of positive enactment, is supposed to be founded in the established principles of civil jurisprudence; while those who maintain the negative, have on their side, among others, the authoritative name of Pothier. But the former are supported by the approbation of Mr. Burge, the learned British commentator on the conflict of laws, as well as by the opinion of sir William Grant in *Pottinger* v. *Wightman*, (3 Merivale, 67) and by the decisions of some of the American courts; which would be amply sufficient to turn the scale of authority were it not for the powerful doubt thrown in, on the other side by Mr. Justice Story. "Notwithstanding," says he, "this weight of authority which however, with one exception, is applied solely to the case of *parents*, there is much reason to question the principle on which the decision (in *Pottinger* v. *Wightman*) is founded, when it is obviously connected with a change of succession to the property of the child. In the case of a change of domicil by the guardian, *not being a parent*, it is extremely difficult to find any reasonable principle on which it can be maintained that he can, by any change of domicil, change the right of succession to the minor's property." (Conflict of Laws, 2d ed. § 506 *in notis*.) And there are reasons for this doubt, which seem to bear it out. An infant who has a parent *sui juris*, cannot, in the nature of things, have a separate domicil. This springs from the *status* of marriage which gives rise to the institution of families, the foundation of all the domestic happiness and virtue which is to be found in the world. The nurture and education of the offspring, makes it indispensable that they be brought up in the bosom, and as a part of their parent's family; without which, the father could not perform the duties he owes to them, nor receive from them the service which belongs to him. In every community, therefore, they are an integrant part of the domestic economy; and the family continues for a time to have a local habitation and a name even after its surviving parent's death. The parent's domicil, therefore, is consequently and unavoidably the domicil of the child. But a ward is not necessarily or naturally a part of his guardian's family; and though the guardian may appoint the place of the ward's residence, it may be, and usually is, a

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place distinct from his own. When our infant has no parent, the law remits him to his domicil of origin, or to the last domicil of his surviving parent; and why should this natural and wholesome relation be disturbed by the coming in of a guardian when a change of the infant's domicil is not necessary to the accomplishment of any one purpose of the guardianship? The appointment of a new residence may be necessary for the purpose of education or health; but such a residence, being essentially temporary, was held, in *Cutts* v. *Haskins*, (9 Mass. R. 543) insufficient to constitute a domicil. But, granting for the moment, that a guardian may for some purposes change his ward's domicil, yet if he may not exercise his power in this respect purposely to disappoint those who would take the property by a particular rule of succession (and nearly all agree that even a parent cannot) how can he be allowed to exercise it so as obviously and unavoidably to injure the ward himself? It is true, that what has been said on the subject has had regard to a change of national domicil, and that here we have to do with a supposed change, by implication of law, from one township to another in the same county; but the power of the guardian to do injury, can be no greater in the one case than it is in the other. The very end and purpose of his office is protection; and I take it there is no imaginable case in which the law makes it an instrument of injury by implication. Where indeed he acts fairly and within the scope of his power, the ward must bear the consequences because he must bear those risks that are incident to the management of his affairs; but that is a different thing from burthening him with a loss as a mere technical consequence of the relation. But a guardian cannot convert his ward's money into land, or his land into money, except at his own risk; and for a reason more imperative than any to be found in a case of mere conversion, he must not be allowed to burthen his ward with a certainty of loss by subjecting his property to taxation for purposes in which the ward has an interest. It is said these minors may receive an equivalent for their contributions to the school fund by participating in the instruction which it was intended to dispense; but the district in which their parents resided has elected to reject both the benefits and the burthen of it; and to say they are bound by the election made by the inhabitants of their guardian's district, is to assume the ground in dispute—that their domicil has been changed. A guardian has indeed power over his ward's person and residence; but it follows not that the ward's domicil must attend that of his guardian, for there is nothing in a state of pupilage which requires it to do so. We are of opinion then that the domicil of a ward is not necessarily the domicil of his guardian; and that the personal property of these children, was not taxable by the borough of Chester. Judgment affirmed.

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District Court of the United States, Southern District of New York, February, 1842 — *in Bankruptcy.*

IN THE MATTER OF AUGUSTUS ZAREGA.

Bankruptcy: Foreign creditors.

THIS was a petition to be declared a bankrupt, and was opposed by a creditor of the petitioner on the following grounds: 1. That the petition and schedule were not specified on oath before an officer, duly authorized to act in cases of bankruptcy. 2. That he does not furnish an accurate list of his creditors, their residences, and the amounts severally due — and that he has not set forth a true inventory of his property and effects. 3. On the constitutional grounds. There were seven other objections filed against this petitioner which were not read at the first hearing, but it was stated that several of the creditors resided in Antwerp, and some in Rio Janeiro, and that the notice had been too brief to allow them to derive any benefit from it, and that the schedule did not set forth the agents of any such foreign creditors. The points were argued by

Joachimssen for the opposing creditor, and by

J. H. Patten for the petitioner.

BETTS J. delivered an elaborate opinion in favor of the constitutionality of the law; also in favor of the jurisdiction of this court, and the authority of commissioners to attest the necessary papers. At a subsequent day an opinion was pronounced upon the other points in substance as follows:

It appears that some of the creditors of the petitioner reside abroad, and the objection taken by the opposing counsel is, that the discharge of the bankrupt under the laws of this country do not discharge him from his creditors residing abroad. The exception is taken under the idea that the debt was contracted in Germany, although I see no evidence before the court to that effect, or any thing to show but that the debt was contracted here in the ordinary course of business transactions, such as an order sent abroad for goods or the like. It is not essential to ascertain the origin or location of the debt. If, however, the debt was contracted in Germany, it might have an effect on the proceedings, when the final steps are to be taken. The question here is, whether the discharge of a bankrupt under the law of this country, would operate as a bar to the demands of foreign creditors, it being asserted that the United States have no power to destroy a contract entered into without their jurisdiction, and the contract is to be left to the jurisdiction of that country wherein it originated. It is not important, in disposing of this question, to enter into a discussion of the essence of contracts or their obligations, nor to inquire into the effect

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of a discharge in this country, under the bankrupt law, if set up in a foreign country as a bar to the claims of creditors. In England, as well as in France and Holland, and perhaps throughout Europe generally, the discharge of a bankrupt under the laws of either country operates in all other places whatsoever. So a person having been decreed a bankrupt in France, may avail himself of the privileges it confers on him, in any part of England, and plead it with the same effect, as in his own country. So in England, where they set up that claim in behalf of their own bankrupts in foreign countries, they allow the same privilege to others. But in this country we do not recognise such a doctrine. A discharge as a bankrupt in a foreign country is not deemed here a bar to any action that may be brought. The discharge is considered as local, and although an assignee of an individual declared a bankrupt in a foreign country, would be allowed to sue as such assignee, yet our courts would not recognise the discharge as a bar to debts contracted in this country, or due to citizens of this country. Here the law operates as a bar to any action brought in any of our courts.

It is objected that congress is not competent to pass a law, which should destroy debts contracted abroad. The discharge operates as a bar to any suit brought in our courts, and while the act extinguishes the debt, it declares in the same section, that it may be pleaded in bar of any action brought in any court within our judicature. Taking the questions on the broad ground that the law is not competent to discharge debts contracted abroad, I see no ground for the argument urged. If the petitioner had come here with the intention of availing himself of this law to extinguish debts contracted in another country, that might defeat the proceedings. But if he resides here, and the debts were contracted abroad, I see nothing that should exempt him from the full effects of a discharge given to a bankrupt. Nor is it important to consider how far the discharge here might avail him if set up abroad. His creditors abroad might perhaps proceed against him there, if he should come among them; we have nothing to do with that. The comity of nations recognises the unity of the bankrupt law. Although this is applicable as a general rule in other countries, we do not recognise it is as exonerating the person of a foreign bankrupt from arrest, or his property from seizure. Under these views I see no ground for interrupting the proceedings. The law operates as a bar to all creditors here, and may be pleaded as a bar to any suit brought against him here.

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In the matter of Charles P. Houghton.

Bankruptcy : In the petition to be declared a bankrupt, the date of the *jurat* is not essential.
A fraudulent transfer by the petitioner will not prevent his being declared a bankrupt.

This was the case of a petition by Charles P. Houghton, to be declared a bankrupt under the late act of the congress of the United States. Upon a notice to show cause, several objections were made to the decree to the effect, that there was no date to the *jurat*; that the petitioner converted trust funds to his own use in May, 1840; and that, in October, 1839, he fraudulently conveyed property to his father in trust for his wife.

Betts J. The petition is dated on the 7th of February, and the jurat is dated February, without specifying the particular day, and, it is said, this renders the petition imperfect — that no remedy could be had against the party for false swearing, because there could be no proof as to when such false swearing occurred. The objection is not one of substance. The offence would be false swearing, and it forms no part of the attestation that the date should be affixed. It would be sufficient if the party were indicted for false swearing, to shew that the oath was made. If the party were accused of swearing falsely on the 7th of February, it might be proved that it was any other day.

A more important question in the case is, the interposition of the objection, that the petitioner has been guilty of fraud in contemplation of bankruptcy, and whether it would be a sufficient bar to his decree, because the acts of fraud were committed anterior to the passage of the act. The question is, can the court bar the party from his decree because he committed frauds previous to the enactment or its going into actual force?

This is a question of great importance, and must be sometime or other met in the courts, as there is no doubt that creditors will interpose various acts of the debtor on the ground of fraud, such as his giving some of his creditors a preference, or making an assignment for his own benefit. These and various other such objections will no doubt be offered to his discharge. But it seems to me, that this is not the place to raise such objections. No doubt the parties will be met by all sorts of objections that can be raised against making him a bankrupt. All may be brought up, and if they are established they will overthrow his petition, unless the act indicates some other remedy. On this subject the law pronounces, that giving a preference to creditors shall be deemed a fraud against the act. And if it stopped there, the petitioner in such a case would be prevented from getting a decree. But this section is framed for a different purpose. It does not mean that the party shall be stopped from being a bankrupt, but seems to call for an enforcement of his petition, and that he shall be

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made a bankrupt, and then it goes on to point out how it shall act for the benefit of his creditors. The act of fraud clothes the general assignee with power to take possession of the property, thus indicating that the assignee in such a case is to have power over the property. But if the petition could be stopped there can be no assignee, and the creditors would be remediless, whereas this act contemplates that the act of fraud shall divest the property from the fraudulent assignor, and give it to the benefit of all the creditors. It says that any transfer of property made in contemplation of bankruptcy, to a person not being a *bona fide* creditor, shall be void, and a fraud on the act. And it is therefore urged, that the party committing a fraud upon the act shall be excluded from the benefit of the act. If the provisions of the act stopped there, the court would apply them. But the act goes on and says that the general assignee shall be at liberty to claim the property so disposed of, as part of the assets of the bankrupt. Therefore it cannot be a bar to obtaining bankruptcy, but puts the property in subjection to the assignee.

It is further said, that the assignee shall immediately go and recover the property thus fraudulently assigned, notwithstanding this assignment. But it does not say that the party shall be prevented from being a bankrupt, but that he shall be deprived of the benefit of the act. It does not debar him from the proceeding, but rather calls for his being made a bankrupt and places the property under the control of the assignee, and the assignee distributes it to the creditors. This construction of the law renders it unnecessary for the court now to pronounce whether all acts, antecedent and before the passage of the statute, came within its provisions. The question does not now come up, and the court need not say whether the statute is retrospective or applies to acts antecedent to its passage.

The court therefore wishes it to be understood, that, in relation to petitions for discharge, it is not sufficient cause to prevent the bankruptcy, to show before this court that there has been a fraudulent assignment, before the passage of this act, as there are other remedies for such cases. And in this case the objections that the petitioner made a conveyance to his father for the benefit of his wife, and made an assignment for preferred creditors, are included in this decision. The objection that the petitioner, since the passage of the act, used trust funds for his own benefit, is a matter of fact, which must go to the commissioners.

In the matter of Cassander Frisbee.

Held, that the inventory of the petitioner in the present case was not sufficiently distinct.

Amendments of schedules will be allowed, in cases of bankruptcy, on payment of costs, where there is proof that the errors arose from inadvertence.

This was a petition by Cassander Frisbee to be declared a bankrupt. Objections were made that his inventory was not sufficiently distinct.

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Betts J. In mere matters of form, where the court has discretionary power, the utmost possible indulgence will be given. But many of the objections to the regularity of the proceedings are not matters of form, but of substance. They are, that the petitioners have not complied with the demands of the statute, which gives the bankrupt his discharge if he complies with them, but not otherwise. Petitioners come into court, some of whom apparently take a pleasure or pride in evading the law, by adopting what they think a better mode than that pointed out by the statute or the rules of court. But in doing so, they are irregular, for they are strictly bound to conform not only to the statute, but also to the rules as much as the statute, as the rules have been made to carry out in detail the requisites of the statute, and were not framed by the court with a view to its own convenience or that of the parties interested, but adopted under the express directions of congress, and therefore it is not optional with the parties to devise any better mode, if they could do so. And if they attempt it, they must run the hazard of throwing impediments in the way of their clients, and have to begin anew.

The objections in this case are, first, that the property is not properly described. The party should have seen what is required by the act and have complied with it. This is not mere matter of form, but is made by the law a condition that he should do so, and he can no more obtain his discharge without a proper inventory than he could without entering his petition. Counsel must thus see the importance attached to the inventory. By the act, the assignee must have such a description of the property as would fix its location and enable him to identify it.

This schedule is loosely drawn, and sets forth that the bankrupt is entitled to some real estate, one half of certain land, the whole of which is valued at $4000. "An interest in half a lot of ground in Buffalo, which your petitioner intends to assign to the assignee. The present value unknown, but which when purchased was estimated at $4000." This is no description at all. It only says that there is some ground at Buffalo which he had a claim to.

The party had nothing to do but turn to the form of the act, which sets forth what was necessary to be done, when describing his real estate. If the ground is described as a lot in a certain part of Pearl street not now occupied, or a farm of land lying in such a state or territory and county, conveyed by such a person to the petitioner, so that the assignee can go and trace it out and see it, it would be then sufficient, but as it now stands, it is not. It is not optional with the parties not to comply with the law. There must be a compliance with it, and the court must insist that the parties shall do all that is required of them.

Another branch of this inventory which is objected to, is that of the household furniture. The petitioner merely says household furniture, but does not say where it is, or whether it is Buffalo, NewJer-

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sey, or Connecticut. With respect to this objection, similar objections have been raised in other cases before the court, and the parties are bound to set forth every part of their property, and the location of every part and portion of it, and furniture is not excepted.

The law allows the assignee to set apart a certain portion for them, but it must be put in the description for the assignee; although the parties by doing so might subject it to an execution, that does not exempt them. The petitioner does his duty when he describes the property, and if the assignee cannot bring it into the general fund for all the creditors, it is not the bankrupt's fault, he does his duty.

It is a matter of regret that delays in the proceedings should thus occur; but a rule having been laid down, it must be observed. In this case, the property is of small amount, but if the court let two or three hundred dollars pass, it might do so in a case which involved thousands. The inventory must, therefore, in all cases, designate the property so that the assignee can find it out, and identify it.

Counsel for the petitioner. Every article of the furniture is set forth in the inventory. The petitioner is now in New York, is it necessary to state the house in which the furniture is?

Betts J. I think it is.

Counsel. In regard to the description of the property. He never derived any interest from that property. It was conveyed to him on condition of his paying 8000 dollars, and he never paid it. And there is a penalty of 800 dollars incurred by his not paying, and therefore it is not a property but only a debt.

Betts J. Your observations are seemingly made in order to convince me that he had no interest in it, and if he had no interest in it, he should not come here and tell his creditors that he had such an interest. In his schedule he says, "interest in half a lot of ground in Buffalo, which your petitioner intends to assign to the assignee." If he had said he had but a verbal contract, it might do; but what he tells is a very different thing. He does not speak of a deed, but of an interest of which he has a deed.

Counsel. Can the petition be amended, if the commissioners say there is no fraud in it?

Betts J. You may make a subsequent motion in relation to it, but at present I deny the motion for a decree.

Counsel. I would then move to amend the description, if it is deemed insufficient, without going through the process of two publications.

Betts J. There is a deeper difficulty still to be considered. It is questionable whether the court can allow the amendment.

At a subsequent day Betts J. referred to the question as to the competency of the court to allow amendments. He thought that the United States courts sitting in bankruptcy, had power to regulate and

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modify the proceedings, but the great difficulty would be to arrive at that point where the court could interfere. When does the court take cognizance of the matter? Not till the petition is presented and the order made. But whether, during the running of the first notice, the court could allow the petition to be varied does not arise here. Every power that the court can justly exercise over a suitor, it can exercise over a bankrupt. In this state, the court thought that the bankrupt might have the privilege of amending his schedule or inventory; but it was a privilege which would be granted with great caution. The court would not permit papers to be prepared loosely and carelessly, and then allow the petitioner to come in and ask for a remedy. The court must be satisfied that every thing had been done in good faith, that the errors had occurred through inattention or inadvertence, that it was not an omission studied with a view to the privilege of amending. Proof must be exhibited to the court that it was an error of inadvertence. If there was any design, or symptom of it, the matter will be referred over. As a general rule, the court has power to authorize an amendment to the schedule, but only on very convincing proof that the error was unintentional; nor would it then be allowed, without payment of costs. In this case of Frisbee, the court said no amendments could be allowed, as that question had not been argued, nor was there any of that proof required before an amendment would be authorized. The court only relieved the bar from the difficulty as to the power of the court to allow amendments, but they would not be allowed on a bare motion, or on the statement of counsel.

In the matter of Thomas D. Lee.

Bankruptcy: Examination of a petitioner, before the decree of bankruptcy is granted.

This was the case of a petition to be declared a bankrupt, and the question was, whether the party was subject to personal examination before the decree of bankruptcy was passed against him. There was a motion to have him examined before the commissioners, and his counsel objected that he was not subject to examination until after the decree was passed.

Betts J. This is an important point, but I think that the counsel for the petitioner is mistaken in his reading of the law. He will find by the fourth section, that the bankrupt shall be always subject to examination orally or by interrogatories before the court or commissioners touching all matters relating to the bankrupt, and his acts and doings as the court may think proper. It is said, that congress intended only that he should be subject to an examination after

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being declared a bankrupt. But in referring to another section of the act, it will be found, that he takes the name of bankrupt before he is pronounced so by the court. On filing their petitions they are deemed bankrupts, and that is the *descriptio personæ.* And though he has still to be declared so by the court, yet on showing cause and giving notice, he is nominally, and for the purpose of enforcing this act deemed a bankrupt from the time he applies to the court. And I have no doubt that congress intended to subject him to examination from the time he applied to be made a bankrupt. But it also appears by another section, that it was intended to subject him to the orders of the court; and that he cannot get his discharge until he complies with all the orders of the court; and one of the orders of the court is, that certain matters shall be sent to the commissioners; and if the court order the bankrupt to go to the commissioners for examination, it is as much an order as it would be to desire him to show his books; and it is an order in strict conformity with the act. But the court is also authorized to proceed summarily, as in chancery. And in summary proceedings in equity, it is the ordinary practice to send matters before a master in chancery for examination. In either point of view, he is therefore bound to go before the commissioners for examination, before he is declared a bankrupt. He is bound to go there, because it is one of the orders of the court, which he is bound to comply with, or because it is a proceeding in the nature of equity, and in either of these points of view he is bound to go there, and the court has power to make him do it. The act manifestly intended that the creditor should have the right to go into the whole matter, in order to show, if he can, that the petitioner has not complied with the law, and thus cut him off from a decree.

There can be no doubt, that when the framers of this act first prepared it, they contemplated only the voluntary bankruptcy, but it was afterwards thought better to couple with it the involuntary, and in order to do so this mode of proceeding was provided. It would of course be unjust to let a creditor proceed against a bankrupt, without giving him any remedy, and it is manifest that congress intended to let the debtor come in and show that the creditor had no right to stop his business and take away his property, and it therefore gave him this proceeding to counteract it. But in doing so they have attached to the voluntary proceeding the same privilege as to the involuntary proceeding, and have given to the creditor the same power as to the debtor, and in both cases it is competent for the parties to show, by matter of fact or law, why the proceedings should not go on.

It is sometimes the interest of the creditor to prevent the bankrupt getting a decree, as his not doing so might better ensure individual debt, and therefore it was his interest to prevent him. Ordinarily it is for the interest of all parties that the proceeding should go on and the property go to the assignee. But the creditors have liberty in this incipient stage of the proceeding to show that the bankrupt is not entitled to a decree.

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In the matter of Robert Malcom.

Bankruptcy: Informalities in the petition.

In this case, the application of Malcom for a decree of bankruptcy was opposed on the ground of informality in his petition: 1. Because the name of the petitioner was not signed in full; 2. Because there were erasures and interlineations in the petition; 3. Because the schedule was not sufficiently definite.

Betts J. said, that, by the rule of the court, the petition should be free from erasures, etc., and the name of the petitioner signed in full. If wanting in conformity to these rules, the papers would be sent back. It was not contemplated by the rule to destroy the merits of an application, unless the sense of the paper was ruined by such erasures and interlineations, or if the papers were grossly imperfect. It is intended, to have the papers neatly made out, so that they can readily be read over. In this case, he thought the objections not founded in fact. The petitioner first wrote his name with the ordinary abbreviation of "Rob't," and that was erased and the name written in full. So with the interlineations in the papers. They were not such as affected the sense of the document, but in some instances rendered it more definite. The court did not think it an infringement of the rule, that one or two small words were interlined in the body of a paper. Another objection is, that the schedule is not sufficiently definite. The party sets out family stores. It is not necessary that the petitioner should set forth a perfect and complete exhibit of every article. But it must be so explicit that the assignee or his agent may be enabled to find the property if necessary. And so with wearing apparel. It is not necessary that every article of clothing should be set out, only it should be so set forth that the assignee may be enabled to ascertain whether he can claim it or not.

In the matter of Horace Plimpton.

Bankruptcy: Informalities in the petition.

Betts J. In this case the objections are, that the petitioner did not set forth, to the best of his knowledge, a list of his creditors, with their places of residence and the amounts due to each. The parties must, however, point out the instances in which it has been omitted, and if they do the court will not pass it over. The second objection is, that the schedule annexed to the petition is defective in not showing the residences of all the petitioner's creditors. This objection rests

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under the same imperfection as the other, namely, that the particular omissions were not pointed out. Another objection is, that the petitioner does not set out an accurate inventory of his property and every portion of it. This is a question of fact, and if he has not set it out properly, it would be fatal to his application. The fourth objection is, that by the schedule it plainly appears the petitioner has an interest or ownership in certain furniture, which is not properly mentioned in the schedule. The schedule says, "other furniture in said house, which is mortgaged to a person in Massachusetts," and when thus designating this mortgaged furniture, he refers, in relation to it, to the clerk of the record office in Brooklyn, to show that the furniture is mortgaged for more than it is worth. As the petitioner thus sets forth the amount of part of his furniture, and sets forth that more of it is mortgaged, and to whom, I apprehend he complies with the act, as the assignee can be under no difficulty in relation to it, and can see what part of it is under incumbrance and what is not. It is not to be expected that papers of this sort will be positively certain as to every particular, but only reasonably certain, so that the creditors can fairly avail themselves of them. The fifth objection is, that the petitioner does not set forth in his schedule an assignment of certain property which he assigned to C. Sherwood, by an assignment of certain accounts or choses in action, etc., belonging to the petitioner. The schedule says, that those debts were "assigned to Sherwood as my assignee, to be divided amongst my creditors *pro rata.*" This general reference to the assignment would not be sufficient, but when the party gives a copy of the assignment, it is to be considered part of the schedule, and I do not see any necessity for a list of the debts which are contained in that assignment. It may be a question between his assignee and the general assignee as to who shall have the property; but a list of the debts would throw no further light on the subject; and would be merely putting into the hands of the assignee a paper of no use to him. These objections were overruled, and the matters of fact sent before a commissioner.

In the matter of Chester S. Kasson.

Articles of jewelry belonging to a bankrupt, do not come under the description of wearing apparel, and if not set apart by the assignee, must be surrendered to him.

Articles of a similar nature, belonging to the wife of a bankrupt, if belonging to her before her marriage, do not vest in the assignee — or if presented to her since, and they are such as are suitable to her condition and circumstances in life, they may likewise be retained by her.

Whether they are suitable or not, is a question of fact, to be determined by evidence before a commissioner, on a reference upon exceptions taken to the decision of the assignee.

[The opinion of Judge Betts in this case is omitted for want of room. A recent decision of Mr. Justice Story, in a similar case, wherein a somewhat different doctrine is held, will appear next month.—Editor.]

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INTELLIGENCE AND MISCELLANY.

Obituary Notice. Died, at his residence in Hingham, County of Plymouth, Mass., February 11, the Hon. Ebenezer Gay, Counsellor at Law, aged 71 years.

He was born in Boston, February 24, 1771, and was a son of Martin Gay, Esq., a highly respectable mechanic of that town. His paternal grandfather was the Rev. Ebenezer Gay, D. D., who for 69 years was pastor of the church in Hingham, and died March 8th, 1787, in the 91st year of his age. It is said of this venerable divine, "that he retained the vigor of his mind to this advanced age," and "that he died on the morning of the Sabbath, as he was preparing to go through the labors of the day." His memory is still revered for learning and patriotism, and for his ministerial gifts and piety. The subject of this notice was graduated at Harvard College, with the class of 1789. He studied law in the office of Christopher Gore, who was an eminent lawyer and statesman of that day, and afterwards governor of the Commonwealth. Mr. Gore was a pattern of literature and science, making them the heirs of his ample fortune, by bequeathing it in his will to Harvard College. The innate disposition of Mr. Gay for integrity was fostered by the example of his excellent tutor; and, upon his admission to practice, at the Court of Common Pleas, April term, 1793, in the county of Suffolk, he soon rose in the esteem of the citizens of his native town, as a young lawyer, who united the elements of moral worth with a correct knowledge of his profession. His practice increased and was lucrative, even when fees were small, and the country was not prosperous. He might have gained an ample fortune; but, attracted by early associations, he, in the year 1809, removed to Hingham. He was soon afterwards offered by Governor Gore the appointment of Judge of the Court of Common Pleas, but declined it; and he continued the practice of his profession, but in a more limited sphere, to his death. He was of that valuable class of the profession, who, without possessing the rare gift of eloquence, or the more common talent for the conflicts of the bar, are yet able, by their learning and integrity, to pay the debt which every lawyer justly owes to his profession. His clients, and among them the many widows and orphans who resorted to him for advice, always found in him a friend as well as a counsellor. He was not so tenacious of the honorary reward of his own skill, as of their profit. He delighted to cultivate peace among his neighbors, to sooth their irritated feelings, and to check the spirit of litigation. He was universally regarded as an honest lawyer, without fear or reproach. In the law, those are not always the best models of the human character, who are most renowned for the arts of the profession. But it is due to our age to say, that no profession has more reason to be proud of its sons than the law: for they adorn and improve every department of society, and possess in the highest degree the confidence of the nation. Through life, Mr. Gay exhibited a unity of character, which was always marked with usefulness, without ostentation or display. From its establishment, he was the President of the Hingham bank, and managed its affairs with singular prudence and success. He was a benevolent man, without seeking the praise of beneficence; and he has left to his children a beautiful example of moral worth and integrity in all the relations of life. In politics, he belonged to the old federal school, claiming Washington for their model and leader. It is true, that the youthful aspirants for political distinction of the present day, and even some others who cannot plead youth as an apology, use *federalism* as a term of reproach. But if there is any truth in history, we are indebted to the leading men of that school for the wise and equal constitution of the national government, which will, if ought human can, perpetuate the Union, and for the best examples of republican virtue. This is their monument of imperishable honor. Mr. Gay was chosen into the Senate of this Commonwealth for two years in succession, the people of the county of Plymouth paying this voluntary and unsought tribute to his virtue, without descending on his part to the arts of popularity. We delight to record the memory of the just — for the honor of departed worth, and the encouragement of living excellence.

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BANKRUPTS IN MASSACHUSETTS.

The following list of persons who have petitioned under the late act of congress to be declared bankrupts, in Massachusetts, has been compiled for the Law Reporter from authentic sources, and is believed to be entirely accurate. It includes the names of all whose petitions had been filed up to Saturday, March 26. The whole number of petitioners is one thousand and ninety-one. The whole number of petitions is only nine hundred and forty-seven; many of the petitions containing several names. Where the petitioners are described as members of firms, that fact is signified, and where more than one of the members of a firm have petitioned, the name of each member will be found under the appropriate letter of the alphabet. The names of those who reside in Boston come first in the following list and are placed together in four columns; those who reside in other parts of Massachusetts follow those in Boston, and are placed in two columns, the residence of each person being given at the end of his name. In the bankrupt docket of the district court, in Massachusetts, neither the names of firms nor the residences of petitioners are given. On this account, in preparing this list, it was necessary not only to procure the names from the docket, but also to ascertain from other sources the residence, &c., *in each particular case.* This added very much to the labor of the undertaking and may furnish some excuse for any inaccuracies in the list.

A.

Adams, Asa
Adams, Chas. J.
Adams, Jos. H. *firm of A. & Amory.*
Adams, Samuel N.
Alexander, Solomon R.
Alexander, Henry F.
Alden, David
Allen, Amos S.
Allen, Francis, *firm of Champney & A.*
Amory, Thomas C., *firm of Adams & A.*
Appleton, Samuel B.
Appleton, Geo. W. *firm of Claflin & A.*
Arnold, Wm. E.
Ayres, Oliver

B.

Babcock, Archibald D., *firm of Drew & B.*
Babcock, James S.
Baldwin, James W., *firm of Fishers & B.*
Barber, Erastus
Barker, Albert G.
Barnes, Edwin
Barnes, John
Barnett, Robert, *firm of Grant, Seaver & Co.*
Barry, Geo.
Bates, Joseph N., *firm of Hall & B.*
Baxter, Benj. D., *firm of B. & Caldwell.*
Beaumont, Ira O.
Bedlington, Timothy
Beers, Hiram S.
Bell, Geo.
Bell, Geo. M.
Blake, Samuel P., *firm of Dyer & B.*
Blanchard, Charles
Blood, Samuel D.
Brabrook, Ezra H.
Brackett, Newell
Bragg, Augustine
Brastow, Geo. O.
Braynard, John H.
Broad, Orion
Broadhead, Joseph C.
Brown, Henry
Brown, James
Brown, Joseph M.
Brown, John
Brown, Vernon
Browne, Charles A., *copartner with George S. Jackson.*
Brownell, Isaac A., *firm of Mowry & B.*
Bruce, Benj., *firm of B. & Richards.*
Bryant, Danville
Bryant, Harrison C., *firm Smith & B.*
Bryant, Nathl.
Bryant, Seth, *firm of Mitchell & B.*
Bryant, Geo. W.
Burgess, James C., *firm of Proctor & B.*
Burnham, H. M.
Burr, Richard

C.

Cameron, James
Carleton, Albert S., *firm C. Wilder & Co., Lancaster.*
Carter, David
Carter, Joshua B.
Chandler, John G., *firm of C. & Swan.*
Chard, Stephen
Chase, Algernon S. *firm of Hicks, Lawrence & Co., New York.*
Cheney, Jona. H.
Churchill, William
Clapp, J. B.
Clark, John
Clement, Andrew A.
Clough, Henry H.
Coburn, James H., Jr., *firm of Noah Gray & Co.*
Cochran, Lorenzo H. M.
Coffin, Geo. W., *firm of G. W. C. & Co., Bangor and Cherryfield, Me.*
Cole, Joshua
Colby, John, *firm of Colby & Kinnerston, Campton, N. H.*
Conant, Wm. H.
Cooke, Manuel M., *firm of Geo. Roberts & M. M. C.*
Coolidge, Cornelius
Crombie, Benj.
Crosby, Porter

D.

Dakin, John H.
Daniel, Josiah, *firm of J. & C. Daniel.*
Dascomb, Philip F.
Davenport, Daniel, *formerly called Daniel Wardwell 3d, of Andover.*
Davenport, Edwin
Davis, David
Davis, Geo.
Davis, Job
Darling, Saml. *firm of Barnes & D.*
Demerritt, Albert C.
Dexter H. H. *firm of Raymond & D.*
Dinsmoor, Geo. K., *firm of Grant, Seaver & Co.*
Doe, Wm. H.
Dodge, Andrew, Jr.
Domett, Geo.
Doolittle, Lucius
Drinkwater, Geo. L.
Drury, Otis
Dunbar, Peter
Dunnels, Amos
Dutton, William P.
Dyer, John F., *firm of Valentine Silk Co.*
Dyer, Ezra C., *firm of D. & Blake.*
Dyer, Saml. N., *firm of E. & S. D. and Marston & D.*

E.

Earl, Charles
Eaton, Benj.
Eaton, Lemuel P.
Edmands, Geo. W.
Edwards, Thos.
Ewers, John

F.

Farnsworth, Geo.
Fisher, James T. *firm Fishers & Baldwin.*
Fiske, Austin
Flanders, Wm. B.
Follansbee, Edwd. F.
Ford, John

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Foster, Wm. H.
Foster, John S. (doing business in Lowell.)
French, John A.
French, Wm.

G.

Gay, James, *firm of J. G. & Co.*
Giving, Ebenezer, Jr.
Goddard, Charles
Goldsmith, Oliver B.
Goodridge, Lowell, *firm of G. & Bailey.*
Grafton, Daniel G.
Grant, Benj. B., *firm of G. & Searer and G., Scarer & Co.*
Gray, Noah, *firm of N. G. & Co.*
Greene, Augustin P.
Grover, Eliphalet, Jr., *firm of Weeks & G., Portsmouth, N. H.*

H.

Hall, Isaac, Jr.
Hall, Joshua G.
Hallett, Russell
Ham, Daniel H., *firm of D. H. H. & Co.*
Hancock, Thomas
Hardwick, Wm.
Harley, Robt.
Hartshorn, Caleb
Hartshorn, Joseph
Hayden, Grenville G.
Hayden, John C.
Hazeltine, James
Helon, Wm.
Hewes, Jabez F.
Hildreth, Clifton B.
Hilliard, Wm.
Hitchcock, David K.
Hobbs, John
Holden, Artemas R.
Holden, Erastus S., *firm of H. & Saunders.*
Hovey, Abijah W.
Hovey, Henry A.
Howe, Ephm. M.
Hunnewell, John L. *copartner with Geo. B. Rogers, Geo. A. Devins, and Geo. A. Gannett.*
Hunt, J. B.

I.

Ingalls, Wm.
Ingols, Levi

J.

Jackson, Geo. S., *copartner with C. A. Brown.*
Johnson, James B.
Johnson, John
Johnson, Joseph, *firm of Hayward & J.*
Johnson, Marshall
Johnson, Wm. R. *firm of W. R. J. & S. W. J., Chester, Vt.*

K.

Keith, Robert
Kellogg, Ralph
Kimball, John S.
Knowlton, John

L.

Ladd, Rufus K.
Lakin, Joseph P.
Lamson, Thomas
Lane, Daniel
Lane, Daniel, Jr.
Lang, Richard
Lathrop, Charles H., *firm of W. & C. L.*
Lathrop, Wm., *firms of Wortham L. & Co., N. Orleans, and W. & C. L., Boston.*
Lawrence, Wm.
Leach, Josiah F.
Lecain, Frederick
Lee, Elon A.
Lewis, Saml
Libbey, Oliver
Lindsey, James
Livermore, Horatio G.
Lobdell, Thos J., *firm of Samuel Davis & Co.*
Lombard, Danl. H.
Loring, Wm. M.
Lyman, Gad C., *firm of L. & Elder, Southampton.*
Lyon, Joseph B., *firm of Hawes & L.*
Lyon, Thaddeus M. H.

M.

Macomber, Charles A., *firm of Drury & M.*
Makepeace, Wm., Jr.
Marsh, Bela, *firms of M., Capen, Lyon & Webb, and M., Capen & Lyon.*
Marshall, Alonzo
Marston, Ephraim
Martin, Valentine, *firms of Rufus L. Bruce & Co. and V. M. & Co.*
Matthews, Geo. F.
McKenna, Francis
McKay, John, *firm of McK. & Canfield.*
Merriam, Wm. *firm of M. & Perry,* (on petition of creditors.)
Merritt, Jerome, *firms of M. & Bush, and Kent & Co., St. Mary's Landing, Missouri.*
Meserve, John B.
Meyer, Borchart, *firm of B. M. & Ludovig M.*
Mondruccu, Emiliano F. B.
Moneton, Newell H., *firm of Hunting & M.*
Morgan, Albert
Morril, Henry A., *firm of M., Mosman & Blair.*
Morse, Harry M., *copartner with Eliphas Jones.*
Murdock, James E.

N.

Nason, Wm. B.
Newton, Isaac
Nichols, Jacob L.
Norton, Benj. H.
Noyes, Jefferson
Noyes, Stephen, *firms of Hosea Ilsley & Co. and N. & Ilsley.*
Nute, Ephm., Jr., *firm of N. Tedd & Co.*

O.

Ordway, Fred. J.
Orral, Thos.

P.

Palmer, John K., *firm of P. Jones & Blake, P. & Nash, and P. & Blake.*
Parish, Geo. A.
Parrott, Wm. M.
Pattee, John C.
Pearce, Samuel, *firm of Pearce & Sons, Gloucester.*
Perry, Orves B. *firm of Merriam & P.* (on petition of creditors.)
Pierce, Stephen A., *firm of Gaylor & Colburn, and Kressler & Co., Charleston, S. C.*
Pierce, Charles
Pomroy, Thomas M.
Pond, Sabin, Jr., *firms of S. P., Jr. & Co., Bangor, and P. Co., N. York.*
Pond, Prescott P.
Pool, Fred.
Pope, Wm., } *firm of S. & W. Pope.*
Pope, Saml. }
Prisby, Rodney, *firm of Page & P., Ware, N. H.*
Pratt, Geo. W.
Prouty, Dwight

R.

Rand, Oliver P.
Randall, Benj., *firm of Timothy Reed & Co.*
Read, Jas., *firm of Jas. Read & Co.*
Ridgway, Edwd. W.
Ridgway, John W.
Robertson, Robt. A.
Robinson, Shadrach
Rogers, Wm. H.
Rogers, Geo. B., *firm of R. Devins & Co. and G. A. Gannett & Co., N. York.*
Ross, Andrew
Rowe, Sherburn, *firm of Libbey & R.*
Rust, Henry L.
Ryan, James
Ryan, John

S.

Salisbury, Ambrose
Salvo, Benedict
Sargent, John R.
Saunders, Thorndike P.
Sawin, John
Seaver, George, *firm of Grant & S. and Grant, S. & Co.*
Sewall, Thos. R.
Seymour, Edwd., *firm of S. & Robinson.*
Shales, John
Shattuck, Lemuel, *firm of Russell, S. & Co.*
Shaw, Josiah, Jr.
Shepherd, Walter B.
Shute, Wm. M.
Sibley, Rodney
Slack, Thomas W.
Smith, Chas., *firm of S. & Bryant.*
Smith, Geo. S.
Smith, Hiram
Smith, Jona. C.
Smith, Lebbeus W., *firm of Daniel H. Ham & Co.*
Smith, Thos.
Snow, Humphrey L. *firm of Goldsmith & S.*
Snow, Geo.
Souther, Wm.
Spaulding, B. } *firm of Spaulding & Co. and Cheney Hickman & Co., Philad.*
Spaulding, S. R. }
Stearns, Geo. B.
Swan, Jos. Jr.
Swift, Erdix T.

T.

Taylor, Geo. W.
Taylor, Thos. L.
Taylor, Simeon P.
Tebbitts, John C., *firm of Mariner, T. & Co.*
Thayer, Elias B., *firm of E. B. Thayer & Co.*
Thayer, Stephen
Thompson, Wm.
Thomson, Nathan
Thomas, Chas. F.
Thomas, Waldo W.
Thorndike, Jas. F.
Titcomb, Steph.
Tuckerman, G. } *firm of W. & G. Tuckerman.*
Tuckerman, W. }
Trescott, Chas. E.
Turrell, Albert A. *copartner with Jas. Hooton.*
Tyler, Laban A.

U.

Upham, Walter W.

V.

Veazie, Joseph A.
Vose, Thos. B.

W.

Wadleigh, Mark
Waldo, Geo. A.
Walker, Chas. E., *firms of C. E. W. & Co. and W. & Richardson.*
Walker, Joel H., *firms of King, W. & Co. and W. H. Stone & Co., Chicago, Ill.*
Walker, Lawrence
Washburn, Bradford A.
Webb, Asa
Webster, Amos
Western, James H.
Wheelock, Hiram
Wheelwright, Eben'r.
White, Chas. H.
White, John
White, John L.
White, Wm.
Whitney, Wm., *firm of James & W.*
Williams, H. B. *firms of E. Whiting and E. Whiting & Co., Fayette, and Tarpin & W., St. Louis, Mo.*
Williams, Saml. G.
Williams, Thos. A.
Winslow, Benj.
Winsor, Nathaniel, Jr. *firm of W. & Bruce.*
Wolcott, Chas.
Wood, Amos, Jr.
Wood, Timothy N.
Woodman, Jos., Jr., *firm of J. & Wm. W.*
Woods, John L.
Wright, Thos., *firm of Begbie & W.*

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A.

Name	Town
Abbott, Moses	Methuen.
Adams, Seth	Quincy.
Adams, Simon	Lowell.
Alden, Silas, Jr.	Randolph.
Allen, Andrew,	Cambridge.
Allen, Edward, firm of Newell & A.	Salisbury.
Allen, John F.	Salem.
Allen, Sylvester	Springfield.
Aldrich, Charles, firms of E. & C. A. & Co., and D. & A. Lyman & Co., of Philadelphia,	
Alvord, Tilton A., firm of A. & Co.	Westfield.
Amory, John G.	Dorchester.
Angier, Roswell P.	Worcester.
Andrew, John	Lynnfield.
Annable, Joseph D.	Cambridge.
Anthony, Abram	Adams.
Austin, George	Swansey.
Austin, John	Lowell.
Austin, Nathan N.	Haverhill.
Avery, Samuel	Marblehead.
Ayers, John	Oakham.

B.

Name	Town
Babcock, Elijah C.	Wales.
Babcock, Robert G.	Quincy.
Babson, Joseph	Rockport.
Bacon, Rufus F.	Warren.
Bailey, Mark	Lowell.
Baker, David	Leyden.
Baker, Freeman, Jr.	Dedham.
Baker, George Ellis	South Yarmouth.
Balcom, Jonas	Lowell.
Balcom, Estus	Douglas.
Balcom, Jesse	Douglas.
Bancroft, Ephraim	Tyngsborough.
Banister, Samuel	Worcester.
Bangs, Anson	Barre.
Banning, Erastus M.	Southampton.
Barker, William S.	Medford.
Barker, Thomas T.	Brookline.
Bartholomew, Horace	Montgomery.
Bartlett, Franklin	Deerfield.
Bartlett, Henry F.	Natick.
Barton, Benjamin	Hingham.
Barton, Joshua A.	Stockbridge.
Batchelder, Henry	Beverly.
Batchelder, Joseph W.	Topsfield.
Batcheller, John, firm of B. & Kimball,	Millbury.
Bates, Jacob N.	Weymouth.
Battle, Elbridge	Dover.
Bayley, Zerah C.	Lowell.
Beals, James	Winsor.
Bellows, Christopher W. firms of Buttrick & B. and C. W. B. & Co.	Pepperell.
Bellows, Samuel M.	Lowell.
Bennett, John	Lowell.
Bickford, Horace	Newbury.
Bigelow, Samuel	Cambridge.
Billing, Daniel, firm of B. & Carney,	Lowell.
Bird, William, firm of Hutchinson & B.	Dorchester.
Birge, Francis A., firms of F. A. B. & Co., and B. Stebbins & Co.	Greenfield.
Bishop, Jonathan P., copartner with M. B. H. Bishop,	Medfield.
Black, Joseph	Natick.
Blaisdell, Jacob	Carlisle.
Blake, Dudley P.	Pepperell.
Blanchard, Charles, firm of B. & Lesure,	Worcester.
Blanchard, Hezekiah	Roxbury.
Blithers, Joseph P.	Somerset.
Bowen, Arnold	Adams.
Bowen, Charles	Adams.
Bowers, Charles E.	Cambridge.
Boyce, Gilbert	Lynn.
Boyden, Arnold,	Lowell.
Boyden, Elisha S.	Bellingham.
Boyden, Lewis	Mendon.
Bradley, Samuel P., firm of B. & Hersey,	Haverhill.
Breck, Joseph, firm of J. B. & Co.	Brighton.
Breed, Ebenezer	Charlestown.
Breed, Henry A.	Lynn.
Brewster, Jonathan	Northampton.
Brickett, Franklin, firm of Pecker & B.	Haverhill.
Briggs, Joseph	Hanover.
Brooks, Isaac	Stow.
Bronson, Asa	Fall River.
Brown, Benjamin	Marblehead.
Brown, George	Beverly.
Brown, Hiram	Haverhill.
Brown, Josiah	Haverhill.
Brown, Nelson	Mendon.
Brown, Pemberton	Uxbridge.
Brown, Sewall, firms of Dow & B. and Brooks & B.	Millbury.
Brown, William H.	Salem.
Bryant, George W.	North Bridgewater.
Bryant, Oliver, firm of O., B. & Co.	Enfield.
Buffum, Daniel	Douglas.
Buffum, Paul	Douglas.
Bullard, Amasa	New Bedford.
Burbank, Ebenezer	Lowell.
Burbank, Stevens N.	North Bridgewater.
Burbank, Stevens M.	Plymouth.
Burley, Joshua	Lowell.
Burnham, Anson B.	Greenfield.
Burrage, Jonathan	Fitchburg.
Burrell, Thomas J.	Weymouth.
Burt, Orlow	Sandisfield.
Butterfield, Charles A.	Andover.
Butterfield, Daniel	Pepperell.

C.

Name	Town
Calef, James	Lowell.
Cannon, Ebenezer, Jr.	Rochester.
Capen, Nahum, firm of Marsh, C., Lyon & Webb,	Dorchester.
Carleton, Moses, firm of C., Wilder & Co.	Lancaster.
Carney, Thomas, firm of Billings & C.	Lowell.
Carr, Thomas	Stow.
Carrol, Edward	Lynn.
Cazneau, Edward	Hingham.
Chamberlain, Edward, Jr. firm of Joseph Breck & Co.	Brighton.
Chamberlain, John B.	Charlestown.
Chamberlain, Jonathan	West Stockbridge.
Chamberlain, Kinsman	Hingham.
Champion, Levi	Palmer.
Champlin, John D., Watumpka Trading Co., Ala.	Dorchester.
Chandler, George, firm of Wales, Huron & Co., Buffalo Grove, Illinois,	Belchertown.
Chapin, Caleb	West Springfield.
Child, Hiram B.	Webster.
Child, Thomas	Mendon.
Childs, Isaac	Lynn.
Christian, John, firm of C. & Rowell,	Dorchester.
Chubb, John	Charlestown.
Chubb, Thomas, Jr.	Charlestown.
Churchill, Addison G.	Lynn.
Claflin, Thomas J., firm of C. & Appleton,	Hopkinton.

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Name	Residence
Clapp, John H., firm of C. & Co.	Charlestown.
Clapp, Philo	Westborough.
Clapp, Zebulon	Lowell.
Clark, John, Jr.	Cambridge.
Clark, Jonathan	Lowell.
Clark, Levi G.	Greenfield.
Clark, Thomas A.	Springfield.
Clark, Strabo, Brewster Manufacturing Co.	Brewster.
Clark, William L., firm of Whittemore & Co.	Worcester.
Clement, William T.	Shelburne.
Clough, Josiah R.	Lynn.
Cobb, Anson B.	Springfield.
Cobb, Henry	Lynn.
Coffin, Jethro	Dartmouth.
Coffin, William	Rochester.
Colcord, Thomas R., Jr., copartner with Peter Miller, Pittsburg, Pa.	
Colbath, John F.	Natick.
Colburn, Joshua, Jr.	Dracut.
Colby, Elbridge G.	Gloucester.
Cole, Samuel W.	Chelsea.
Collins, Franklin	Lynn.
Collins, George O.	Lynn.
Collyer, Rob. S. / Collyer, Sam. B. — Copartners.	Lynn.
Converse, Solomon	Northampton.
Cook, Alvin	Uxbridge.
Cook, Charles	Newbury.
Cook, Rufus R.	Chelsea.
Copeland, B. F. / Copeland, Chs. — Firm of C. & Lovering.	Roxbury.
Corbett, John	Milford.
Corning, Ezra H.	Springfield.
Cummings, Nathaniel F.	Townsend.
Currier, Enoch, Jr.	Amesbury.
Currier, William E.	Newburyport.
Curtis, Warren	Hingham.
Cushing, William W.	Abington.
Cushing, Zattee	Scituate.
Cutler, Nehemiah	Pepperell.
Cutler, Samuel B.	Lowell.
Cutler, Stephen	Grafton.
Cutler, Amos F.	Lexington.

D.

Name	Residence
Dadley, James G.	Newton.
Daniell, George K.	Newton.
Daniels, David	Medway.
Daniels, George	Holliston.
Darling, Lewis, firm of D. & Prentice,	Mendon.
Davenport, Charles A. firm of D. & Rice, Charleston, S. C.	Mendon.
Davenport, George L.	Mendon.
Davis, Eden	Webster.
Davis, Gilbert F.	Haverhill.
Davis, John T., firm of J. T. & J. E. D.	Gloucester.
Davis, Joseph E., firm of J. T. & J. E. D.	Gloucester.
Davis, Moses	Lowell.
Davis, Thomas	Sutton.
Davis, William S.	Westfield.
Day, Martin	Westfield.
Delano, Thomas A.	Charlestown.
Demerit, George W.	Haverhill.
Dennis, Benjamin	Marblehead.
Derby, Joseph P.	Cambridge.
De Wolf, Henry, firm of Southwick & Handy,	Uxbridge.
Dickinson, Dexter O., firm of D. O. D. & Co.	Cambridge.
Dickman, James	Cambridge.
Dodge, Charles	Lowell.
Dorman, William H.	Georgetown.
Dorr, Alfred, copartner with Hen. W. Ridgway.	Dorchester.
Douglas, Peter G.	Roxbury.
Drew, Charles, firm of D. & Babcock,	Fairhaven.
Durgin, Erastus	Lowell.
Dyer, Abraham	Braintree.
Dyer, Ezra	Braintree.

E.

Name	Residence
Eager, William	Charlestown.
Eames, Joshua N.	South Reading.
Earle, Enoch	Worcester.
Elder, John B., firm of Lyman & E.	Chester.
Emerson, A., firm of Bullard & E., Southampton.	Pepperell.
Emery, William E.	Lowell.
Emory, George	Newburyport.
Evans, David	Newburyport.
Everett, Leonard	Dorchester.
Everett, Samuel, firm of Clapp & E.	Milton.
Ewers, Henry A.	Greenfield.

F.

Name	Residence
Fairfield, James	Richmond.
Farley, Joseph	Ipswich.
Farnham, Charles N., firms of F. & Fiske and F., Fisher & Hollingshead and F. Hollingshead & Co.	Roxbury.
Farnum, Isaac	Essex.
Farnum, Peter, firms of Grafton Woollen Manuf. Co., Blackstone Woollen Co., Luther Wright & Co., Farnum & Wright, Central Manuf. Co., and Wadsworth Wool'n Co.	Grafton.
Fernald, Lewis S.	Lowell.
Fessenden, Charles B.	Charlestown.
Field, Matthew D.	Southwick.
Fields, George C.	Cambridge.
Fisher, George L., firm of Albert McKinly & Co.	Dorchester.
Fisher, Joseph	Newton.
Fisk, Caleb S., copartner with Leonard Fisk, Jr. Laporte, Ind.	Holden.
Fisk, Leonard	Greenfield.
Fiske, George	Cambridge.
Fiske, John	Holden.
Fletcher, Joel	Worcester.
Fletcher, Othiel	Westford.
Follet, George	Quincy.
Foote, Luther	Cambridge.
Folsom, Simeon, firm of S., F. & Co.	Southbridge.
Ford, Elbirt	Abington.
Foster, Aaron	Haverhill.
Fowle, John	Roxbury.
Fowler, Augustine	Springfield.
Francomb, Charles E.	Lowell.
French, Calvin, Jr.	Braintree.
French, Harvey	Quincy.
French, Hiram	Worcester.
French, William	East Bridgewater.
Frye, Joseph S.	Salem.
Fuller, Elisha	Lowell.
Fuller, Francis A.	Roxbury.
Fuller, Luther R.	Springfield.

G.

Name	Residence
Gammons, Darius M.	Taunton.
Gerry, Joseph	Fitchburg.
Gilman, Christopher G.	Charlestown.
Gilman, Henry	Lowell.
Gillis, George	Lowell.

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Gleason, Eliphaz G.	Westborough.
Goodil, Aaron	Lowell.
Goodnow, Rufus E., firm of Howe, Stone & Co.	Shrewsbury.
Goodrich, George K., firms of G. & Wells and G. & Co.	Cambridge.
Goodwin, Alfred	Lowell.
Goodwin, Elijah	Dracut.
Gorton, Daniel, firms of Sanderson & G., and J. A. Wilder & Co.	Pepperell.
Gould, James E.	West Boylston.
Graves, Simeon P.	Montague.
Green, Joseph W.	Marblehead.
Gregory, Samuel B.	Marblehead.
Grinnell, William P.	New Bedford.
Gross, Thomas	Westfield.
Grover, Willard	Foxborough.
Gulliver, Lemuel	Charlestown.
Gunnison, Edward	Roxbury.
Gurney, Charles	North Bridgewater.

H.

Hafford, Stephen	New Bedford.
Hale, Joseph W.	Newburyport.
Hall, Henry F.	Richmond.
Hall, Wm., firm of Luke & W. H.	Hingham.
Hamblin, Edward J. firm of H. & Lawrence,	New Bedford.
Hammond, Elisha	Brookfield.
Hancock, George W.	Lowell.
Hancock, William, firm of H. Holden & Adams and Horatio N. Davis, N.Y.	Roxbury.
Harden, Nahum	East Bridgewater.
Harden, Willis	Abington.
Hardy, Samuel B.	Bradford.
Hardy, Sewall	Bradford.
Harlow, Andrew B.	Cambridge.
Harmon, Stiles	Belchertown.
Haskell, William E. P.	Chelsea.
Haskins, John	Roxbury.
Hastings, John J.	Roxbury.
Hastings, Jonathan	Princeton.
Hastings, Joseph S.	Cambridge.
Haynes, Charles	Charlestown.
Hayward, Jabez	Charlestown.
Hayward, Horace	Acton.
Head, Nathaniel	Fairhaven.
Herring, Charles	Natick.
Hersey, John P.	Hingham.
Hersey, Joshua, Jr.	Hingham.
Heywood, Charles L., firm of Grant & H.	Grafton.
Hildreth, Otis	Westford.
Hill, Benjamin B., firm of Otis, Stone & Co.	Worcester.
Hill, Hollis N.	Lowell.
Hillard, John, firm of Lanman & H.	Framingham.
Hitchcock, Abner	West Stockbridge.
Hitchcock, Quartus	Conway.
Hodgett, Samuel B.	Springfield.
Hodgman, Reuben, Jr.	Ashby.
Hodgson, Mary Ann	Dedham.
Holbrook, Henry	Barre.
Holden, John G.	Grafton.
Holden, Nathaniel, copartner with Edwin Davenport	Lynn.
Holden, Seth	Barre.
Holkins, Joel	Ludlow.
Holway, Philip	Lowell.
Holloway, Rufus	Springfield.
Holman, Asa	Lowell.
Holmes, James L.	Plymouth.
Holmes, Orpheus	Cambridge.
Holt, Abiathar	Princeton.
Horton, Simeon	Lowell.
Howard, Seth, Jr.	New Bedford.
Howard, Albert	Milford.
Howarth, James, firm of John H. & Co.	Andover.
Howe, Henry, firm of H. Stone & Co.	Shrewsbury.
Howe, Lambert N.	Lowell.
Howland, Southworth	Brookfield.
Hoyt, Ezekiel	Cambridge.
Hunt, Atherton N.	Weymouth.
Hutchinson, Joseph, firm of H. & Bird,	Dorchester.

I.

Ilsley, Hosea, firms of H. I. & Co. and Noyes & I.	Chelsea.
Ingalls, Elias T.	Haverhill.
Ivers, Theron	Westfield.

J.

Jellison, Moses	Rowley.
Jenkins, James W., Sen.	Barre.
Jillson, George H.	Lynn.
Johnson, Daniel H., copartner with E. T. Aldrich, New York	Salem.
Johnson, Edward A.	Lynn.
Johnson, Nathaniel T.	Deerfield.
Johnson, Samuel W., firm of W. R. & S. W. J., Chester, Vt.	Millbury.
Johnson, Thomas J.	Canton.
Josselyn, Lewis	Cambridge.
Josselyn, Freeman M.	Pembroke.
Jones, James B.	Fall River.
Jones, John P.	Medway.
Jones, Leonard S.	Greenfield.
Jones, William H.	Springfield.

K.

Keith, Charles F.	Grafton.
Keith, Zenas, firm of Z. K. & Sons	East Bridgewater.
Keith, Scott; Keith, Wm. — firm of Zenas K. & Sons.	East Bridgewater.
Kelley, Andrew	Lowell.
Kelley, Ezra; Kelley, John — firms of J. K. & Co., and J. K. & Son	Haverhill.
Kendall, Stephen	Waltham.
Kennedy, John J.	Lowell.
Kimball, Benjamin, 3d.	Methuen.
Kimball, Nathaniel T.	Bradford.
Kimball, Porter	Dracut.
Kimball, Richard	Millbury.
King, Oliver	Methuen.
Knight, Thorndike	Salem.
Knowles, Jonathan	Seekonk.
Knowlton, Calvin — firm of W. S. & C. K.	Grafton.
Knowlton, Wm. S. — firm of W. S. & C. K.	Southbridge.

L.

Lake, Joel	Topsfield.
Lake, Silas	Topsfield.
Lake, William G., copartner with Joel L.	Topsfield.
Lakin, Ancel, firms of Sam. B. Scott and L. & Stone.	Worcester.
Lane, Abner B.	Bedford.
Lane, Gideon	Gloucester.
Lane, Gustavus A.	Gloucester.
Lang, Claudius B., firms of Blackstone Woollen Co., and Luther Wright & Co., at Barre and Worcester.	Grafton.

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Latham, Sumner	Hardwick.
Lawrence, James R.	West Boylston
Leach, Albert	Plymouth.
Lefavor, Francis F.	Marblehead.
Leighton, Isaiah	Lowell.
Leland, Joshua W.	Grafton.
Leonard, Charles W.	Cambridge.
Lewis, Alexander	Townsend.
Lewis, Benjamin	Natick.
Livermore, Samuel B.	Waltham.
Loop, Augustus B., firms of Smith, L. & Gaul, L. & Swift, and L. Swift & Roberts, at Hudson and Albany, N. Y.	Great Barrington.
Lord, Aaron P.	Ipswich.
Loring, Samuel, Jr.	Duxbury.
Lovering, John	Lowell.
Lovering, Nathaniel P., firm of Copeland & L.	Roxbury.
Lowe, Henry	Lancaster.
Lowell, John, Jr.	Methuen.
Lummus, Thomas J.	Lynn.
Lynde, Nathan	Charlestown.

M.

Makepeace, David B.	Barre.
Marshall, Lafayette	Rockport.
Marshall, Thomas	Monson.
Martain, William C.	Lowell.
Mascroft, William P.	Grafton.
Mayhew, Holway	Edgarton.
McIntyre, Daniel, firm of McI. & Cutler	Cambridge.
McKenzie, Jonas, firm of McK. & Wilkinson	Southbridge.
Merrifield, Aaron R.	Northampton.
Merrill, Amos	Lowell.
Messer, Darius	Methuen.
Millett, Joseph	Lynn.
Mitchell, Nathan, Jr.	Bridgewater.
Mitchell, Winslow	Bridgewater.
Monk, Nathan	Stoughton.
Monroe, Charles	Westfield.
Moore, Nathaniel S.	Montgomery.
Moore, Portius	Chester.
Morrison, John	Lowell.
Morse, Bryan	Dighton.
Morse, Jonathan, 2d.	Methuen.
Morse, William	Hanover.
Morss, Edward B.	Haverhill.
Moseley, Seth	Westfield.
Moses, Ebenezer	Beverly.
Moulton, Mark D., firm of Robinson & M. and M. M. & Co.	Oxford.
Mowatt, Henry T.	Lowell.
Murphy, Michael	Lowell.

N.

Nash, David R.	Roxbury.
Nason, Jonathan	Amesbury.
Newell, Frederick R.	Cambridge.
Newhall, Daniel U.	Lynn.
Newhall, Isaac, Jr.	Lynn.
Newhall, Otis, Jr.	Lynn.
Newhall, Robert	Lynn.
Newman, Samuel	Ipswich.
Nichols, Daniel	Haverhill.
Nichols, Loyal C., firms of Merrill & N. and Purdan & N., Portsmouth, N. H.	Lowell.
Nichols, William S.	Roxbury.
Nolen, Nathaniel	Oxford.
Norcross, William	Templeton.
Nutting, Vespasian	Lowell.

O.

Oakes, Ebenezer	Rockport.
Oldham, Aurora W.	Pembroke.
Olney, David	Fall River.
Ordway, Thomas	Lowell.
Orne, Adoniram C.	Marblehead.
Orrok, James L. P., firm of O. & Simmons	Roxbury.
Osgood, Cady	Methuen.

P.

Packard, Roland	Dedham.
Page, David	Bedford.
Page, Holman	Roxbury.
Page, Saml.	Lowell.
Park, John	Groton.
Park, John, Jr.	Harvard.
Park, Thos.	Chelsea.
Parker, Saml.	Chelmsford.
Parrot, Wm. W., firm of Wm. Pierce & Sons	Gloucester.
Patch, John S.	Lowell.
Patten, John R.	Danvers.
Peach, Thomas	Gloucester.
Pear, John	Cambridge.
Pearce, George W. firm of Wm. P. & Sons	Gloucester.
Pecker, Wm.	Wilmington.
Pecker, Wm. firm of P. & Brickett	Haverhill.
Perhard, Chas. O.	Groton.
Perkins, Eben'r.	Salem.
Perkins, Wm. C.	Chelsea.
Phillips, David	Fitchburg.
Phillips, Ezekiel, firm of Mechanics' Co., Woonsocket Falls, R. I., and Southbridge, Mass.	Mendon.
Phillips, Nathl. M.	Lynn.
Phillips, Thos.	Lynn.
Pierce, Stephen	Chelmsford.
Pierce, Oliver	Dedham.
Pillsbury, Amos D.	Georgetown.
Plimpton, Edwin D.	Southbridge.
Plumer, John	Upton.
Porter, Edwd.	Wenham.
Porter, Eleazer A. firm of James Bradley & Co. N. York	Haverhill.
Powell, Darius S.	New Marlborough
Pratt, Chandler M. firms of P. & Putnam, and J. G. Putnam & Co. N. Orl'ns	Grafton.
Pratt, Chas. L.	W. Boylston.
Pratt, Nathl. M.	Lowell.
Pratt John	Lynn.
Pratt, Leander S. firm of L. S. Pratt	Grafton.
Pratt, O.	Natick.
Pratt, Harrison B.	Mansfield.
Presby, Alpha	Dedham.
Prescott, Joseph	Natick.
Prescott, Wm. Y.	Lowell.
Prescott, Sylvester	W. Boylston.
Proctor, Geo. firm of P. & Burgess	Sterling.
Prince, Otis, firms of Barre Woollen Manf. Co. and Wadsworth Woollen Co.	Barre.
Pulsifer, Wm.	Ipswich.
Putnam, James G. firm of Pratt & P. and J. G. P. & Co. New Orleans	Grafton.
Putnam, Jasper W., firms of J. W. P. & Co. and J. M. Leland & Co., N. Orl'ns	Grafton.

R.

Ray, John T.	Lowell.
Ray, Joseph	Franklin.
Raymond, John	Winchendon.
Raynes, Joseph	Lowell.
Reed, John	Taunton.

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Name	Place
Reed, Jesse	Marshfield.
Reed, Wm.	Taunton.
Rice, Anson	Northborough.
Rice, Luther	Framingham.
Rice, Saml.	Conway.
Rich, Moses P., firm of M. P. R. & Co.	Scituate.
Richardson, Caleb, Jr.	Danvers.
Richardson, Calvin	Chelsea.
Richardson, Jason	Woburn.
Richardson, Saml. S.	Woburn.
Rhodes, Jesse	Lynn.
Roberts, Geo.	Andover.
Roberts, John W.	Natick.
Robbins, George, firm of Geo. Sanger & Co., New York, and the N. York and Watertown Starch Co.	Watertown.
Robinson, Noah	Lowell.
Rogerson, Robert	Uxbridge.
Roundy, John	Marblehead.
Ruggles, Sumner I., firm of Samuel T. R. & Co.	Dorchester.
Russ, John	Lowell.
Russell, Eben'r.	Ipswich.
Russell, Harrison	Deerfield.
Russell, Rufus	Lowell.
Russell, Stephen	Waltham.
Ryason, Joseph P.	Lowell.

S.

Name	Place
Sabin, Danl.	Douglas.
Sanborn, Benning	Springfield.
Sanford, Edwd. S.	Medway.
Sanford, Stephen	Lowell.
Sargent, Asa	Dracutt.
Sargent, Sylvester H.	Haverhill.
Sawtell, Homer	Worcester.
Schenck, Saml. B.	Foxborough.
Scott, James	Oxford.
Seagrave, John	Uxbridge.
Seagrave, Saul S.	Douglas.
Seagrave, Seth	Uxbridge.
Seaver, Alanson	Lowell.
Seaver, Joshua	Roxbury.
Senter, Charles L.	Walpole.
Shaw, Jacob N.	Lowell.
Shaw, John, Jr.	Weymouth.
Shed, Thomas	Charlestown.
Sheldon, Elbridge G.	Holden.
Shepard, Benj.	Wrentham.
Shumway, James	Webster.
Sibley, Royal	Attleborough.
Sibley, Mahum	Oxford.
Simonds, John P.	Lowell.
Simpson, Parley	Southbridge.
Simpson, John H.	Reading.
Skerry, Henry	Lynn.
Small, Isaiah M.	Topsfield.
Smith, Benj. F.	South Hadley.
Smith, David	W. Newbury.
Smith, Ellingwood	Manchester.
Smith, Jacob B.	Westfield.
Smith, James F.	S. Hadley.
Smith, Josiah	Lexington.
Smith, Moses M.	N. Bedford.
Smith, Wesley J.	Lowell.
Smith, Wm.	Watertown.
Smith, Thos.	Lowell.
Smith, Wm. W.	N. Bedford.
Snow, James H.	Marblehead.
Snow, Henry	Dartmouth.
Snow, Nathaniel	Malden.
Snow, Wm.	Woburn.
Southland, Wm., Jr.	Upton.
Spooner, Wm. H.	Roxbury.
Spring, Luther	Worcester.
Stetson, Nathan	E. Bridgewater.
Stetson, Sumner	Pembroke.
Stevens, Joseph	Lowell.
Stevens, Thos. S	Pepperell.
Stevens, Wm.	Richmond.
Stevens, Aaron, Jr.	New Marlborough.
Stickney, John	Salem.
Stimpson, John H.	Reading.
Stimpson, John	Gloucester.
Stoddard, Ansel	Braintree.
Stone, Aaron, Jr., firm of Otis, S. & Co.	Worcester.
Stone, Job C., firms of Wyman & S. and Howe, S. & Co.	Shrewsbury.
Stone, Geo. W., firm of Hale & S.	Sudbury.
Stowell, Wm.	Plainfield.
Streeter, Otis	Heath.
Strong, Philip	Marblehead.
Studley, John	Hanover.
Swan, Thos. 2d	Marblehead.
Sweet, Wm. G., firm of D. O. Dickinson & C.	Cambridge.
Sweetser, Abel	Springfield.
Sweetser, David S.	Lynn.
Sweetser, Ephraim, copartner with Isaac Child	Lynn.
Swift, John, firms of Barre Manf. Co. and Wadsworth Woollen Co.	Millbury.
Symonds, Nathl. G.	Charlestown.

T.

Name	Place
Tainter, Elijah F.	Hingham.
Tallman, James H.	N. Bedford.
Tapley, Jesse	Danvers.
Teel, Geo. S.	Lowell.
Tenney, Paul	Lowell.
Thayer, Eli	Hatfield.
Thayer, Dwight	Worthington.
Thomas, Silvanus	Plympton.
Thompson, Geo., firm of G. & Jas. L. T.	Milton.
Thompson, John	Cambridge.
Thompson, Joseph W.	N. Brookfield.
Thompson, Thomas W.	Coleraine.
Thornton, John	Cambridge.
Thornton, Wm.	Grafton.
Thurston, Wilder S., firm of T. & Bird	Lancaster.
Tinkham, Caleb	Middleborough.
Tomlinson, Sheldon	Springfield.
Trescott, Elijah	Dedham.
Trescott, Reuben G.	Charlestown.
Turner, Eliakim	Quincy.
Turner, Tertius W.	Mount Washington.
Turner, Israel	Stoughton.
Tuttle, Lambert	Lynn.
Tyler, Caleb G.	Georgetown.

U.

Name	Place
Underwood, Charles	Lowell.
Underwood, Peter, Jr.	Cambridge.

V.

Name	Place
Vaughn, John G.	Middleborough.
Viall, Saml.	Lynn.
Vila, James	Lexington.
Vincent, Thos.	Lynn.
Vining, Allen, firm of N. & A. V., New York	Weymouth.
Vining, Daniel H.	Weymouth.
Vining, David, Jr.	Weymouth.

W.

Name	Place
Wadsworth, Paul, firms of Barre Woollen Man. Co. and Wadsworth Wool.Co	Barre.
Wadsworth, David	Barre.

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Name	Residence
Wadsworth, Hiram	Barre.
Waldron, Levi D.	Saugus.
Walton, John	Cambridge.
Wait, David	Deerfield.
Ward, J. F. } firm of J. F. & S. W. Ward, S. }	Cambridge.
Warner, John T. firm of Hide & W., New York	Greenwich.
Warner, Emory C.	Springfield.
Waterman, L. C. } firm of S. & L.C.W. Waterman, S. Jr. }	Scituate.
Washburn, Thos. J.	Weymouth.
Waters, Jona. E., firm of J. S. Pratt	Millbury.
Waters, Parley	Douglas.
Webb, John	Haverhill.
Weld, Thos. S.	Roxbury.
Wentworth, Thos.	Lowell.
Wheeler, Aaron H. firm of Hale, W. & Co. Gallatin, Miss.	W. Springfield
Wheeler, Chas.	Rockport.
Wheeler, Ira	Haverhill.
White, Wm.	Medway.
Whitehouse, Eliphalet T.	Chelsea.
Whitman, Moses N.	E. Bridgewater.
Whittaker, Robt.	Lowell.
Whittemore, Chas.	Groton.
Whittemore, Chas. firm of W. & Clark	Worcester.
Whittemore, Jas.	Worcester.
Whittredge, Alfred W.	Lowell.
Whittredge, Thos. J.	Malden.
Whittredge, Wm. A.	Lynnfield.
White, Ezbon	Dudley.
Wiley, Adam, firm of Eames & W.	S. Reading.
Willard, Daniel, Jr.	Harvard.
Willard, Joseph	Grafton.
Willcomb, Danl. L.	Ipswich.
Williams, Benj. D.	Mendon.
Williams, John D.	Roxbury.
Williams, Thos. E.	Greenfield.
Williams, Ziba	Cambridge.
Willis, Charles, Jr. firm of W. & Stevens, St. Louis, Mo.	Chelsea.
Willis, Rufus, (on petition of creditors,)	Newburyport.
Wilson, Wm.	Northampton.
Winslow, Nathl., Jr. } firm of Brewster Manf. Co. Winslow, Kenelm, }	Brewster.
Winthrop, Grenville T.	Watertown.
Wood, Joseph M.	Mendon.
Wood, Simeon	Worcester.
Woodbury, J. P. } firm of S. D. & J. P. W. Woodbury, S. D. }	Lynn.
Woodman, Joseph K.	Haverhill.
Woods, Wm. S.	Lowell.
Worcester, Wm.	Webster.
Wright, Luther, firms of Grafton Woollen Co., Blackstone Woollen Co., Luther Wright & Co. and Farnum & Wright	Barre.
Wyatt, Henry	Wenham.
Wyeth, Stephen	Erving.

Bankrupt Law. There is no subject of greater interest to the profession throughout the country, at the present time, than the late act of congress establishing a uniform system of bankruptcy. The law descends so little into details and confers such extraordinary powers upon the circuit and district courts of the United States, that every decision from any of these tribunals is eagerly sought for by the community in general, as well as by the legal profession. In carrying out the main object of this journal, we shall endeavor to present early and authentic reports of all cases in bankruptcy, from all parts of the country, and we have made such arrangements as we believe will secure our object.

We have already published two communications, in which the effect of attachments upon the property of a bankrupt, prior to the declaration of bankruptcy, has been considered, and we have received two more upon the same subject, one of them defending the position that such attachments will hold, and the other taking the opposite ground. We are obliged to decline publishing either of them for want of room; and besides this, we doubt whether a further discussion, in our pages, of the question, will be of any practical utility. On a late occasion, Mr. Justice Story was understood to remark from the bench, that attachments on mesne process, *after the filing of the petition*, could not stand, and his language left no reason to doubt, that, in his opinion, an injunction would properly issue in such a case against the attaching creditor. On a more recent occasion (March 26), a petition has been presented to the district court of the United States in Massachusetts, for an injunction against certain creditors who took a portion of the bankrupt's property on mesne process before he filed his petition. This is a question of great interest and importance; it will doubtless be thoroughly discussed at the bar, and we shall publish a report of it as soon as possible after the decision.

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